ESTABLISHMENT OF MILITARY JUSTICE

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON MILITARY AFFAIRS UNITED STATES SENATE

SIXTY-SIXTH CONGRESS

FIRST SESSION

ON

S. 64

A BILL TO ESTABLISH MILITARY JUSTICE

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ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, AUGUST 2, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 1.30 o'clock p. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

The bill under consideration by the subcommittee is here printed in full as follows:

S. 64. A BILL To establish military justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act shall be known as the military justice act, and the articles included in this section shall be known as the Army articles and shall at all times and in all places govern the Army of the United States.

I. PRELIMINARY PROVISIONS.

ART. 1. DEFINITIONS.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(a) The word "officer" shall be construed to refer to a commissioned officer;

(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

(c) The word "company" shall be understood as including a troop or battery; and

(d) The word "battalion" shall be understood as including a squadron.

ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this act, except as specifically provided in this article, shall be construed to apply to any person under the UnitedStates naval jurisdiction, unless specifically provided by law.

(a) All members of the military forces of the United States, including all officers and soldiers belonging to the Regular Army, all cadets of the United States Military Academy, all members of the Army Nurse Corps, and all contract surgeons, all volunteers from the dates of their muster or acceptance into the military service of the United States, and all other persons lawfully called, drafted, or ordered, into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same; and all officers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases; and all other persons who now are or may hereafter be made members of the Military Establishment by law;

(b) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the

armies of the United States in the field, both within and without the territorial jurisdiction of the United States though not otherwise subject to these articles;

(c) All persons under sentence adjudged by courts-martial.

II. Courts-martial.

Art. 3. Courts-martial classified.—Courts-martial shall be of three kinds, hereinafter designated and hereafter to be known as—

General courts;
Special courts; and
Summary courts.

A. Composition.

Art. 4. Who may serve on courts-martial.—All officers and soldiers in the military service of the United States and officers and soldiers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on general and special courts, and all such officers shall be competent to serve on summary courts for the trial of any persons who may lawfully be brought before such courts for trial, except as may be hereinafter otherwise provided.

Art. 5. General courts.—General courts shall consist of eight members, three of whom in the case of the trial of a private soldier shall be privates, and in the case of the trial of a noncommissioned officer or warrant officer shall be noncommissioned or warrant officers, respectively.

Art. 6. Special courts.—Special courts shall consist of three members, one of whom in the case of the trial of a private soldier shall be a private, and in the case of the trial of a noncommissioned or warrant officer shall be a noncommissioned or warrant officer, respectively.

Art. 7. Summary courts.—A summary court shall consist of one officer who shall be the officer of the command deemed by the appointing authority best qualified therefor by reason of rank, experience, and judicial temperament.

B. By whom appointed.

Art. 8. General courts.—The President of the United States, the commanding officer of a territorial division or department, the superintendent of the Military Academy, the commanding officer of an Army corps, a tactical division, or of any isolated body of troops consisting of a regiment or more which, by reason of delay and difficulty of communication with it, the President shall find it necessary to constitute a separate general court jurisdiction, may appoint general courts; but when the organization of the forces is such as to justify such a course the President may direct that any commanding officer herein named shall not exercise such power.

Art. 9. Special courts.—The commanding officer of a district, a brigade, a regiment, or any isolated body of troops consisting of a battalion or more, which superior authority may deem it necessary to constitute a separate special court jurisdiction, or authority superior to such commanding officer, when deemed desirable by him so to do, may appoint special courts; but superior authority may convene a special court for the trial of a member of any isolated body of troops less than a battalion when in any particular case it is found by him to be necessary; and such superior authority, when the organization of the forces is such as to justify such a course, may direct that any commanding officer herein named shall not exercise such power.

Art. 10. General and special courts, how organized.—The appointing authority of a general or special court shall designate a panel, which he shall increase as may be found necessary, consisting of those who are by him deemed fair and impartial and competent to try the cases to be brought before them, and from such panel the court shall be constituted, as hereinafter provided.

Art. 11. Summary courts.—The commanding officer of a regiment or of any detachment of troops may appoint summary courts, but such summary courts may in any case be appointed by superior authority when by the latter deemed desirable. When but one officer is present with the command, he shall be the summary court of that command.

Art. 12. Appointment of court judge advocates.—The authority appointing a general or a special court shall appoint for the court a judge advocate. No person shall be appointed judge advocate for a general court unless at the time of his appointment he is an officer of the Judge Advocate General's Department, except that when an officer of that department is not available the appointing authority shall appoint an officer recommended by the Judge Advocate General of the Army as specially qualified by reason of legal learning and experience to act as judge advocate, and the

officer appointed as judge advocate of a special court may be an officer of the Judge Advocate General's Department if such an officer is available, and whenever such officer is not available the appointing authority shall select that available officer of his command whom he deems best qualified therefor by reason of legal learning or aptitude and judicial temperament. The judge advocate shall not be a member of the court, but shall sit with it at all times in open session and shall fairly, impartially, and in a judicial manner perform the following duties and such others not inconsistent herewith as may be prescribed by the President in virtue of article 41:

(a) To organize the court from those on or added to the panel designated by the appointing authority for the purpose;

(b) Rule upon all questions of law properly arising in the proceedings, including challenges and questions touching the competency and impartiality of the court;

(c) Advise the court and convening authority of any legal deficiency in the constitution and composition of the court or in the charge before it for trial;

(d) At the conclusion of the case and before the court proceeds to deliberate upon the findings, sum up the evidence in the case and discuss the law applicable to it, unless both he and the court consider it unnecessary;

(e) Take care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity, and for that purpose the judge advocate may call and examine such witnesses as may appear to him necessary or desirable to elicit the truth;

(f) Approve a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense, when as a matter of law the evidence of record requires such action; and such action shall be held to be the action of the court;

(g) Announce the findings of the court-martial and upon conviction of the accused impose sentence upon him;

(h) Suspend in whole or in part any sentence that does not extend to death or dismissal.

His rulings and advice given in the performance of his duties and made of record shall govern the court-martial. If the judge advocate dies, or from illness or any cause whatever is unable to attend, the court shall adjourn and another judge advocate or law member shall be appointed by the proper authority, who shall act for the residue of the trial or until the judge advocate or law member returns.

C. JURISDICTION.

ART. 31. GENERAL COURTS.—General courts shall have power to try any persons subject to military law for any crime or offense for which the punishment prescribed by these articles involves death, dismissal, or dishonorable discharge, and any other person who by the law of war is subject to trial by a military tribunal: *Provided*, That no officer shall be brought to trial before a general court appointed by the Superintendent of the Military Academy.

ART. 14. SPECIAL COURTS.—Special courts shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles, and any other person who by the law of war is subject to trial by a military tribunal; but special courts shall not have power to adjudge death, dismissal, loss of files, dishonorable discharge, confinement for more than six months, or any other penalty which under article 48 may not be imposed in lieu or in addition to confinement for six months or less.

ART. 15. SUMMARY COURTS.—Summary courts shall have power to try any person subject to military law except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense for which the punishment authorized by these articles does not involve death or dishonorable discharge; but summary courts shall not have power to adjudge confinement for more than one month, nor restriction to limits for more than three months, nor forfeiture or detention of pay for more than three months.

ART. 16. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

ART. 17. OFFICERS—HOW TRIABLE.—In no case shall an officer when it can be avoided be tried by officers inferior to him in rank.

D. PROCEDURE.

ART. 18. PREFERRING CHARGES.—No charge shall be preferred for trial before a general or special court unless it shall be signed by a person subject to military law who shall make oath that he has actual personal knowledge as to the truth of the matters set forth in said charge and that the same are true in substance and in fact, or who in case he has not such personal knowledge shall make oath that he has personally investigated the matters set forth in said charge and that the same are true, in substance and in fact, to the best of his knowledge and belief.

ART. 19. REFERRING AND FORWARDING CHARGES FOR TRIAL.—No officer with authority to appoint a special court shall refer any charge to such court for trial nor shall any commanding officer charged with such duty forward any charge to an officer having authority to appoint general courts until he shall have made or caused to be made a thorough investigation as to the truth of the matter set forth in the charge, and he shall not refer such charge for trial unless he believes that the charge can be sustained and in the interests of the service and of justice can not be disposed of without trial, nor shall such officer forward any charge to any appointing authority of a general court until he shall have made or caused to be made a thorough investigation as to the truth of the matters set forth in said charge, in which he shall hear whatever the accused may desire to say in his own behalf and any available witnesses requested by the accused, and in so forwarding any charge he shall accompany it with statements of the substance of the testimony taken on both sides during the investigation and all other evidence, including such statement, if any, as the accused may have voluntarily made during the investigation.

ART. 20. CHARGE MUST BE LEGALLY SUFFICIENT.—No charge shall be referred to or be tried by a general court unless an officer of the Judge Advocate General's Department charged with such duty shall have indorsed in writing upon the charge that in his opinion an offense made punishable by these articles is charged with legal sufficiency against the accused and that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged, nor unless the officer referring the charge believes that in the interests of the service and of justice the charge can not be disposed of except by trial by general court-martial.

ART. 21. APPOINTMENT OF PROSECUTORS.—For each general or special court the appointing authority shall appoint a prosecutor and for each general court one or more assistant prosecutors, when necessary, each of whom shall be competent to perform all the duties of the prosecutor. The prosecutor shall prosecute in the name of the United States. Such prosecutor may be an officer of the Judge Advocate General's Department, and if such an officer be not available, the prosecutor shall, whenever practicable, be an officer or enlisted man deemed by the appointing authority specially qualified for the duty by reason of learning in or aptitude for the law.

ART. 22. RIGHT OF COUNSEL.—In all court proceedings, except a summary court, the accused shall have the assistance of and be represented by military counsel of his own selection, and he may have the like assistance of civil counsel if he so provides. Such civil counsel shall be civilian lawyers and such military counsel shall be officers or soldiers; and any officer or soldier under command of the appointing authority who shall be selected by the accused shall be assigned as counsel unless the appointing authority shall furnish the court with a certificate which shall be placed in the record that such assignment can not be made without serious injury to the service and setting forth the reasons therefor. If military counsel be not selected by the accused, the appointing authority shall assign as military counsel to assist in his defense an officer who is well qualified as to rank and experience in the service and who has, if any such there be within the command, special learning in or aptitude for the law.

In any case before a general court in which the accused is without civil counsel and in which he shall make it appear to the judge advocate that he needs, but is without available means to procure, the assistance of civil counsel, the judge advocate shall employ civil counsel, wherever it is practicable so to do, and fix the amount of compensation for his services, which shall be paid out of any funds available for the purpose; and if the trial shall result in a lawful conviction, the judge advocate may order that the Government be reimbursed by a stoppage of such amount, or any part thereof, against the pay of accused at the rate of two-thirds of his monthly pay until the amount ordered stopped be paid.

ART. 23. CHALLENGES.—An accused before a general court shall have the right to two peremptory challenges and before a special court to one peremptory challenge; and he shall have the right to challenge members of a general or special court for cause stated, which shall include the grounds for principal challenge and challenge to the favor as recognized at common law. If the accused shall file in the proceedings

an affidavit of prejudice, accompanied by a certificate of counsel of record that such affidavit is made in good faith, alleging specific grounds to show that the officer appointing the court has bias or prejudice against him or that the court, by reason of any matter touching its constitution or composition can not do justice, the court shall proceed no further until the judge advocate shall decide whether it is able to proceed with absolute impartiality in the pending case, and if he decides that the court can not proceed with absolute impartiality the court shall not be competent for the trial of the pending case, and he shall report to the appointing authority; thereupon the next superior authority may appoint a court for the trial of said case. And whenever an accused shall file a like affidavit alleging bias or prejudice of the judge advocate, such judge advocate shall proceed no further in the case, but another shall be appointed.

ART. 24. OATHS.—The judge advocate of the court shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation:

"You and each of you do swear (or affirm) that you will well and truly try and determine according to the evidence the matter now before you between the United States of America and the person to be tried, and that you will duly administer justice without respect to the rank or position of the person to be tried or of any other person, and without partiality, favor, or affection, according to the law and the evidence, to the best of your understanding; and you and each of you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be announced in open court. Neither will you disclose or discover the vote or opinion of any particular member of the court unless required to give evidence thereon as a witness by a court of justice in due course of law, so help you God."

When the oath of affirmation has been administered to the members, the president of the court shall administer to the judge advocate an oath or affirmation in the following form:

"You do solemnly swear (or affirm) that you will administer justice without respect to the rank or position of the person to be tried or of any other person, and that you will faithfully and impartially discharge and perform all the duties incumbent upon you, according to the best of your abilities and understanding and agreeably to law, so help you God."

And the judge advocate of the court shall then administer to the prosecutor, and to each assistant prosecutor, if any, an oath or affirmation in the following form:

"You, A B, do swear (or affirm) that you will faithfully, fairly, and to the best of your ability perform your duties as prosecutor (or as assistant prosecutor) before this court, so help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form:

"You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form:

"You swear (or affirm) that you will faithfully perform the duties of reporter to this court, so help you God."

Every interpreter, in the trial of any case before a court-martial, shall before entering upon his duties make oath or affirmation in the following form:

"You swear (or affirm) that you will truly interpret in the case now in hearing, so help you God."

In case of affirmation, the closing sentence of adjuration will be omitted. The oath of a witness, reporter, and interpreter will be administered by the judge advocate of a general or special court-martial or by the summary court-martial.

ART. 25. CONTINUANCES.—The judge advocate of a court may for reasonable cause grant a continuance to either party for such time and as often as may appear to be just.

ART. 26. REFUSAL OR FAILURE TO PLEAD.—When an accused arraigned before a court fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or makes a plea of guilty improvidently or through lack of understanding of its meaning and effect, the judge advocate of the court or the summary court shall direct that a plea of not guilty be entered, and the court shall thereupon proceed accordingly.

ART. 27. PROCESS TO OBTAIN WITNESSES.—Every judge advocate of a court and every summary court shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its Territories and possessions and such judge advocate or summary court shall give notice to such persons subject to military law as may appear to be necessary as witnesses for

the Government and for the defense to appear and testify at a certain time and place, and such persons so notified shall immediately make application for the necessary orders enabling them to appear at the time and place specified; and the said judge advocate or summary court shall subpoena such number of civilian witnesses on behalf of the Government and of the defense as may appear to be necessary and material, and the fees of which witnesses for the accused shall be paid by the Government and in the same manner as its witnesses: *Provided*, That the accused makes application under oath before the trial or, in case of necessity, during the trial, setting forth the names of such witnesses and what he expects to prove by them, in order that the judge advocate or summary court may be advised whether or not the testimony be material to the issue.

ART. 28. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.

ART. 29. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a court, commission, court of inquiry, board, or before any officer conducting an investigation or any officer, military or civil, designated to take a deposition to be read in evidence before a court, commission, court of inquiry, or board, or officer conducting an investigation, shall be compelled to incriminate himself or to answer any question that may tend to incriminate him or to answer any question not material to the issue that tends to degrade him.

ART. 30. DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence for the Government before any special or summary court or before any military commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing, but testimony by deposition may be adduced for the defense before all military tribunals and in all cases.

ART. 31. RESIGNATION WITHOUT ACCEPTANCE DOES NOT RELEASE OFFICER.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent hims. lf permanently therefrom shall be deemed a deserter.

ART. 32. CLOSED SESSIONS.—Whenever a general or special court shall sit in closed session, the judge advocate, the prosecutor, and the assistant prosecutor, if any, shall withdraw; and when the legal advice or assistance of the judge advocate is required, it shall be obtained in open court.

ART. 33. ORDER OF VOTING.—Members of a general or special court in giving their votes shall begin with the junior in rank.

ART. 34. ACCUSED IMMEDIATELY TO BE INFORMED OF ACQUITTAL.—When an accused is acquitted of all charges and specifications the court shall not reconsider nor be directed to reconsider its findings, but the judge advocate of the court of the summary court shall immediately inform the accused and the officer by whose authority he may be in custody, of his acquittal, and such officer shall thereupon immediately release the accused from custody unless he is in custody for reasons other than the pendency of the charges of which he has been acquitted.

ART. 35. CONTEMPTS.—A court may punish as for contempt any person who uses any menacing words, signs, or gestures in his presence, or who disturbs its proceedings by any riot or disorder, and any person lawfully called before it as a witness who refuses to qualify, or to testify, or to answer any question lawfully put to him; but such punishment shall in no case exceed that which may be awarded by a summary court-martial, and such punishment of a witness shall be a bar to prosecution for the same misconduct under article 28.

ART. 36. RECORDS—GENERAL COURTS.—Each general court shall keep a separate record of its proceedings in the trial of each case brought before it, which record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and one other member of the court.

ART. 37. RECORDS, SPECIAL AND SUMMARY COURTS.—Each spehial court and each summary court shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

ART. 38. DISPOSITION OF RECORDS—GENERAL COURTS.—The judge advocate of each general court shall, with such expedition as circumstances may permit, forward the original record of the proceedings of such court in the trial of each case to the appointing authority or to his successor in command, who shall without delay transmit the same to the Judge Advocate General of the Army.

ART. 39. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS.—The record of a special court or the report of a summary court shall be transmitted without delay to the officer appointing the court or to his successor in command, who shall transmit such record or report to such general headquarters as the President may designate in regulations. The judge advocate at such headquarters shall, with powers of review similar to those prescribed in article 52, review and revise all such records and reports for errors of law prejudicial to the accused. When no longer of use, the reports of summary courts may be destroyed.

ART. 40. IRREGULARITIES—EFFECT OF.—The proceedings of a court shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure or for any other error of law unless after an examination of the entire proceedings it shall appear that the error complained of has injuriously affected the substantial rights of an accused.

ART. 41. RULES OF EVIDENCE TO GOVERN—RULES OF PROCEDURE.—Courts shall, except in so far as Congress has prescribed or may hereafter prescribe different rules especially applicable to such tribunals, apply the rules of evidence which are generally recognized in the trial of criminal cases in the district courts of the United States.

The President may from time to time prescribe rules not inconsistent with these articles to govern the procedure of all military tribunals, except the court of military appeals, and such rules shall be laid before the Congress annually.

E. LIMITATIONS UPON PROSECUTIONS.

ART. 42. AS TO TIME.—Except for desertion committed in time of war, or for murder or mutiny, no person subject to military law shall be liable to be tried or punished by a court for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles 82 and 95 of this code the period of limitations upon trial and punishment shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

ART. 43. AS TO NUMBER.—No person shall be prosecuted for an offense for which he has once been tried, and a person shall be held to have been once tried when the proceedings in his case have resulted in a lawful sentence or whenever the Government, without his consent entered upon the record, withdraws the charge or otherwise discontinues the prosecution after the arraignment.

F. PUNISHMENTS.

ART. 44. CRUEL AND UNUSUAL PUNISHMENTS PROHIBITED.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

ART. 45. PLACE OF CONFINEMENT—WHEN LAWFUL.—When the accused has been convicted and sentenced to confinement for more than one year a penitentiary may be designated as the place of confinement in the following cases only:

(a) When confinement in a penitentiary is prescribed in these articles.

(b) When conviction is for a civil offense denounced by some statute of the United States or of the District of Columbia, or by the common law as the same exists in the District of Columbia and made punishable thereunder with confinement in a penitentiary for more than one year.

(c) When a sentence of death has been commuted to confinement in a pentitentiary.

When the accused has been convicted of two or more offenses, any one of which is punishable with confinement in a penitentiary, the entire sentence to confinement may be executed in a penitentiary. Confinement in a penitentiary hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States. Persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere, as the Secretary of War or the authority executing the sentence may direct, but not in a penitentiary. Any sentence of confinement at hard labor, except confinement served in a penitentiary, may, when so ordered by proper authority, be served in any military unit that may be organized for penal servitude or in the performance of any work necessary in or incident to the Military Establishment, under such restrictions as proper authority may impose and with or without imprisonment.

ART. 46. NUMBER TO CONVICT—DEATH SENTENCES—Conviction of an offense by a general court shall require the concurrence of three-fourths of the members, but no death penalty shall be imposed except for an offense in these articles expressly made punishable by death and when the finding of guilty is concurred in by all the members of the court or when the death penalty is mandatory. Conviction of an offense by a special court shall require the concurrence of two-thirds of the members of the court.

ART. 47. AMOUNT OF PAY FORFEITABLE.—In any sentence which does not include confinement in a penitentiary or in the disciplinary barracks a court shall not adjudge forfeiture or detention of pay at a rate greater than two-thirds of the pay per month.

ART. 48. PUNISHMENTS AUTHORIZED.—Whenever confinement for a period longer than six months is authorized by these articles as a punishment for an offense, the court may impose in lieu thereof, with or in addition thereto, any one or more of the following punishments:

(a) In case of an officer—

Dismissal;

Loss of files;

Suspension from rank, command, or duty, with or without pay or part of pay, for a period not in excess of the maximum authorized period of confinement;

Forfeiture of pay for a period not in excess of said period;

Hard labor for a period not in excess of said period;

Restriction to limits for a period not in excess of said period; and

Reprimand.

(b) In the case of a soldier—

Dishonorable discharge;

Reduction to the ranks;

Forfeiture or detention of pay not in excess of the maximum authorized period of confinement;

Restriction to limits for a period not in excess of said period;

Hard labor for a period not in excess of said period.

Whenever the maximum period of confinement authorized by these articles is six months or less, the court may impose in lieu thereof or in addition thereto any of the above-mentioned punishments except dismissal, loss of files, and dishonorable discharge.

G. PROCEDURE AFTER TRIAL.

ART. 49. APPROVAL AND EXECUTION OF SENTENCE.—No sentence of death shall be carried into execution until approved upon review as prescribed in article 52 and, in addition, confirmed and ordered executed by the President, and no sentence of dismissal or dishonorable discharge shall be executed until approved upon review as

prescribed in said article, and any death sentence when thus approved, confirmed, and ordered executed, and any sentence of dismissal or dishonorable discharge when thus approved will upon notification to him to that effect, be carried into execution by the officer appointing the court or by the officer commanding for the time being, or by any specially designated military authority, and every other sentence will be carried into execution upon the receipt of the record or report of the proceeding by the officer appointing the court or by the officer commanding for the time being, or by any specially designated military authority; but nothing herein contained shall operate to deprive any officer of the power of mitigation, remission, and suspension of sentence conferred upon him by article 50.

ART. 50. MITIGATION, REMISSION AND SUSPENSION OF SENTENCE.—Any officer having authority to appoint a court may mitigate, remit or suspend, in whole or in part, any sentence not extending to death or dismissal or not confirmed or commuted by the President that is being served by any person under his command and that was imposed by a court of a kind not higher than such officer is empowered to appoint, and may vacate said order of suspension at any time: *Provided*, That when a sentence of dishonorable discharge has been suspended the order of suspension shall be vacated only by authority of the Secretary of War, and no sentence of any person serving in the disciplinary barracks or any branch thereof or in any military unit organized for the purpose of penal servitude shall be suspended, mitigated, or remitted or, if suspended, be ordered executed, except by the authority of the Secretary of War, and the period during which a sentence of confinement is suspended shall be deemed a part of the sentence served.

The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court, and the death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

ART. 51. JUDGE ADVOCATE GENERAL TO RECEIVE RECORDS; COURT RECORDS ARE PUBLIC.—The Judge Advocate General of the Army shall receive and file the record of the proceedings of all general courts, courts of inquiry, and military commissions and shall immediately transmit to the court of military appeals the record of all proceedings which carry sentences involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months. The records of and reports upon the proceedings of all courts and military commissions, wherever filed, shall be public records and subject as such to public examination.

ART. 52. REVISION BY COURT OF MILITARY APPEALS.—There is hereby created a court of military appeals which, for convenience of administration only, shall be located in the Office of the Judge Advocate General, and which shall consist of three judges appointed by the President by and with the advice and consent of the Senate, each of whom shall be learned in the law, shall hold office during good behavior, and shall have the pay and emoluments, including the privilege of resignation and retirement upon pay, of a circuit judge of the United States. Unless the accused when sentence is pronounced upon him shall make the statement in open court that he does not desire that his case be reviewed by the court of military appeals, which statement shall be made a matter of record by the judge advocate, or unless he shall thereafter notify said court of appeals in writing that he does not wish his case reviewed, said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; and such power of review shall include the power—

(a) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

(b) To disapprove the whole or any part of a sentence.

(c) To advise the proper convening or confirming authority of the further proceedings that may and should be had, if any, upon the disapproval of the whole of a sentence; and in any case in which all the findings and the sentence are disapproved because of such error of law in the proceedings the appointing authority may lawfully order a new trial by another court.

(d) To make a report to the Secretary of War for transmission to the President, recommending clemency in any case in which the sentence, though valid, shall appear to the court to be unjust or unduly severe.

Said judges may select the presiding judge of the court and may prescribe its rules and procedure. In case any judge shall become temporarily incapacitated for the performance of his duties, the President at the request of the court may assign to duty upon the court a judge advocate deemed qualified for such duty who upon assign-

ment and taking the oath of office shall have the power and shall perform the duties of a judge of said court; and the Judge Advocate General shall assign to duty with the court such officers, enlisted men and civilian employees in the Judge Advocate General's department as the court may find necessary for the thorough and expeditious performance of its duties.

Each judge before entering upon the duties of his office shall take the oath prescribed for the judge advocate of a general court.

And said court of military appeals shall have like jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence, upon application to that end made by the accused within six months after the passage of this act: *Provided*, That in no case in which the sentence has heretofore been approved shall be tried again: *And provided further*, That the revision or reversal of the sentence in any such case shall not be effective to retain in the military service any person who has been dismissed or discharged therefrom in execution of such sentence thus reviewed, or to entitle any person to any pay or allowances, but shall be limited in its effect to the final determination that the separation from the service was honorable instead of dishonorable.

III. Punitive Articles.

A. ENLISTMENT; MUSTER; FALSE STATEMENTS.

Art. 53. Fraudulent enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment and shall receive pay or allowances under such enlistment, and any soldier who without having first received a regular discharge from the organization in which he last served enlists himself in another organization shall be guilty of fraudulent enlistment and shall be punishable with confinement for not more than six months.

Art. 54. False muster and official statements.—Any officer who makes a false muster, return, certificate, or official statement, in due course of military administration, knowing the same to be false and with intent to deceive, shall be dismissed the service, and in case the offense be committed in time of war, shall in addition be punishable with confinement for not more than ten years.

B. DESERTION; ABSENCE WITHOUT LEAVE.

Art. 55. Desertion.—Any person subject to military law who quits the military service with the deliberate and fixed intent not to return to it, or who quits his organization or place of duty with the intent to avoid hazardous duty, shall be guilty of desertion and shall, if the offense be committed in time of war, be punishable with death or confinement for life or for a fixed period, and if the offense be committed in time of peace, by confinement for not more than two years. And any person subject to military law who attempts to desert shall be punishable with the punishment authorized for desertion.

Art. 56. Advising or aiding another to desert.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall be punishable with the punishment authorized for desertion.

Art. 57. Entertaining a deserter.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punishable with the punishment authorized for desertion.

Art. 58. Absence without leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave for a period of not more than sixty days, shall be punishable with confinement for not more than six months, and if the absence without leave is for a period of more than sixty days, with confinement for nor more than one year.

C. DISRESPECT; INSUBORDINATION; MUTINY.

ART. 59. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT; CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURE.—Any person subject to military law who uses contemptuous or disrespectful words against the President, Vice President, the Congress, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered, shall be punishable with confinement for not more than one year.

ART. 60. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punishable with confinement for not more than six months.

ART. 61. ASSAULTING SUPERIOR OFFICER.—Any person subject to military law who knowingly assaults or strikes his superior officer, being in the execution of his office, shall be punishable with confinement for not more than one year, in addition to the punishment authorized elsewhere in these articles to be imposed for assaulting or striking.

ART. 62. WILLFUL DISOBEDIENCE OF LAWFUL COMMAND.—Any person subject to military law who willfully and with intent to defy lawful authority disobeys any lawful command given to him by his superior officer, being in the execution of his office, whether the same is given orally or in writing or otherwise, shall be punishable with death or confinement for life or for a fixed period.

ART. 63. ASSAULTING NONCOMMISSIONED OFFICER.—Any soldier who assaults or strikes a noncommissioned officer, in the execution of his office, shall be punishable with confinement for not more than six months, in addition to the punishment authorized elsewhere in these articles to be imposed for the assault or striking.

ART. 64. DISOBEDIENCE OF ORDERS OF NONCOMMISSIONED OFFICER.—Any soldier who disobeys any lawful order of a noncommissioned officer, in the execution of his office, shall be punishable with confinement for not more than six months.

ART. 65. MUTINY.—Any person subject to military law who, in concert with another or others, unlawfully opposes, resists, or defies superior military authority, with the deliberate and fixed intent to usurp or subvert the same, shall be guilty of mutiny and shall be punishable with death or confinement for life or for a fixed period; and any person subject to military law who attempts to create or who begins, excites, causes or joins in any mutiny, shall be punishable with the punishment authorized for mutiny.

ART. 66. FAILURE TO SUPPRESS MUTINY.—Any officer or soldier who, being present at any mutiny, does not use his utmost endeavor to suppress the same or, knowing or having reason to believe that a mutiny is to take place, does not without delay give information thereof to his commanding officer shall be punishable with death or confinement for life or for a fixed period.

ART. 67. QUARRELS, FRAYS, AND DISORDERS.—All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith, and whosoever, being so ordered, refuses to obey such officer or noncommissioned officer, draws a weapon upon or otherwise threatens or does violence to him shall be punishable with confinement for not more than one year.

D. ARREST; CONFINEMENT.

ART. 68. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any person subject to military law, except an officer or a soldier, charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent unless such limits shall be enlarged by proper authority; and any person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punishable with confinement for not more than one year.

ART. 69. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in confinement shall be continued therein more than eight days or until such time as a court

can be assembled. When any person is put in arrest for the purpose of trial, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days, unless postponement be had at the request or with the consent of the accused. If a copy of the charges be not served, or the arrested or confined person be not brought to trial as herein required, the arrest or confinement shall cease and the officer holding the accused in custody shall immediately release him, and any accused thus released from arrest or confinement shall not thereafter be tried for the crime or offense upon which he was placed in arrest or confinement: *Provided*, That in time of peace no person shall against his objection be brought to trial before a general court within a period of five days subsequent to the service of charges upon him. Any officer whose duty it is to make the release from arrest or confinement as herein required or any officer who fails or refuses to make the investigation or to perform the other duties required of him by articles 19 and 20 shall be punishable with confinement for not more than six months.

ART. 70. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall at the time deliver a specific account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punishable with confinement for not more than six months.

ART 71. REPORTING PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement or as soon as he is released from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punishable with confinement for not more than six months.

ART. 72. RELEASING PRISONER WITHOUT PROPER AUTHORITY.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge or who through neglect or design suffers any prisoner so committed to escape shall be punishable with confinement for not more than one year.

ART. 73. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service and in addition be punishable with confinement for not more than one year.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

E. WAR OFFENSES.

ART. 74. MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters shall be punishable with death or confinement for life or for a fixed period.

ART. 75. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command to give it up to the enemy or to abandon it, shall be punishable with death or confinement for life or for a fixed period.

ART. 76. IMPROPER USE OF COUNTERSIGN.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it accord-

ing to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, be punishable with death or confinement for life or for a fixed period.

ART. 77. FORCING A SAFEGUARD.—Any person subject to military law who, in time of war, forces a safeguard, shall be punishable with death or confinement for life or for a fixed period.

ART. 78. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punishable with confinement for not more than twenty years.

ART. 79. DEALING IN CAPTURED OR ABANDONED PROPERTY.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect to receive any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punishable with confinement for not more than twenty years.

ART. 80. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall be punishable with death or confinement for life or for a fixed period.

ART. 81. SPIES.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States or elsewhere shall be tried by a general court or by a military commission, and shall, on conviction thereof, suffer death.

F. MISCELLANEOUS CRIMES AND OFFENSES.

ART. 82. MILITARY PROPERTY—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION OF.—Any person subject to military law who, willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposes of any military property belonging to the United States shall make good the loss or damage and be punishable, if the property is more than $50 in value, with confinement for not more than two years and, if the property is less than $50 in value, with confinement for not more than six months.

ART. 83. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses his horse, arms, ammunition, accoutrements, equipment, clothing, or other property issued to him for use in the military service shall be punishable, if the property is more than $50 in value, with confinement for not more than two years, and if the property is less than $50 in value, with confinement for not more than six months.

ART. 84 DRUNK ON DUTY.—Any person subject to military law who is found drunk on duty shall, if the offense be committed in time of war and in the zone of combat, be punishable with death or with confinement for life or for a fixed period; and if the offense be committed at any other time or place, it shall be punishable with confinement for not more than one year.

ART. 85. MISBEHAVIOR OF SENTINEL.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war and in the zone of combat, be punishable with death or confinement for life or for a fixed period; and if the offense be committed at any other time or place, it shall be punishable with confinement for not more than one year.

ART. 86. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot shall be punishable with confinement for not more than six months; and any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, shall be punishable with confinement for not more than one year.

ART. 78. DUELING.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge

sent or about to be sent fails to report the fact promptly to the proper authority, shall be punishable with confinement for not more than one year.

ART. 88. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement of conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of any oath to any fact or to any writing or other paper, knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punishable with a fine of not more than $5.000 or with confinement for not more than five years, or with both. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

ART. 89. RIOT.—Any person subject to military law who is guilty of riot or of participating in a riot, either by being present personally or by instigating, promoting, or aiding the same, is punishable with confinement for not more than two years.

ART. 90. OPENING LETTERS.—Any person subject to military law who willfully and without authority opens or reads or causes to be opened or read a sealed letter, telegram, or private paper shall be punishable with confinement for not more than six months.

ART. 91. SUPPRESSING EVIDENCE.—Any person subject to military law who practices any deceit or fraud or uses any threat, menace or violence with intent to prevent any party to a proceeding before any military tribunal from obtaining or producing therein any book, paper or other thing of evidential value in said proceedings, or from procuring the attendance or testimony of any witness therein, or with intent to prevent any person having in his possession any book, paper or other thing of evidential value in such proceedings, or to prevent any person knowing any fact material thereto from producing or disclosing the same shall be punishable with confinement for not more than one year.

ART. 92. SODOMY.—Any person subject to military law who carnally knows any male or female person by the anus or by or with the mouth, or who voluntarily

submits to such carnal knowledge, or who carnally knows in any manner any animal or bird, is guilty of sodomy and shall be punishable with confinement in a penitentiary or other authorized place for not more than five years.

ART. 93. MURDER; RAPE.—Any person subject to military law who commits murder or rape shall be punishable with death or confinement for life, or for a fixed period, but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 94. CONSPIRACY.—Any person subject to military law who conspires with another or others to commit any offense authorized to be punished by any of these articles with death, dismissal, or confinement for one year or more, and one or more of the persons conspiring to any act to effect the object of the conspiracy, shall be punishable with confinement for not more than one year.

ART. 95. VARIOUS CRIMES.—Any person subject to military law who in any place commits any crime or offense denounced by any statute of the United States or by any statute for the District of Columbia, and not specifically denounced by these articles, shall be punishable with confinement for a period not exceeding the maximum period of confinement prescribed by said statutes: *Provided*, That whenever a statute of the United States and a statute for the District of Columbia denounce the same offense, the former shall govern.

ART. 96. GENERAL ARTICLE.—Any person subject to military law who commits any act or is guilty of any omission which constitutes conduct to the prejudice of good order and military discipline or of a nature to bring discredit upon the military service, and which is not punishable by any other article herein, shall be punishable with confinement for not more than six months.

ART. 97. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service.

ART. 98. FAILURE TO ACQUAINT SOLDIERY WITH THESE ARTICLES.—It shall be the duty of any officer who enlists, musters, or inducts any soldier into the military service, at that time or within ten days thereafter, to read and explain to him these articles, and it shall be the duty of the commanding officer of every garrison, regiment, or company once every six months to read and explain these articles to the soldiers of his command; and every such officer failing or neglecting to perform such duty shall be punishable with confinement for not more than six months.

IV. COURTS OF INQUIRY.

ART. 99. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

ART. 100. COMPOSITION.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

ART. 101. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

ART. 102. OATH OF MEMBERS AND RECORDERS.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of award. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In cases of affirmation the closing sentence of adjuration will be omitted.

ART. 103. POWERS; PROCEDURE.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts and the judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being

inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

ART. 104. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

ART. 105. RECORD OF PROCEEDINGS—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

V. MISCELLANEOUS PROVISIONS.

ART. 106. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke-alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary pun, ishments upon persons of his command without the intervention of a court, unless the accused demands trial by a court.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by a court for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

ART. 107. INJURIES TO PERSON OR PROPERTY, REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and to examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damage made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

ART. 108. ARREST OF DESERTERS BY CIVIL OFFICIALS.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

ART. 109. SOLDIERS TO MAKE GOOD TIME LOST.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

ART. 110. SOLDIERS; SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court.

ART. 111. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Army Articles." This oath or affirmation may be taken before any officer.

ART. 112. COPY OF RECORD OF TRIAL.—Every person tried by a general court shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

ART. 113. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after the collection of such effects said summary court shall transmit such effects, and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to his son, daughter, father, mother, brother, or sister, in the order named, if such be found by said court, or to the beneficiary named by the deceased, if such be found by said court, and such court shall thereupon make to the War Department a full report of its transactions: but if there be none of the persons hereinabove named, or such persons or their addresses are not known to, or readily ascertainable by, said court, and the court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of the deceased, except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

ART. 114. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court to investigate the circumstances attending the death; and, for this purpose, such summary court shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

ART. 115. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court, any summary court, the judge advocate of a general or special court, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

ART. 116. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said sistrict court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

ART. 118. OFFICERS—SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions.

ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to join or do duty together the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

ART. 121. COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer and, upon due application to such commander, is refused redress may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

SEC. 2. That section 1342 of the Revised Statutes of the United States as amended and all other acts and parts of acts in conflict herewith are hereby repealed.

SEC. 3. That the provisions of this act shall take effect and be in force on and after the thirtieth day following the approval of this act, except that article 52 shall take effect immediately upon approval of this act.

SEC. 4. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking of effect of this act may be prosecuted, punished, and enforced in the same manner and with the same effect as if this act had not been passed.

Senator WARREN. The committee will come to order. We have before us Maj. Runcie, and we shall proceed to hear him now.

You understand, Maj. Runcie, that we are considering the Articles of War, and that the bill which is before us seeks to, as you may say, reorganize the Articles of War entirely; and hence, in your testimony, when you allude to them, will you allude to the corresponding portions in the two, and state the differences from the present Articles of War that are necessary, in your opinion?

STATEMENT OF MAJ. J. E. RUNCIE, UNITED STATES ARMY (RETIRED).

Maj. RUNCIE. I doubt that I would be prepared to discuss the detailed provisions of this proposed legislation, which I did not see until yesterday, but I think that the real underlying question which the bill raises is a question as to whether military discipline shall be enforced by law or by the exercise of arbitrary and often capricious authority by military commanders.

I would like to say that after long experience of both the military law and the civil law, I was long ago convinced, and have for many years maintained, that there is not and never has been anything in our military system that deserves to be called military law.

Senator LENROOT. Now, Major, might I ask you, preliminary to your statement, to state what your experience has been, and your occupation?

Maj. RUNCIE. I was graduated from the Military Academy in 1879. I served at the Military Academy as instructor of mathematics and as instructor of law from 1880 to 1884.

I served after that in a great variety of duties, among them as judge advocate of a military division and department. I have sat as a member of a great many courts-martial and have been judge advocate of many such courts—that is, I have acted as prosecutor. I have frequently acted also as counsel for accused persons—officers and enlisted men.

I was retired from active service, and having been admitted to the bar I practiced law for 24 or 25 years.

I retired from the practice of the law, voluntarily, about five years ago, since which time I have been the librarian at the Military Academy at West Point.

Senator LENROOT. Proceed.

Maj. RUNCIE. Now, to continue what I was saying, when I say that there is not any such thing as military law I mean, as the fundamental principle of law is that it shall be something established, a rule, something capable of being known or ascertained and determined, that there has been nothing of law in that sense in the military administration during all my acquaintance with it. In all that time every court-martial, together with the reviewing authority that convened it, has been absolutely independent of every other court or authority in the exercise of its jurisdiction. That means that the decisions of those courts on questions of law may be as conflicting as the imagination can conceive, and there is absolutely no

means of reconciling them. It is possible, and I have known it in my own experience, for two military courts convened by the same authority, sitting within two or three miles of each other, to reach absolutely opposing decisions on a very important question of law, with no possible means of determining which of the two was correct, so that in those two cases it was a mere matter of chance how the court before which a defendant was arraigned would decide on the law. In one case the defendant was discharged, and in the other the defendant was convicted and given a sentence of a term of years at hard labor, the two cases being on all fours.

The same is true in respect to what constitutes a military offense. There is no authority which can determine a question of that nature. And so through the whole procedure of military courts. There is uncertainty because of the lack of any controlling legal authority which can speak decisively as to what the law is, and whose decisions courts shall be obliged to follow absolutely. Now, that is what I mean by saying that there is no such thing as military law.

Senator CHAMBERLAIN. You are familiar with the present Articles of War?

Maj. RUNCIE. In general, yes.

Senator CHAMBERLAIN. Under the present Articles of War, how are offenses defined?

Maj. RUNCIE. Offenses, as I remember it, are defined, except in special cases, in very general terms only; but a state of facts which contains no element of a military offense may be described as a military offense, and the accused be brought to trial, convicted, and punished.

Senator WARREN. Major, as I understand, I do not know that I ought to say it was the origin of, but largely the Civil War was responsible for, the present Articles of War as they read, and they are supposed to have grown out of experience in the field in time of war. Have you, with your views, considered just what might be done and what should be done in war, at the front, as, for instance, during the late war in France and Germany—speaking, of course, of law and legal procedure? You would, of course, proceed under these Articles of War?

Maj. RUNCIE. Yes, sir.

Senator WARREN. In what way would you remedy the inadequacy which you describe?

Maj. RUNCIE. That could not be remedied in time of war; and I think you are in error in thinking that the present Articles of War are the outgrowth of conditions existing at the time of the Civil War. The character of the Articles of War dates very far back of the Civil War.

Senator WARREN. Do not understand me as saying that they originated there; but the shaping of them and the trying out of them was gauged largely afterwards, as I understand, by the application during the Civil War, of course. That is my understanding.

Maj. RUNCIE. I have not understood it that way.

Senator WARREN. I wanted to get your idea about it.

Maj. RUNCIE. Yes. The Articles of War from which ours came were not based on law; they were based on the authority of the Crown. The law-making power had nothing to do with them whatever.

We took over those Articles of War very hastily at the time of the formation of the armies of the War of Independence, and while the British system has fundamentally changed since that time, and the military law of the United Kingdom is now based on parliamentary enactments and is administed as law, our system has continued on the basis which the British abandoned long ago; the basis of military command, not of military law.

Senator CHAMBERLAIN. We took over the British Articles of War of 1774?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. And they were adopted in 1776, as I understand, without any discussion.

Maj. RUNCIE. Under the emergency which then existed.

Senator CHAMBERLAIN. Yes; and I believe, from a statement that I have read somewhere, that it was a surprise to the fathers that they were taken over without public discussion.

Maj. RUNCIE. Yes, sir. I think you will find an account of that in the memoirs of John Adams, who sat on that committee.

Senator CHAMBERLAIN. Those Articles of War which were taken over in 1776 have been revised only two or three times since they were adopted?

Maj. RUNCIE. Yes; and only in details, never in system.

Senator CHAMBERLAIN. The last change in the Articles of War I had a good deal to do with, and I know something about it. It was largely a change of phraseology to make the articles apply to the colonial possessions of the United States. If I do not state this correctly, you will correct me about it.

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. The fundamental change made at that time was to give them some power for the exercise of parole, and return of young men to the colors, for good conduct. It extended the military powers.

Maj. RUNCIE. Yes.

Senator WARREN. My observation, also, is this: Maj. Runcie states that the Articles of War go back almost to the foundation of the Government. We were in the Civil War for a very long time, and of course we were also in the War with Mexico. In the real sense I take it that military justice was administered under these Articles of War very much as now; and I thought perhaps in your criticism of them you might point out how they worked then, wherein they failed, and if they failed what remedy was suggested or attempted to be supplied; in other words, how came we in the position in which we now are?

Maj. RUNCIE. I think you will find that they worked very badly, even then, and the evidence of that fact is to be found in the collected orders of that time and immediately following the Civil War, where the executive authority was called on in a great number of cases to correct failures of the military courts and their abuses of authority.

There is another historic case, that of Gen. Fitz-Johnsen Porter, which I think illustrates very well the deplorable consequences of a lack of competent review at the time. It was almost 20 years after the Civil War before Gen. Porter was able to get justice; and then he got it not by any procedure under the military code. An almost extra-legal tribunal had to be devised which could act merely in an advisory

capacity, and the Congress and the Executive, after a long delay, were brought to concur in the findings of that board and to do justice to Gen. Porter.

After the Civil War a rather remarkable phenomenon occurred in our history, namely, the total collapse of all interest in military matters. I think you will find that after the Civil War there was no military interest, other than private and personal interests, that received the attention of the public or the Congress. The same conditions have followed after all of our wars.

Senator LENROOT. At what period would you say that began; how soon after the war?

Maj. RUNCIE. Within a very short time after the Civil War; within five years, I think, the Army was reduced, first to 30,000 and then to 25,000 men. In fact, I think it can safely be said that our country has never had an army except in time of war. That is why there has been no public interest in military affairs. We have had an organization which we called an army. It was nominally organized and administered as a military force. As a matter of fact it was a police force. We had a long frontier, in a very wild country, and swarms of savages, to be looked after. That was the only real duty of the Army for at least 25 years—perhaps 30 years—after the Civil War.

Those duties were important. They called for courage and endurance and self-sacrifice, and all that. But they were not the duties of an army.

Senator CHAMBERLAIN. That very lack of interest has been largely the cause of failure to revise in time of peace these very Articles of War?

Maj. RUNCIE. That was what I was about to call attention to.

Senator CHAMBERLAIN. Do you not find the same case now, largely?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. Except in individual cases and where there have been actual hardships, there is a lack of interest on the part of the public?

Maj. RUNCIE. Yes. Our public is never really interested in military affairs. The military establishment does not touch the people closely. If it did, if they were in daily contact with it all over the country as they are with the postoffice, and in many places with the customs service, the military service would receive that measure of public attention which it never has received except in time of war.

Senator CHAMBERLAIN. Getting down to a concrete proposition, a great many of these cases that have been tried by court-martial have come to my attention since the close of the war, and the impression I have received from them is that the fundamental trouble is that the commanding officer is given too much power. For instance, the commanding officer appoints the court and the judge advocate. The man who defends the prisoner is appointed by the same appointing power. There is nobody except the commanding officer who can revise the sentence of the court-martial. He sets aside the findings of the court-martial in cases where a defendant has been acquitted, and reconvenes the court, and orders the same man convicted; and beyond that there is no power of appeal, as I understand it. Now, is that a fair statement of the situation?

Maj. RUNCIE. So far as it goes; but I think that it is not the commanding officer alone who is chargeable with those consequences. Every officer participates in that responsibility to some extent, and that condition results from the condition under which the Army acted as a police force, without military duties, and without real military administration.

We no longer look upon the Army as a police force. The Army no longer has any police duties. But the customs and the practices of the period during which it was nothing but a police force have been sought to be carried over into the time when we have tried to make an army. For instance, it is perfectly possible for an officer to prefer an accusation against an enlisted man on a statement of facts which contains no element of a military offense, and the commanding officer, if the accuser himself does not happen to be the commanding officer, can refer the matter to a court-martial of his own appointment. The case is tried and it comes back to the commanding officer, who is the immediate superior of the members of the court, dwelling in the same command, in the same military bailiwick. There is not much assurance of justice in a case like that.

Senator WARREN. In a case like that, and in time of war, give us a suggestion of what you would propose.

Maj. RUNCIE. That is very difficult, because all of the conditions which have given rise to the controversies now pending, and which have aroused personal interest in military questions, are not conditions that were developed by the war, but are the outgrowth of those conditions which existed during time of peace and will continue to exist in time of peace.

Senator WARREN. Yes; but practically—because that is what we are to do in this bill—the question is how to make new provisions for the old ones that are defective.

Maj. RUNCIE. Practically, Senator, I do not know how it can be done. I do not see how provisions such as you propose to make will ever effect a cure of these evils. You are considering only the symptoms of the disease, not the causes.

Senator WARREN. What advice have you to give us as legislators along that line?

Maj. RUNCIE. Such legislation should be enacted for the Army as will assure a purely military organization and purely military administration for purely military purposes, with nothing in view but the public service. As it is now, the public service can be entirely ignored, and often is.

I mean that it will be, I think, perfectly useless to enact such legislation as is here proposed if the Army is to continue to be distributed in small posts which do not constitute military establishments, but which are military villages or colonies. If the Army is organized in commands of not less than brigades and preferably division commands and if in such establishments there shall be none but persons in or employed by the military service, you will then be able to have an organization that will administer military law. You can not provide an officer of the Judge Advocate General's Department for every petty post that now exists throughout the United States.

Senator WARREN. Excuse me. I asked the practical question, because I make no pretensions to technical knowledge of law and its operations, and I am thinking of it now along the line of your

last remark. Just now, for instance, I understand they have distributed troops in company units along the Mexican frontier. The trouble we are having with Mexico is such that they can not hold brigades or divisions together where they may be under division command or brigade command, and the troops are scattered along the border. I do not want to interrupt or embarrass your remarks at all, but I want to have you keep in mind the practical side, and I want to ask you for your personal advice.

Maj. RUNCIE. Yes, sir. Now, that is a command in the field, and of course the conditions are quite different. But what I have had in mind in the statement so far as it has gone is the permanent establishment which I understand is contemplated for the training of troops, a really military establishment, from which at any time such divisions or brigades or greater commands could be put into the field, carrying with them the same military organization, and in particular the same organization for the administration of military justice, that they had in their garrison; just as they would carry with them their supply officers, medical officers, ordnance officers, and others of the staff.

Senator CHAMBERLAIN. Do you think that any system, any military code, is proper which vests such power in the commanding officer of a district or a department—we will say the commanding officer of the smaller unit first, and then of the next larger unit, and so on up to the largest unit. Do you think any system is proper which vests such power in the commanding officer?

Maj. RUNCIE. No, sir.

Senator CHAMBERLAIN. Why?

Maj. RUNCIE. Because any such commanding officer is independent of every other commander in his view of the law, and every court that may be appointed by him is independent of every other court in its view of the law, unless there is provided, as this bill does provide, a competent revising authority, whose decision on every question of law shall be final.

Senator CHAMBERLAIN. That is what I want to get at.

Maj. RUNCIE. And, so far as I have observed, there is lacking in this bill a provision, such as the rule of *stare decisis*, which shall make the decisions of the military court of appeals binding on the inferior courts.

Senator CHAMBERLAIN. In other words, under the present system the commanding officer is supreme?

Maj. RUNCIE. Yes, sir, supreme in his interpretation and application of the law, except when a stubborn court refuses to be coerced.

Senator CHAMBERLAIN. And the judgments of courts-martial are lenient or severe according to his own humor; is not that true?

Maj. RUNCIE. That is true; but that is only a small part of it. The court may be wrong and the commanding officer may be right.

Senator WARREN. There are some systems of appeal under the law as to the officers who may call a court, and as to review by particular officers, I believe?

Senator CHAMBERLAIN. None whatever. That is the trouble with the old Articles of War.

Maj. RUNCIE. There are none whatever.

Senator WARREN. I do not read the Articles of War that way.

Senator CHAMBERLAIN. That is the interpretation that has been placed on that. Gen. Crowder has undertaken to say that under the power given to review and modify on the part of the Judge Advocate General, that power does not give power to reverse or modify, and that the only power of the Judge Advocate General is to ascertain if the court had jurisdiction of the proceedings and that the proceedings have been regular.

Senator WARREN. I spoke of it before it gets to that point. That is, some of those court findings are reviewed, we will say, in the field, if it happens to be there, as I understand it, and they go up to the President, and, you may say, to the Judge Advocate General's office.

Senator CHAMBERLAIN. What is the proceeding of the Judge Advocate General's office now?

Maj. RUNCIE. Nothing but advisory; it has no control over the actions of courts or of reviewing authorities.

Senator CHAMBERLAIN. We will take a case that has been tried and in which judgment has been rendered by the court. In case the defendant wants to go higher, what is the process?

Maj. RUNCIE. He can not by any legal proceeding.

Senator CHAMBERLAIN. There is no way in which he can get his case before a higher tribunal?

Maj. RUNCIE. There is no higher tribunal. There is no such thing as an appeal or a writ of error or certiorari; nothing of that nature.

Senator WARREN. Either in the law or regulations, do you mean?

Maj. RUNCIE. No, sir. By extra legal action—unlegal and extralegal—he can cause intercession to be made by his friends to the reviewing authority.

Senator CHAMBERLAIN. To the reviewing authority. What is the power of the reviewing authority?

Maj. RUNCIE. To approve, to disapprove, or to modify.

Senator CHAMBERLAIN. That is the next higher authority?

Maj. RUNCIE. That is the officer who convenes the court.

Senator CHAMBERLAIN. Is there any appeal from him?

Maj. RUNCIE. Not an appeal exactly. In grave cases affecting life or involving dismissal of an officer his action is not final. It must go to the President.

Senator CHAMBERLAIN. But only in those two cases?

Maj. RUNCIE. But that is not an appeal.

Senator CHAMBERLAIN. That is true only in those two cases?

Maj. RUNCIE. Yes, sir; that is all.

Senator CHAMBERLAIN. Where a court has convened and has found a defendant guilty and a severe sentence has been imposed, that goes from the court up to the commanding officer who convened the court, and he approves or disapproves?

Maj. RUNCIE. Really, to give the procedure in detail, it goes to his judge advocate, who reads the record and makes a recommendation to the convening authority. The convening authority may or may not regard that recommendation. He often disregards it.

Senator CHAMBERLAIN. If he approves it, then he approves the findings of the court?

Maj. RUNCIE. Yes; and orders execution in all except those cases which are reserved for the action of higher authority.

Senator CHAMBERLAIN. We will say that the commanding officer who convened the court has approved the findings of the court. Then what becomes of it?

Maj. RUNCIE. The record is transmitted to the office of the Judge Advocate General and filed.

Senator CHAMBERLAIN. At the Capital?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. And has he the power of setting aside?

Maj. RUNCIE. No, sir.

Senator CHAMBERLAIN. He only has the power of advising?

Maj. RUNCIE. Yes, sir.

Senator WARREN. What happens in case the reviewing officer refuses to accept and does not approve the finding of the court?

Maj. RUNCIE. He can then disapprove the proceedings in the entire case and practically set them aside.

Senator WARREN. Then I do not believe that you and I differ at all. Perhaps we do in terms. But it does not occur that one set of men passes judgment on a man and that is the end of it, as a matter of fact, in all cases, because of course they get this review—what you call a review. It may be incompetent, but I am speaking of it as a second step.

Maj. RUNCIE. It is not a review in the legal sense. I mean, it does not involve a re-examination of the legal questions which may have been raised; as, for instance, to the sufficiency of the evidence. And, again, it leaves it to the arbitrary judgment of the convening authority as to what he will do. I have had, in my experience, a case or two in which it was extremely difficult to keep the convening authority from doing grave injustice. It came so close to it once that the commanding general, who was my chief at the time, insisted on sending to prison a man as to whose very identity there was grave question, a man who denied that he had ever been in the military service, whose identity was not established by the evidence in the record, and to whom the court had denied sufficient time to produce evidence which he said, would show that at the time he was supposed to be in the military service he was working at his trade in a State 2,000 miles away. But the commanding general said he was morally convinced of the guilt of that man; and when he was assured that men could be punished not by moral assurance of their guilt but only by legal conviction, he said he would take a chance. And he said that civil courts anyway could have nothing to do with the case; and when he was advised that, far from that being the fact, the civil courts could, by writ of habeas corpus in a case of that kind, in which the question in issue was one of the jurisdiction of the court, interfere at once, he said, well, he relied on the judge advocate to protect him in that case; which his judge advocate said he would decline to do, whereupon the commanding general changed his mind, and the man was released.

Senator CHAMBERLAIN. Of course the difference between Gen. Ansell and Gen. Crowder, from the legal viewpoint, was and is this: I think Gen. Crowder's contention is that the Judge Advocate General has no power to reverse or to modify or to change the sentence of a court-martial, but that he can, if he thinks there is any insufficiency of evidence or any irregularity, simply advise the commanding officer, if you please, concerning the propriety of the sentence. Gen. Ansell, on the other hand, claims that under the power given by the Articles of War the Judge Advocate General has power to review and revise and modify the judgment of the court-martial.

There is the difference between those two gentlemen, both very distinguished officers of the Army.

Assuming, as the Secretary of War has assumed, that Gen. Crowder's contention is the correct contention, do you think there ought to be some power somewhere that would have the right to review, revise, and modify the sentence of a court-martial?

Maj. RUNCIE. Yes, sir; I think that is the indispensable step to establishing government of law instead of government by caprice.

Senator CHAMBERLAIN. Have you examined the provisions in these revised Articles of War which cover that point?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. Do you think they are sufficient to do it?

Maj. RUNCIE. Yes, sir.

Senator CHAMBERLAIN. That is really the main contention between these two distinguished men.

Maj. RUNCIE. That, of course, is purely a question of the interpretation of the statutes.

Senator CHAMBERLAIN. Absolutely, that is all.

Maj. RUNCIE. On the whole, I do not think that any such revisory authority is vested in the Judge Advocate General.

Senator CHAMBERLAIN. You differ with Gen. Ansell on that?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. That is Gen. Crowder's view of it.

Maj. RUNCIE. But that is perhaps the principal of all the existing conditions that calls for a remedy, and the remedy is provided here; and as to the details of the exercise of the revisory jurisdiction, I think—well, I have not had time to look into it. As I say, I saw this proposed legislation for the first time yesterday.

Senator CHAMBERLAIN. There is no analogy for the system we now have anywhere in the civil courts?

Maj. RUNCIE. No, nor in any other military establishment or system that I have any knowledge of.

Senator CHAMBERLAIN. So that, in the last analysis, it leaves the enlisted man or the noncommissioned officer, who is summoned before a court-martial, entirely at the mercy of the commanding officer who acts in a revisory capacity after the finding?

Maj. RUNCIE. And of the court.

Senator CHAMBERLAIN. Yes.

Maj. RUNCIE. The court is responsible in more cases, I think, than the commanding officer; because it is absurd, I think, to expect a court composed of men, mostly young men, inexperienced men, with no training whatever in the consideration of questions of law, to pass on questions which affect the liberty, the resources and the lives of enlisted men; or of their brother officers, for that matter. It is not only absurd, it is unjust to young officers, destitute of training or experience, to impose on them such grave duties and to require them to exercise such weighty powers without the guidance of officers trained and experienced in dealing with such questions. A lieutenant is not permitted to command a platoon until he has had ample instruction in the duties of a platoon commander, but as soon as he receives a commission and procures a uniform he is deemed qualified to take part in decisions of questions of law affecting the good name, the liberty, and even the life of a fellow soldier. It is unjust to the young officer, as well as to the soldier in whose case he sits in judgment.

Senator WARREN. You have noticed, of course, in the Chamberlain bill, the proposition that in courts-martial—you were speaking of this trouble—that there may be included, or shall be included, in fact, enlisted men, in the trial of enlisted men and noncommissioned officers?

Maj. RUNCIE. Yes.

Senator WARREN. You were speaking of the inexperience and ignorance of officers, and of course that would apply below as well as above; and I agree with you that probably there is more trouble about thst than about anything else.

Maj. RUNCIE. Yes.

Senator WARREN. Would you like to tell us what you think about that proposition?

Maj. RUNCIE. I think it is a very doubtful expedient, because, of course, as you very justly remarked, an enlisted man would be very much less competent, in general, to pass on those questions than an officer. And, again, in the Army as it now exists—I mean in time of peace—the enlisted man will probably be entirely subordinate to his officers who are on the court.

Senator CHAMBERLAIN. Why?

Maj. RUNCIE. Because the relation that exists between the officer and the enlisted man in our Army is not a military relation; it is a feudal relation; it is a social relation.

Senator CHAMBERLAIN. I wish you would explain that.

Maj. RUNCIE. It is a relation that exists between men of a superior cast and men of an inferior cast.

Senator CHAMBERLAIN. I would like you to enlarge on that and tell us just what you mean, because it is along that line that complaints have been made to me within recent months, by enlisted men and the friends of enlisted men, claiming—and I am only giving the claim, not that I have knowledge of it—that the enlisted man is looked upon as not the equal of the officer socially or mentally or otherwise, no matter what his standing may have been before he went into the service. That complaint is everywhere met. Now, you called it to my attention by making the statement you did as to the relation of the feudal system. How did it originate?

Maj. RUNCIE. If you will have patience enough to let me go back to a statement I made a while ago, I think it is owing to the same conditions that existed when the Army was a frontier police, when the enlisted men were recruited from, perhaps, the inferior strata of the community; when the officers were first allowed only to bring their families into these little police posts; whereupon the enlisted man began to be regarded as available for domestic wants of the officer, to take care of his domestic establishment. The enlisted men who were permitted to have their families at the post of course found their families depended upon, also, to supply the wants of officers' families. I think that if it were not for the presence of the families of officers in military posts, the relation between the officer and the man would become purely military. As it is, naturally, the soldier whose wife is a laundress and whose daughter is a waitress finds himself looked upon as one of the menial class rather than of a military class. That is, it has come to be regarded that the officer is one kind of man and the enlisted man is another kind of man; that the difference is one of class, not of position, as it ought to be and as it is in other armies.

Now, that goes to such lengths that it may be in point to exemplify it. Soon after we found ourselves engaged in war, when the Red Cross people sent around to different communities expert women instructors in the kind of work which the women of our country took up so enthusiastically, the preparation of bandages and surgical dressings and comforts for the relief of the wounded and sick, one of these instructors came to a very large post at which there were many officers and many officers' families and many enlisted men with their families. The course of instruction having begun, the wives and daughters of some of the enlisted men requested that they might be permitted to receive the instruction. They were as much interested in the accomplishment of the desired end as the officers' families were. The instructor was perfectly willing, but the officers' wives and daughters announced that that would not do; that if the enlisted men's women were permitted to come to the class in which the instruction was given, they would withdraw; that social distinctions must be preserved.

Senator CHAMBERLAIN. Was it enforced?

Maj. RUNCIE. It was, so far as I know.

Senator CHAMBERLAIN. Does that condition exist between the officer and the enlisted man at West Point?

Maj. RUNCIE. I think it exists practically everywhere in the Army. It has been my experience that it does; that the relation between the officer and the enlisted man, instead of being merely that of a military superior and a military subordinate, is primarily that of a social superior and that of a social inferior. That did not work any great harm so long as the Army was small and could be recruited from the class of the community which was willing to occupy that position; but, exactly as the troubles which have arisen in the administration of military justice in time of war have their roots in the conditions which exist unchallenged in time of peace, so this social relation of superiority and inferiority in time of peace is inevitably carried into the time of war, when the class of enlisted men is totally different from that which used to fill the ranks at the old frontier police posts. Why, you were asked here a short time ago to appropriate a large sum of money for the construction and maintenance of a hotel at West Point, to convert the military academy more than ever into an amusement resort. At the hotel that now exists there, there has stood, and for all I know still stands, a rule which excludes any enlisted man from the accommodations of the hotel. And after the war had begun for us, the question arose whether enlisted men, voluntarily enlisted or included in the selective draft, could visit the hotel to visit their friends there, or, if they came to West Point to visit their friends, could go to the hotel for accommodations.

Senator CHAMBERLAIN. How was it determined?

Maj. RUNCIE. I think the rule was perhaps suspended in that case; but at any rate permission had to be asked. Now, I cite that only as an illustration of the conditions which in my opinion absolutely prevent a really military establishment.

Senator LENROOT. Is this hotel open to the public generally?

Maj. RUNCIE. Except to enlisted men.

Senator LENROOT. That is what I say, except as to enlisted men? Any one can have the accommodation except enlisted men, on paying for it?

Maj. RUNCIE. Exactly.

Senator CHAMBERLAIN. Is that a regulation of the Academy?

Maj. RUNCIE. I think not. I think it is simply a quiet rule.

Senator WARREN. Is that the old hotel that stands on the grounds?

Maj. RUNCIE. Yes, sir.

Senator WARREN. It is an unwritten law that the enlisted men understand and that the officers understand?

Maj. RUNCIE. Yes.

Senator WARREN. As a general rule you can not get in there—it is impossible for anybody?

Maj. RUNCIE. The attractions of the place come periodically, and of course the pressure on the hotel accommodations comes periodically. But why a hotel should be a part of that military establishment I have never been able to understand.

Senator CHAMBERLAIN. Does the cadet at West Point imbibe that class distinction from the time of his entry into the establishment?

Maj. RUNCIE. It is impossible for him to avoid it.

Senator CHAMBERLAIN. He comes from the class, as a rule, from which the enlisted men of the Army come?

Maj. RUNCIE. I think a majority of them do.

Senator CHAMBERLAIN. Yes.

Maj. RUNCIE. But the cadet stays there four years, as a rule, and he finds there enlisted men engaged not in military duties but in the care of a vast village. Many of them have no arms, have no other uniforms than those of working men—laborers and artisans. They do nothing but take care of that vast village. The inevitable result is that the cadet, after he has been exposed during the formative period of his character for four years to such surroundings, comes out not so much with the feeling that it is his duty to serve, as that it is his privilege to be served.

Senator CHAMBERLAIN. You think that he carries that into the service with him?

Maj. RUNCIE. I know that he does.

Senator CHAMBERLAIN. With that feeling of class distinction, with the officer having that feeling of superiority, do you feel that under the present system it is possible for a man to deal as justly with the enlisted men as with those of his own class?

Maj. RUNCIE. I feel that it is utterly impossible.

Senator CHAMBERLAIN. Do you not feel that where an enlisted man is tried by court-martial for some trivial offense he may be given a much longer sentence than a commissioned officer who may be found guilty of a much more serious offense?

Maj. RUNCIE. That frequently happens; but it goes much further than that. The enlisted man may be tried and convicted for something which is not an offense at all.

Senator LENROOT. You mean an offense not defined by any law?

Maj. RUNCIE. For an act or omission that contains not a single element of a military offense. There was a case, which excited some unpleasant comment, of an enlisted man who was accused, arraigned, tried, and convicted before a military court for lack of respect or lack of obedience, or something of that kind, to an officer's wife.

Now, there is absolutely no military relation, and should be none, between any person in the military service and any woman, because she happens to be an officer's wife. This conviction was not for such conduct towards any woman as would have been reprehensible and would have subjected the man to proper punishment in the case of any woman; but the case rested on the conviction which has grown up in the military service, that there is a measure of military respect and obedience due from the enlisted man as such, not only to the officer but to all of the officer's family, and to all of that social class.

Senator LENROOT. Where was this case?

Maj. RUNCIE. At West Point.

Senator LENROOT. When did it occur?

Maj. RUNCIE. I think it was about two years ago.

Senator WARREN. Of course, the law, as I understand it, prior to some late additions, did not presume that officers in the Army had families, or provide for any families. That is, the matter of families did not enter into Army provisions at all. The woman does not appear anywhere in such provisions.

Maj. RUNCIE. That shows how things grow without regard to law.

Senator WARREN. There has been some legislation to change that lately. The proposition is illustrated very plainly at a post, where naturally an officer may have a wife and a number of children; and he may have spent a lot of money keeping his place up, but if his commission dates a day later than that of another officer who comes to that post, the man who has just come there may walk in and say, "Get out of here; I want this house." In fact, you will find that in early times officers in speaking to their men, in haranguing the crowd, advised against marriage. They said there was no provision made for families; that there was no provision for carrying baggage, and all that.

Maj. RUNCIE. I think, if you will look back to about 1835, around the time of Gen. Scott's regulations, you will find that it was not contemplated that officers' families should be admitted into garrisons at all, and I do not think there has ever been any declaration of that as a right at all. But in the old police force it was easy to set troops to work to chop down cottonwood trees and build a little addition to an officer's cabin for the accommodation of his family.

Senator WARREN. That has been changed by law since, so that the men can not be asked to do such service. I do not know whether that law is observed.

Maj. RUNCIE. I do not remember any provision of law that recognizes the right of an officer's family to live in a military establishment.

Senator WARREN. No; but I was speaking of using the men. An officer can not use men now in that kind of service.

Maj. RUNCIE. Yes; but it is done right along.

Senator WARREN. Yes; but when an officer does that he is violating the law and is subject to court-martial.

Maj. RUNCIE. Yes; but he gets away from that by saying that he himself does not employ the man; that his wife employs him.

Senator CHAMBERLAIN. It is a rule that does not work both ways.

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. Now, let me call your attention to this. I think that class spirit exists not only at West Point, but at the Naval Academy.

Maj. RUNCIE. That is possibly true; I do not know. But it exists throughout the whole military service.

Senator CHAMBERLAIN. You will remember the instance where a cadet a few years ago took a nurse, a respectable lady, to a cadet dance, and he was practically ostracized by his fellows for having done so.

But, going back to this proposition, let me call your attention to one thing for which you will not find a parallel in the laws of this or any other country. Article 96 on page 53 of the existing law provides:

ART. 96. *General article.*—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

As I read that article there is not a thing under the sun that has anything to do with the military establishment that can not be denounced as a military offense and punishable by a commanding officer.

Maj. RUNCIE. By a court, and with the approval of the commanding officer.

Senator CHAMBERLAIN. In the last analysis it is the same thing.

Maj. RUNCIE. Yes, it is. That article will cover any statement of facts which the authority which convenes the court chooses to regard as a military offense, although legally there is not one element of a military offense in it.

Senator CHAMBERLAIN. Yes; and the grossest injustices have been perpetrated under it. For instance, take a man who is absent without leave, it may be for a day or two, and comes back again. There have been cases where men absent without leave for five days have been sentenced to 20 years in the penitentiary, and sometimes, on being absent for a less time, have received a lighter sentence. Can a man absent without leave be punished under that section for desertion?

Maj. RUNCIE. No; he would have to be charged with desertion, because that is provided for under a special article.

Senator CHAMBERLAIN. Absence without leave can be punished under that article, as though he had been charged with desertion, can it not?

Maj. RUNCIE. No; I think not.

Senator CHAMBERLAIN. Is there any other provision of the Articles of War which provides for punishment for absence without leave?

Maj. RUNCIE. I am not sufficiently familiar with the new articles to say.

Senator CHAMBERLAIN. I mean in the articles as they are now enforced.

Senator WARREN. I think there is unlimited latitude allowed for conviction because of the various grades. You might find him innocent or you might fine him a dollar. For instance, if he had left when an action was expected, to avoid battle, and had been caught away, of course that would be true desertion.

Maj. RUNCIE. That would be cowardice.

Senator CHAMBERLAIN. There is no limit, then, to the punishment that may be fixed?

Maj. RUNCIE. That is true. That was formerly known as "the devil's article." It was the catch-all for everything that nobody had thought of putting specifically among the offenses triable by a court. It makes punishment possible, therefore, for any action which, though not involving any real offense, a commanding officer may choose to regard as prejudicial to good order and military discipline. If he can appoint a court that will accept his view of the matter or that he can coerce into agreeing with him, he can punish a man for almost anything.

This article serves another purpose also. It is available to defeat the ends of justice as well as to perpetrate injustice. If, for instance, an officer has been guilty of acts that would properly be described as "conduct unbecoming an officer and gentleman," the penalty for which is dismissal from the service—I mean that upon conviction under such a charge the sentence of dismissal is mandatory, the court having no discretion in the matter—and if for any reason the commanding officer does not desire to expose the accused officer to the risk of dismissal, he may cause the charge against him to be brought under this ninety-sixth article for "conduct to the prejudice." Then, in the event of a conviction, the court has a range of discretion as to the penalty to be imposed, and the commanding officer as reviewing authority can mitigate or remit the penalty imposed by the court. I give that just as an example.

Senator CHAMBERLAIN. Take the instance that you spoke of, disrespect to an officer's wife; that would come under it?

Maj. RUNCIE. If you chose so to regard it.

Senator WARREN. It would have to be disrespect "to a lady," rather than "to an officer's wife," specifically in the charges?

Maj. RUNCIE. Yes; almost anything would do, as the practice now is.

Senator WARREN. They would hardly have the cheek to do it otherwise, I think.

Senator CHAMBERLAIN. I make no claim to the authorship of this bill. At the request of the committee last year, when I was chairman of the Committee on Military Affairs, I asked Gen. Ansell to prepare revised Articles of War, and this bill is the result. In order to cure the section you speak of there, this rule has been suggested:

ART 96. *General article.*—Any person subject to military law who commits any act or is guilty of any omission which constitutes conduct to the prejudice of good order and military discipline or of a nature to bring discredit upon the military service, and which is not punishable by any other article herein, shall be punishable with confinement for not more than six months.

That limits the amount of punishment.

Maj. RUNCIE. That limits the amount of punishment, but does not limit the discretion——

Senator CHAMBERLAIN. No.

Maj. RUNCIE (continuing). As to what constitutes a military offense.

Senator CHAMBERLAIN. Do you not think it ought to limit the discretion, also?

Maj. RUNCIE. It is very much like cases of disorderly conduct coming before a police court or a municipal magistrate.

Senator CHAMBERLAIN. Yes.

Maj. RUNCIE. But of course those minor civil courts are guided by a long course of experience and legal precedents; but the military courts have no such experience and they are under no obligation to be guided by precedents.

Senator CHAMBERLAIN. Now this, I presume, is under regulation rather than by law. Where it is suggested to a commanding officer that a complaint ought to be made, accusing an enlisted man, he has an inspector look into it, and the inspector is on the Government's side of the controversy, and the complaint is based on that. I understand that it is not the rule, and that it is rather forbidden, that the opposing view shall be inquired into by the inspector. Do you know about that?

Maj. RUNCIE. I do not know what the present practice is about that. The actions of inspectors are liable to be perfunctory.

Senator WARREN. It is on the ground that it is a sort of grand jury?

Senator CHAMBERLAIN. Yes; but a grand jury hears both sides.

Senator WARREN. Yes; it does, if it does its duty.

Senator CHAMBERLAIN. In a criminal court where the defendant chooses not to disclose his case, then it is his own fault.

Maj. RUNCIE. In a court-martial the defendant's side is heard if he wants it to be heard.

But all this legislation, I think, will be ineffective unless measures of purely military administration can be introduced into the Army and maintained. There is, in my opinion, no more reason why an officer's family affairs, his domestic concerns, and his social relations, should be mingled with and even take precedence over his official duties than there is for having the post office filled with the families of all the employees, from the postmaster down to the letter carriers. The conditions which permitted that system to grow up, in the days when the Army was a police force, no longer exist.

Senator WARREN. They do not exist by any positive assurances of law, now.

Maj. RUNCIE. No. I mean the conditions of an officer's life and service in remote places, in small detachments which were not military forces but police forces, in which the presence of officers' families to a limited extent did not materially interfere with the discharge of police duties. Those conditions no longer exist. But because the officers' domestic establishments were allowed—were tolerated—at those old, little posts, one-company posts, two-company posts, it has come to be considered that an officer has an undoubted right to accommodations for his family and to a supply of almost everything that his family may want at the public expense.

It is impossible to maintain a military spirit and a military establishment in a democratic country with such conditions as those. I say this after having had considerable experience in the Military Establishment, and quite as much outside of the Military Establishment, and having no interest in the question in either way.

Senator CHAMBERLAIN. You have observed that very severe sentences have been passed upon enlisted men for very trivial offenses, have you not?

Maj. RUNCIE. Yes, sir.

Senator CHAMBERLAIN. It may be claimed that that was necessary in order to maintain discipline. But in your opinion, from the

experience you have had, do you not believe that most of these cases could have been tried by minor courts and the same discipline maintained?

Maj. RUNCIE. I would go further than that and say that such an abuse of military discretion is destructive of real discipline, the sole purpose of which is to secure good and efficient service.

Senator CHAMBERLAIN. It is destructive of morale?

Maj. RUNCIE. It substitutes servitude for honorable service.

Senator CHAMBERLAIN. Let me give you an illustration, and ask you if any such system as would warrant this can be sustained, in morals at least: There was a young lieutenant in France who was the keeper of the company funds, who lost the money—or lost his books, rather. His things were put with those of the others, into a dump heap, at the place where they landed. He lost his books, and, finding that they were lost, in his efforts to find them he was absent without leave for a while. The inspector reported that he ought to be prosecuted, and he was tried for absence without leave. He produced the money in court, what he did have, and produced evidence to show what he should have had, although he did not have his books. He was found guilty of embezzlement and of absence without leave, and he was dismissed from the Army. That was the beginning and the end of his punishment.

Then, when the matter was brought to the attention of his commanding officer, he ordered the court to be reconvened, because, as he said, an officer guilty of embezzlement and absence without leave should have been dishonorably discharged from the Army. The court was reconvened and found him guilty, as before, of embezzlement and of absence without leave, and sentenced him to be dishonorably discharged from the Army and to forfeit his pay, and sentenced him to imprisonment in Fort Leavenworth for a term. Is there anything in that case that would justify such a punishment as that?

Maj. RUNCIE. Nothing whatever in the statement you make; and a competent legal officer with the record of such a case before him, even though his power was nothing more than advisory, would recommend that the entire proceeding be set aside and the officer restored to duty.

Senator CHAMBERLAIN. That case came here, and I am glad to say that the clemency court recommended the remission of the extreme penalty. The young man did not go to Leavenworth, although he was on the way, all right; and yet the stigma of conviction of a felony clings to him. There is no way for him to get rid of it.

Maj. RUNCIE. There is absolutely no way of removing the record of his conviction.

Senator CHAMBERLAIN. There are thousands of cases, not on all fours with that, but thousands of cases where the same hardship has been imposed. The best evidence of it, Major, is the fact that the clemency court have reduced the aggregate of 28,000 years of sentences to a little over 6,000 years. That ought to be pretty good evidence that the sentences imposed are extreme.

Maj. RUNCIE. You are considering the matter in the officers' direction. I have known many cases in which officers should have been prosecuted for delinquency in dealing with the public funds and with public property in which prosecution has been omitted on

condition that the officer make restitution. Extreme leniency is just as destructive of discipline as extreme severity, and so long as it is left to the option—to the whim or caprice—of a man acting in a personal and not in a judicial capacity, to determine whether a man shall be let off or prosecuted to conviction, I can not see that there is a government of law.

Senator CHAMBERLAIN. It is distinctively a government of men, is it not?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. Now, there is another question I want to ask. Do you not think a man's right to have counsel of his own selection ought to be safeguarded in whatever this committee undertakes to do?

Maj. RUNCIE. Yes; I would have no great hope or great expectation of the protection of the rights of an inferior, of an ignorant man, by such counsel as would be available in most cases under the present organization and administration of the Army. The counsel selected is usually some young man of whom it is supposed that he has not too much to do. He himself is ignorant of the law; and sometimes those men make the most amusing mistakes.

I have heard recently of a case in which an enlisted man was prosecuted for making and uttering a forgery. His wife had run away from him, and he got hold of her allotment check, and not being disposed to have his runaway wife get the benefit of his pay, he endorsed the check with her name, and cashed it, which resulted in his being accused of making and uttering a forgery. The young officer assigned to defend him is reported to have declined to plead to such an unintelligible accusation, on the ground that a forgery is something written, and that "utterance" applies only to something spoken, and he could not intelligently plead to such a specification as that. The court was about to send the charge back to the convening authority to have the mistake corrected, when some thoughtful member said that the law had queer words, and the lawyers had queer ways of using words, and that they had better look this up; so somebody was detailed to make a trip to the nearest available dictionary and it was found that it was possible to "utter" a forgery; whereupon the trial proceeded. The defendant whose rights are intrusted to haphazard counsel like that and to a court like that, does not stand much show for justice.

Senator LENROOT. To what extent are graduates of the Military Academy educated in military law?

Maj. RUNCIE. Very little. In fact, speaking as a graduate of the Academy and as a former instructor of law at the Military Academy, I will say that for the purpose of administering criminal law the course of instruction at West Point is of very trivial value. It is not really a study of the law; it is an exercise in mnemonics for most of them.

Senator LENROOT. Is there any reason why it should not be regarded as a part of the course?

Maj. RUNCIE. Yes. As we depend on the medical schools of the country to furnish us with medical officers, I think we ought to depend on the law schools to furnish us with legal officers. I do not think there is room or time or opportunity at the Military Acad-

emy for sufficient instruction in law to qualify anybody to take part in the administration of law.

Senator WARREN. In that case, you would have a law department, which would, like the medical department, have its officers follow the troops to the front, wherever an army might be?

Maj. RUNCIE. Yes, sir.

Senator WARREN. And which would be distributed whereever the men were located, at the hospitals, and elsewhere? You would have at the camps, where the men were to be tried, those who were particularly educated in law?

Maj. RUNCIE. Yes.

Senator WARREN. By the way, apropos of what you say about detailing counsel, I understand that the accused always has the privilege of selecting his counsel, within certain lines.

Maj. RUNCIE. Yes; if the counsel he selects chooses to serve.

Senator WARREN. In case of the refusal of one not called upon by duty to serve, then, I presume, the court appoints some one as counsel, as the civil courts do?

Maj. RUNCIE. The commanding officer appoints counsel. The court has no authority to detail an officer to any duty.

Senator WARREN. Yes; that is right; the Articles of War do so provide.

Senator CHAMBERLAIN. Is it not true in that connection that nobody is appointed until the court convenes and they come to the trial, and then the accused generally names some young lieutenant who is in the room, who probably knows nothing about the facts, to serve as his counsel?

Senator WARREN. Or otherwise, that the commanding officer does it?

Maj. RUNCIE. No.

Senator WARREN. The court does it?

Maj. RUNCIE. No; it is done on the application of the accused, I should say.

Senator CHAMBERLAIN. I have in mind a case where a bystander was appointed, a lieutenant or some higher officer, and had no opportunity to talk to his client or to learn the facts.

Maj. RUNCIE. Yes; I became aware recently of a case in which there was a sentence of imprisonment for life, where the counsel said in open court that he knew nothing about the case and had not seen the accused until about an hour before the trial.

Senator CHAMBERLAIN. I think it frequently happens, judging from the records that have been submitted to me, that the most, or all, that the counsel does, is to advise the accused to plead guilty, in the hope that he will get a lighter sentence.

Maj. RUNCIE. That often happens.

Senator CHAMBERLAIN. I remember one case where a man was sentenced to be shot, over in France, and if I recollect the record correctly he pleaded guilty without making any statement as to his own case.

Maj. RUNCIE. Yes, sir.

Senator WARREN. Advising the accused to plead guilty is, I think, unfortunately becoming very common in our civil procedure.

Senator CHAMBERLAIN. Yes. It ought not to be done, but it is done sometimes.

Senator WARREN. In our western country it is done quite often.

I wanted to ask the major one more question. I asked about enlisted men on courts-martial. I wanted to ask, if they were to serve, the enlisted men working together as they do, with very strong likes and very strong dislikes among each other, would that probably affect their judgment and findings, or would they be judicial, and act without regard to their affiliations or feelings, with their fellow men?

Maj. RUNCIE. I would not expect to find judicial characteristics of a high order among enlisted men.

Senator WARREN. Perhaps I ought not to have put it that way, but I meant to ask whether their feelings, their likes and dislikes, would bear the test of cool judgment?

Maj. RUNCIE. I am afraid they would not.

Senator WARREN. Excuse me for interrupting, Senator.

Senator CHAMBERLAIN. That is all right. I have asked the major about all the questions that I wanted to ask.

Maj. RUNCIE. In the absence of any experience of that kind with enlisted men, it is mere conjecture.

Senator CHAMBERLAIN. The differences between modern administration of law in the Army and the old-time administration of it are illustrated by the case of a very distinguished Senator who says that when as a private, during the Civil War, he was on duty as a sentinel and went to sleep at his post and his commanding officer came along while he was asleep and took his gun away from him and then waked him up; and he said his commanding officer just put his hand on his shoulder and told him that he had been guilty of an offense which under ordinary circumstances would have caused him to be shot, but, he said, he would not say anything about it, and he asked the soldier not to say anything about it; he excused him, and advised him as a father might advise a son. That man made a splendid soldier and he certainly has made a splendid Senator; but under the modern theory that man would have been shot.

Maj. RUNCIE. It would be a matter of accident whether he would be shot or not, because the latitude of these courts—well—it covers 180 degrees.

I sat on a court-martial, once, at the time of the War with Spain, which tried a sentinel for being asleep on post. Of course he was an ignorant and inexperienced volunteer; State troops, you know, mustered into the service of the United States. He had seen no occasion to spend an uncomfortable two hours as sentinel over a quartermaster's corral, so he pulled down a bale of hay and opened it out, and made himself comfortable and turned in and went to sleep. On his trial his counsel moved for a change of venue, a thing utterly unknown to the military procedure. That having been disposed of, the case proceeded, and the man was found guilty. By the rules under which courts-martial proceed, the mildest sentence proposed must be the first one voted upon, and the first one offered in this case was that he be fined $1 and costs. (Laughter.) Those officers could not conceive that it was different from a police court trial in their home towns for some trivial offense.

Senator WARREN. Now, returning to your idea of a legal division as compared with the medical division of the Army, that brings another thought to my mind. Of course, of the Army and Navy of

the United States the President of the United States is Commander in Chief. Start and come down from there through the various ranks all the way down to the private without reference, as you might say, to civil life or civil procedure or civil courts. Of course the kind of happenings that are liable to take place in the Army, which are supposed to take place, especially if the troops are in the field, at war, are different, and very different from what they are in civil life, and of course the enormity of a transgression, the weight of it, or whether it is weak or strong, is oftentimes judged by the surrounding circumstances. For instance, a man in a camp down here in this country goes to town to have a little fun and he is gone a day and then gets back; that is one thing. If a man is in the trenches with his fellows and he gets out and is gone at the time when a battle with the enemy is expected, that is another thing. I do not understand that you would expect to have all of that matter considered in the home courts afterwards, that the papers may show, without reference to what the conditions may have been or the circumstances which made that offense black or only slightly colored. Am I right about it?

Maj. RUNCIE. Yes; you are perfectly right. The record should show all those conditions.

Senator WARREN. Unfortunately, I think that it does not show enough.

Maj. RUNCIE. Yes; but it should show, and with a proper organization in the time of peace for the administration of military justice we would not have all these troubles in time of war. The sole purpose of maintaining an army for our country now is preparation for war. We should not permit ourselves to prepare in time of peace a military establishment which is to be destroyed in time of war in order to make something that will fit the conditions of war, and we should have, especially in the matter of administration of military justice, something which is determinate from the beginning to the end; something that will compare with the steps in the procedure in criminal cases in courts of law and the corresponding steps of procedure in civil courts, and will see that at every step in military procedure everything in the nature of personal, arbitrary, capricious interference is done away with.

In the matter of accusation, to begin, I would like to say here that I do not see any reason why in the pending bill provision should be made that only an officer or an enlisted man may prefer charges. I think that an affidavit by anybody which sets up a state of facts which involves a military offense should be accepted as a basis for charges, just as you have it in a civil court.

Then the military authority should not be at liberty, in a proper case, to say whether there shall or shall not be a prosecution.

Again referring to my own experience, I recall the case of an officer of rather high rank who was twice accused on grave charges. The court for his trial was called each time, the second time occurring some months or about a year after the first, as I remember, and everything was ready in each case to proceed when an arbitrary order was received from higher authority stopping the whole thing. Nothing was done. The officer could not be brought to trial.

In another case, many years ago, an officer followed for years a course of what in the case of any civilian would have been called plain

swindling. Other officers for single acts of the same character were tried, dismissed, and even sent to penal servitude, but nothing could be done to bring to justice the officer who was repeatedly guilty of the identical offense. As I recall the case, he was never punished at all. When such things can and do occur, it is nonsense to talk about "military law" as law.

When the case goes to trial the action of the court is quite often determined not in absolute and deliberate violation of law, but in ignorance of law; much more so than in civil cases. I am not reproaching the officers. They can not be expected to know how to deal with these questions. They might just as well try to deal with the diagnosis of a medical or surgical case—a difficult case.

Then when the trial is over other openings are reached for the arbitrary interference of the reviewing authority; and finally, even when that has been successfully passed, I think you will find in the Judge Advocate General's Office here records of cases that have never been finally acted upon. Presumably an officer has been convicted, and it is inconvenient——

Senator WARREN. You mean the punishment has not been carried into effect?

Maj. RUNCIE. Nothing whatever has been done. It was inconvenient to proceed further, and the case died; exactly as if after a jury had returned its verdict and judgment had been entered, the court did not proceed to sentence and execution; or it did not proceed to judgment even.

Senator WARREN. Is that the fault of the law, or is it because of criminal neglect of duty on the part of officers, under the law? Because of course that is inexcusable and wicked.

Maj. RUNCIE. I recall one such case. There may be others. You can not at any stage insure the action of the legal machine, as you can in the criminal courts of the land.

Senator CHAMBERLAIN. It is almost impossible, sometimes, to get the records in these cases.

Maj. RUNCIE. They are not public records. They are not accessible, I think.

Senator CHAMBERLAIN. They ought to be.

Maj. RUNCIE. I think so.

Senator CHAMBERLAIN. I do not see why a man who is convicted in a military court should not have the same right to have the light turned in on the proceedings as a man convicted in a civil case.

Maj. RUNCIE. The person tried by general court-martial always has the right to a complete copy of the proceedings.

Senator LENROOT. Not until after it is fully completed. I have a case now in my desk where an officer was tried 20 weeks ago, and he can get no information, and I can get no information.

Maj. RUNCIE. Until the record is complete, he has no right to it.

Senator CHAMBERLAIN. Is it not true, Major, that many times the proceedings are held behind closed doors, where these trials are had?

Maj. RUNCIE. Only in that part of the proceedings in which the court reaches its findings and imposes the sentence, in case of a conviction. But, as a rule, all of the other proceedings of courts-martial are open.

Senator WARREN. Major, when nations can not agree they go to war, just as sometimes towns get into difficulties which are beyond

the reach of town governments and county governments and they declare martial law. As I understand you, you appreciate the fact that the military establishment must have immediate action in law-making and trials, as towns declare martial law; but you desire, in the first place, that they shall be tried by those who are well educated and grounded in the law, when it comes to trial?

Maj. RUNCIE. Yes.

Senator WARREN. And then you want their cases reviewed by a reviewing court, which is entirely outside of military lines?

Maj. RUNCIE. Yes, sir; because the Army is supposed to be governed by law; not law prescribed by military authority, but by the Congress of the United States. That is the fundamental difference.

Senator WARREN. Now, if I understand you correctly, you want this last court of refuge to be absolutely outside of the Army; is that right?

Maj. RUNCIE. Outside of military control in the discharge of their function as a court, but within the Army, if you please—attached to it.

Senator CHAMBERLAIN. I so understood him. You think they ought to wear a uniform?

Maj. RUNCIE. Yes, though I think that unimportant.

Senator CHAMBERLAIN. And be a part of the Army?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. But be outside of the jurisdiction of the commanding officer.

Maj. RUNCIE. Yes, sir; in the exercise of their judicial duties.

Senator WARREN. They should be of the Army and serving regularly?

Maj. RUNCIE. Yes; but the Judge Advocate General, if he possessed, for instance, the revisory power which Gen. Ansell contends he does possess——

Senator CHAMBERLAIN. In which you do not agree?

Maj. RUNCIE. I do not accept that; but in the exercise of that power, if he did possess it, he should be absolutely free from that control by the General Staff which the law now imposes on him.

Senator WARREN. He should be, in one sense, next to the President.

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN. Instead of being the adviser of the military authorities, he should be independent of them?

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN (continuing). And determine whether the court had jurisdiction——

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN (continuing). Whether the proceedings had been regular——

Maj. RUNCIE. Yes.

Senator CHAMBERLAIN (continuing). And whether, under all the circumstances, the case ought to be modified, reversed, or annulled?

Maj. RUNCIE. Yes, sir.

Senator WARREN. Of course in the great multitude of these minor affairs that happen to-day and are punished to-morrow the sentence is completed in a week or two, and you could hardly expect such cases to reach that court?

Maj. RUNCIE. Oh, no.

Senator WARREN. You are speaking now of the really important matters?

Maj. RUNCIE. Important matters; yes, sir.

Senator LENROOT. I did not quite understand whether you were in favor of giving to the judge advocate's office, as such, powers of revision?

Maj. RUNCIE. Oh, no.

Senator LENROOT. Or for the creation of a court or both?

Maj. RUNCIE. Oh, no. I just made a hypothetical case, if the Judge Advocate General's office did possess those powers. I think it would be much better if they were vested in a court.

Senator LENROOT. You stated that you thought wherever a charge was made a court-martial should follow; that there should not be a discretion in the commanding officer to decline?

Maj. RUNCIE. Oh, no. When a charge is made, such proceedings should be had as that before a committing magistrate or before the grand jury in a criminal case; that is, it should be submitted to the law officer of the commanding officer.

Senator LENROOT. Is not that the practice now?

Maj. RUNCIE. Not always.

Senator LENROOT. It has been my limited experience that where charges are made the matter is referred to an investigator for a full report before a court-martial is ordered.

Maj. RUNCIE. I think that is true in the cases of officers, but in a great majority of the cases of enlisted men that come before the minor courts-martial, because of course I have been for a long time out of touch with it and am not familiar with details——

Senator WARREN. I think that is true, although matters of hurry and worry and lack of evidence may sometimes cause cases to be taken up that have not been investigated.

Maj. RUNCIE. Yes; but in any case, for instance, if a civilian feels himself aggrieved by the action of an officer, on submitting proper affidavits setting forth the facts, it should not be left entirely to the discretion of a commanding officer and the officer's legal advisor, who is, of course, his subordinate, whether the charges shall or shall not be tried. If the commanding officer to whom the charge is submitted disapproves or refuses to proceed, there should be an appeal, as from a committing magistrate to a grand jury.

Senator CHAMBERLAIN. What harm could result from the creation of an appellate tribunal in connection with the Military Establishment? What harm could happen to the Government or the Military Establishment after a man was tried for a crime and the commanding officer approved his sentence (it might be for 20 years' imprisonment) if an appeal could be taken by him from the commanding officer to the appellate tribunal? All of the time until the tribunal disposed of his case he would be in confinement, and what harm could result from that course of procedure?

Maj. RUNCIE. None at all; but benefit, as in the case I have referred to.

Senator CHAMBERLAIN. It would give any man the benefit of a trial before such a tribunal.

Maj. RUNCIE. Yes. If there had been such a tribunal at any time after the Civil War, I have no doubt that the gross injustice done to Gen. Fitz-John Porter would have been remedied by legal process.

Senator CHAMBERLAIN. Within a few months?

Maj. RUNCIE. Within a year, at most.

Senator WARREN. As it was, it was not done for a long time?

Maj. RUNCIE. It went for 20 years.

Senator CHAMBERLAIN. It got into political channels, finally.

Maj. RUNCIE. Yes. On that court-martial which convicted Gen. Porter there were some officers who for certain reasons objected to his rehabilitation, and I think that at the end of that inquiry there was no dissension, in military opinion, as to Gen. Porter's conduct at the second Manassas.

Senator CHAMBERLAIN. I have no other questions to ask unless the other Senators have. May I ask you one other thing? In a few words, what are the inherent vices of the present court-martial system?

Senator LENROOT. Before he answers that, I would like to ask a question or two.

Senator CHAMBERLAIN. Certainly. Go ahead.

Senator LENROOT. I understood you to say in the beginning of your testimony that you did not think there was any cure for this condition unless the Army was consolidated into brigades and divisions.

Maj. RUNCIE. Not necessarily; but I mean, in more general terms, unless it be made a purely military organization; that it should have no civil functions; that the War Department should not be concerned with building bridges over navigable streams, and things like that. All of those excrescenses on the Military Establishment are inheritances from conditions that no longer exist.

Senator LENROOT. That is a distinct division, is it not, that does that work?

Maj. RUNCIE. No; it is a part of the Military Establishment.

Senator LENROOT. It is a part of the Military Establishment, so far as it is concerned. That only relates to the board of engineers.

Maj. RUNCIE. Yes; but the Judge Advocate General, for instance, is counsel of the Secretary of War in all those matters that relate to navigable waters and riparian rights; and they have all sorts of things. Those things have no place in a military establishment. But 100 or 140 years ago, when our Government was young and the executive departments were only four in number, the only engineers in this country were the military engineers, a few that we had gotten from France and who were the fathers of all the engineering in our country. Just as the Treasury Department continued for amny years to be a catch-all for all executive functions which did not specially belong to any other department, the War Department became the receptacle for what really amounts to a department of public works.

Senator LENROOT. Yes; but there is a very good reason for that with this matter of the engineers, and certainly you could not expect the Government to educate and maintain a large body of engineers with nothing to do, merely in preparation for their services to be utilized in time of war, when we have a war, nobody utilizing them in efficient public service. When the war came on, we took practically every one of those men and sent them to France, and they could render most efficient service.

Maj. RUNCIE. That really raises another question. The Corps of Military Engineers should be limited to the needs of the military service. The great bulk of the engineering work is not done by the Corps of Engineers. The engineers are administrators and disbursing officers.

Senator LENROOT. Who does the engineering work?

Maj. RUNCIE. The thousands of civil engineers whom they employ.

Senator LENROOT. I think you are mistaken.

Maj. RUNCIE. I have been acquainted with them for 40 years.

Senator CHAMBERLAIN. You go to any of these district engineer's offices and you will find two or three of them only are engineers, and all the rest of the force in the office are clerical force and draftsmen, and so on.

Senator LENROOT. Of the office force; but in every case that I have ever observed, and I am very familiar with that, the chief, the district engineer, is a competent qualified man. He does not get superior qualities from his assistants.

Senator CHAMBERLAIN. Probably not.

Maj. RUNCIE. There might be different opinions as to that; but the result is the introduction into the military establishment of an incompatible and nonmilitary element. The Engineer officer who has been sitting in an office and looking, however well, after river and harbor work, loses his military character.

Senator LENROOT. What would he do if he did not do that?

Maj. RUNCIE. If we had brigade and division posts, every one of them would have its complement of engineer officers, as well as of medical officers and ordnance officers, and they would devote themselves to the preparation of the military material which falls to the part of their corps, to the construction and maintenance of military works and the training of engineer troops. I think there is no question but that the engineering talent of our country developed by the engineering schools of our country is quite competent to take care of the civil engineering that our Government has to have done.

Senator LENROOT. It is quite competent to do it; but, having in mind the condition of the Treasury, it becomes somewhat of an element if we can utilize to do that work, without loss of efficiency in their own sphere, these men we have educated.

Maj. RUNCIE. The engineer who distinguishes himself in engineering work is educated at his own expense. If we want military engineers we should take educated engineers and give them the necessary training to equip them for military work, I think, instead of reversing the process.

Senator LENROOT. Then, you would not educate engineers as such at West Point at all?

Maj. RUNCIE. No, not any more than we educate medical officers. We do not educate engineers at West Point. We can not make an engineer with six months of engineering at that school.

Senator LENROOT. Is that all that he has?

Maj. RUNCIE. Yes; that is practically all.

Senator CHAMBERLAIN. They just appoint the first five in each class to the engineering class.

Maj. RUNCIE. That is it. We might as well just take the first six men in the class and send them to a medical school for six months' instruction in medicine, and then call them medical officers.

Senator WARREN. Nearly all the men go into the Infantry and Cavalry afterwards.

Maj. RUNCIE. That raises, of course, another question which I think should receive serious attention. It costs approximately $20,000 to put a cadet through the Military Academy.

Senator WARREN. It costs the Government that?

Maj. RUNCIE. Yes.

Senator WARREN. And it costs the cadet something, too?

Maj. RUNCIE. Nothing.

Senator WARREN. It costs him in certain ways?

Maj. RUNCIE. Nothing.

Senator WARREN. In other words, he can not pay for his uniforms and living from the money taken from his salary. At least, they do not, most of them.

Maj. RUNCIE. The income of a cadet, what he actually receives in value while he is also receiving his education, is, or was until a short time ago, at least, greater than the income of the average wage-earning family in the United States.

Senator WARREN. It was intended to cover his expenses, I understand.

Maj. RUNCIE. Yes; but it is greater than that of the average wage-earning family of the United States. Less than two years ago the Secretary of the Interior, as chairman of the board that looked into the remuneration of railroad employees, found—I am quoting only from memory—that something over 50 per cent of the railroad employees of the country received not more than $75 per month, and that something like 80 per cent of them received not more than $100 a month. The pay and allowances of a cadet while receiving his education will be at least $100 a month, and in addition to that approximately three times as much will be spent on him as is given to him.

Senator LENROOT. To get back: If I understand you, in your mind there are two paramount evils to be remedied. One is the lack of all authoritative interpretation of law binding on courts-martial.

Maj. RUNCIE. Yes.

Senator LENROOT. And, second, is the arbitrary power of the commanding officer as to courts-martial?

Maj. RUNCIE. Yes.

Senator LENROOT. If we had a military court of appeals, with their decisions to be published and building up a body of military law, with the doctrine, as you said, of stare decisis binding on all courts-martial, would we not do a very great deal to remedy present conditions?

Maj. RUNCIE. I think you would overcome at least three-fourths of the injustice that results not only in positive wrong, but in failure to do justice, by omission, at present.

Senator CHAMBERLAIN. What remedy have you for the other one-fourth that it would not reach?

Maj. RUNCIE. I leave that quarter, as we say in the courts of law, with which we are all familiar——

Senator CHAMBERLAIN. It is hard to find a remedy?

Maj. RUNCIE. It is hard to find a remedy. We charge that to the fallibility of human judgment and intelligence, even with the best of motives.

But even underlying all this is a much more serious question. All of this legislation treats only symptoms; it does not go to the cause of the disease; and until there is a military establishment, legislation will fail to cure the defects of our present organization.

Senator CHAMBERLAIN. That is all I care to ask the major.

Senator WARREN. Have you anything further to submit?

Maj. RUNCIE. No, sir.

(Thereupon, at 3.20 o'clock p. m., the subcommittee adjourned to meet at 1 o'clock p. m. on Monday, August 18, 1919.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

MONDAY, AUGUST 25, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

Senator LENROOT. Will you proceed now, Gen. Ansell, and make such statement as you desire?

STATEMENT OF MR. SAMUEL T. ANSELL, FORMERLY BRIGADIER GENERAL AND ACTING JUDGE ADVOCATE GENERAL, UNITED STATES ARMY.

Mr. ANSELL. Mr. Chairman and gentlemen, the subject of military justice is one in which I think every Army officer ought to be specially interested, and the people themselves generally interested.

I, myself, have been specially interested in this subject since my cadet days. The system of military justice that is ours, it has always appeared to me, does not fit the kind of army with which we must fight the battles of this country; that is, an army that is not composed of professional soldiers entirely—a standing army—but an army that is created for the emergency out of our citizenship.

The old idea has been that a court-martial, which is the agency for executing the disciplinary law of the Army, is a rough and ready tribunal, and must necessarily be so; that it is not a court at all; that it is an agency of a military commander to investigate facts and recommend what disciplinary action ought to be taken; that it is a body responding purely to the exigencies of a military situation; not a normal thing, not governed by principles of law at all.

That was, as I shall show later on, the old continental idea, and it was the theory of the system, was indeed the system, which we ourselves adopted, rather witlessly, when we established this Government.

I think it is by reason of this that courts-martial, as we understand them, have really never had the confidence of our people. They, as a rule, have been sneered at by the legal profession, and it has been pointed out by great lawyers, beginning with Blackstone, that they were not to be regarded as courts at all; that the law gov-

erning them was not law at all, in any proper sense, and that they were not to be relied upon as legal tribunals.

Throughout my experience in the Army I have observed, too frequently, that courts-martial in our system——

Senator LENROOT. Might I suggest that at this point it might be well for you to state when you graduated from West Point, and what your experience has been.

Mr. ANSELL. I graduated from West Point in 1899, was immediately thereafter assigned to the Eleventh Infantry as a line officer, served first in Porto Rico and then went to the Philippines in 1900, and stayed there—serving part of the time with the civil government—until the insurrection was over. In 1902 I left the Philippines and went to West Point as an instructor in law, and remained there on such duty until 1904, when I applied again to rejoin my regiment, stationed at Fort Russell. I served with my regiment then until 1906, when I was again assigned to West Point as instructor in law.

I remained at West Point until 1909, when I was ordered to the Philippines, and while there was detached for duty with the civil government, at the same time, however, performing the duties of judge advocate of the Province of Mindanao, which was under the command of Gen. Pershing.

I returned from the Philippines in 1911 and was assistant judge advocate of the Department of the East until 1912—for a year—and was then ordered to duty in the office of the Judge Advocate General, in 1912, where I have been ever since.

My duties in the office of the Judge Advocate General were, until the beginning of this war, those of legal adviser to the civil jurisdiction of the War Department, including control of the rivers and harbors and reservations—such other civil matters as come under the War Department jurisdiction.

I was also, by special assignment, counsel for the governments of Porto Rico and of the Philippines before the courts of the United States.

My line service, then, includes a service with the Infantry of something less than five years, and something less than two years of that time was in active service in the field in the Philippine Islands. The rest of my service has been in the law department of the Army and on special assignment as counsel for the insular governments.

Senator LENROOT. When did you resign?

Mr. ANSELL. I resigned on the 21st of July last.

Shortly after the war broke out, by virtue of being the senior officer in the department, I became the head of the Judge Advocate General's Department during the absence of Gen. Crowder, when he was performing the duties of Provost Marshal General.

In October of 1917 I was appointed brigadier general and Judge Advocate, and retained as Acting Judge Advocate General while the Judge Advocate General himself was performing the duties of the Provost Marshal General.

During the greater part of the war I was Acting Judge Advocate General, in the sense that I was senior officer on duty in that department. That does not mean that I was responsible for the policies of the office, since a man succeeding by mere virtue of seniority

can not be. In order to be responsible for the policies of the office a man must be assigned under section 1132 of the Revised Statutes as acting chief of bureau.

With no other purpose than that of responding to the chairman's question, I mention the fact that while in the latter days of 1917 an order was published, reciting that it was by direction of the President, appointing me Acting Judge Advocate General of the Army, that order was revoked. I was not in charge of the policies of the office. I made no appointments to the office during the war.

Senator LENROOT. You said, General, that order was revoked? Did I understand you correctly?

Mr. ANSELL. Yes, sir.

Senator LENROOT. How long after the order was published?

Mr. ANSELL. I think the order was never published in printed form. It was delivered to me in the usual typewritten form, properly authenticated, and I should say within a week after it was delivered to me it was revoked or suppressed or otherwise made ineffectual.

I think that we might as well understand right here—and I say this in no spirit of criticism, but as a fact—that my views with respect to the administration of military justice were not concurred in by those bureau chiefs of the War Department who have most to do with the government and regulation of the exercise of military command. My views were not concurred in, speaking more specifically, by the then Acting Chief of Staff, and by the Inspector General of the Army, and though at first they were, later they were not concurred in by the Judge Advocate General himself. I think it is in point to state right here that the first great difference of view between me and the War Department—by which term I mean those bureaus the chiefs of which I have just mentioned, with whom the Secretary of War himself finally concurred—came about shortly after I had assumed charge of the office.

There came to the office, which at that time consisted of myself and 14 civil lawyers and one retired officer of the Army, a case from the Department of Texas, which has become something of a cause celebre respecting military justice during the war. That case was a case of about a dozen noncommissioned officers of the Army who had been tried upon the charge of mutiny. It was perfectly obvious to all of us that the men ought not to have been tried at all, and that such trial as they had was illegal in many respects. The charge itself was imperfect as a matter of law; the defense made for them was not such defense as ought to have been made for them, and the counsel that they had did not give them that full assistance which ought to have been given them. Their rights were generally disregarded during the trial, and their right to make defense and to make the proper inquiry into the sufficiency of the charge and the proceeding. They had been court-martialed upon charges that had been preferred by a young West Point officer who was not an experienced man, who ought not to have preferred the charges at all, whose conduct itself was lawless and arbitrary and wrong, and who, in my judgment, ought to have been court-martialed himself for his part in this affair.

But this case went through the entire proceeding, from the bottom to the top of the military hierarchy—the top of the hierarchy

being a major general in command of the department—without the discovery or detection of any of these errors; or if they were discovered they were ignored; with the result that this trial, which was wrong in its inception, and in which the legal rights of the accused were at no point protected, resulted in the dismissal of these old noncommissioned officers of the Army from the Army of the United States, in disgrace, and in their being sentenced to long terms of confinement in the penitentiary for this most heinous, perhaps, of all military offenses, mutiny.

Senator CHAMBERLAIN. General, pardon me; I am not familiar with the case, of course; but you are making a record here. As a matter of fact, these men were tried for mutiny because they had refused to obey an order?

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. Will you just put in the record the facts out of which this charge of mutiny grew?

Mr. ANSELL. The origin, as I remember it—I must be fairly familiar with it, having gone over it so many times, but I am speaking from memory—was this:

These noncommissioned officers, and perhaps other men of the batteries, were engaged in some mild form of gambling in the company street—perhaps the shooting of craps or some such game. This, of course, is in violation of the standing orders of camps of the Army generally. It ought to be stated, however, that as a human fact it is one of those things which, when unaccompanied by disorder, a man used to the handling of men closes his eyes to or otherwise gets rid of without the application of harsh disciplinary measures. However, this young officer put these noncommissioned officers in arrest in quarters for their participation in this mild gambling. It is according to long-standing orders of the War Department that a noncommissioned officer when placed in arrest in quarters performs no duty. In that respect he is like an officer. He is deprived of all his official powers and functions during the period of that status.

This young officer, however, the next morning, observing that these noncommissioned officers were not present at the early drill formation, made inquiry, and they said to him that having been put in arrest they felt obliged respectfully to say to him—and they did respectfully say to him—that as long as they were in arrest they could not go to drill, for the obvious reason that in accordance with the orders of the War Department they could exercise none of their functions as noncommissioned officers. Notwithstanding this obvious truth, and notwithstanding the very proper and respectful demeanor of the men when they asserted their right under this standing order of the department, the young officer ordered them to drill; and again they said that if they should go to drill they ought to be released from arrest. There was no concerted action. It was a thing well understood, however by all noncommissioned officers and doubtless the voices of the few who spoke were the voices of them all.

After the young officer threatened them with charges of mutiny, told them that charges of mutiny would be preferred because of the fact that all were disobeying, as he called it, his orders, he marched them off to the guard house and put them in close confinement, charged with mutiny. Of course, mutiny must be a concerted action

on the part of those under military authority, concerted lawless action, with an intent to subvert and assume military authority. That is what they were charged with, mutiny, and that is what they were tried and punished for.

Now, when that case got to the department, it was perfectly patent not only that this state of affairs—the facts—did not sustain the charge of mutiny at any point, but that the charge itself was improperly drafted in that it did not set out all the essential elements of the mutiny, and, furthermore, that during the progress of the trial the substantial rights of the men themselves at many points were not protected, so that everybody conceded that without applying meticulous tests to the legality of this proceeding, it ought not, if it could be tested by law, to stand.

Senator LENROOT. May I ask you there, was the verdict of the court-martial approved by the commanding officer?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Did it go from there direct to your office?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Did the record affirmatively show that at the time of the action complained of the noncommissioned officers were under arrest?

Mr. ANSELL. Yes, sir.

Senator LENROOT. That appeared on the face of the record?

Mr. ANSELL. Yes, sir; the facts I have given here.

Senator LENROOT. That appeared upon the record of the court-martial?

Mr. ANSELL. Yes, sir. This was at the beginning of the war, and we knew, of course—expected—that there would be many like cases; and that brought us face to face with the fact that under the practice of the War Department, as suggested at that time, although the proceedings might contain errors of law that at least measured up to reversible error if not annihilating error, it was the practice of the War Department to say, and to act accordingly, that notwithstanding such error it was not reviewable and was therefore incurable. In other words, the War Department at that time held that the proceedings, findings, and judgment of a court-martial are final beyond all remedial, curative power, when those proceedings and judgment are once approved by the commanding general who brought that court into being, regardless of whatever errors of law were committed in the proceedings; and that, conceding that the record was full of such errors, it could not be examined.

Senator LENROOT. That is to say, that the only power of higher authorities and officials would be in the exercise of clemency?

Mr. ANSELL. Yes; that there was no way of modifying the judgment, whatever. It was beyond all review regardless of its conceded illegality.

Senator CHAMBERLAIN. Do not leave that open in the record to misunderstanding. You do not mean that that power existed in the Judge Advocate General, when you speak of the power to exercise clemency?

Senator LENROOT. No; I meant if exercised by the President.

Mr. ANSELL. The Judge Advocate General's office has been in such cases limited to the power of exercising clemency in an advisory way.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. So, that the situation at the beginning of the war was—and it is still largely the situation—that a court-martial judgment can not be modified by any power on earth no matter what prejudicial errors of law were committed in the proceeding. It is around that proposition that the whole controversy—if we can refer to it as a controversy, and I presume we may—revolves. I contend, in short, that a court-martial is a court; that it is a court created by Congress under its power to make rules and regulations for the government of the Army; that it is just as much of a court, though not a part, evidently, of the Federal judiciary, as the courts of the District of Columbia are courts; that it is there to apply the law of Congress passed in this regard; that there is to be a trial, and that the law contemplates a fair trial, with all that that term means; that the court being a court, it is to be governed by law from beginning to end; and that if it commits errors of law there ought to be some method of correcting those errors if prejudicial, and modifying the judgment accordingly.

We sought, all of us, and independently, regarding it as a most important matter, at the beginning of this great war, because obviously all powers affecting courts-martial are powers conferred by Congress itself, to discover some statutory authority for modifying judgments of courts-martial in cases of this sort, where, if they could be tested by law, they were concededly illegal.

Several of the officers of the department came at once upon that section of the Revised Statutes of the United States, section 1199, which provides that all proceedings of courts-martial shall be received in the office of the Judge Advocate General, and by him be revised.

In the pursuit of that study, various memoranda were written by various officers, various conferences were held, and finally, without a single dissent, the officers on duty with that office agreed that within this statute was to be found the power to revise the judgments of courts-martial. At that time the Judge Advocate General was not on duty in the office, but he agreed with me that the power was advisable, that it ought to be located there; that it ought to exist; and he expressed his concurrence with my efforts to deduce it out of that statute. Later on, he changed his mind.

Senator LENROOT. Have you rendered a written opinion that he concurred in?

Mr. ANSELL. Yes; that opinion is in the record of the hearings upon your bill—the Chamberlain bill—Senator Chamberlain, of the last session of the last Congress. Whether you wish it put in the record of these hearings or not, I do not know, Mr. Chairman.

Senator CHAMBERLAIN. What do you think about it, Senator Lenroot, that it ought to be printed or not?

Senator LENROOT. You are more familiar with how material that is going to be to your issue, and I will accept your suggestion, whatever it is, about that.

Senator CHAMBERLAIN. I think probably it ought to go in.

Senator LENROOT. Very well.

Mr. ANSELL. Then I ask permission to insert at this point the office opinion in the mutiny case above referred to—the office opinion

in support of the action taken in that case; and I think, in fairness, the counter opinion of the Judge Advocate General and the ruling of the Secretary of War ought to be included at this point, also.

Senator CHAMBERLAIN. Very well.

Senator LENROOT. Yes.

(The documents referred to and the ruling of the Secretary of War are here printed in full as follows:)

ANSELL EXHIBIT A.

OFFICE OPINION OF BRIG. GEN. S. T. ANSELL, ACTING JUDGE ADVOCATE GENERAL: RE REVISORY POWER OVER COURTS-MARTIAL PROCEEDINGS AND SENTENCES.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, D. C., November 10, 1917.

Memorandum for the Secretary of War
(For his personal consideration).

Subject: Authority vested in the Judge Advocate General of the Army by section 1199, Revised Statutes, to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

1. It is my duty to bring to your attention and present to you my views upon a long-existing situation which arose out of an ill-considered and erroneous change of attitude upon the part of this office that occurred within a score of years after the close of the Civil War—a situation which has endured ever since in the face of the law and in spite of attending difficulties but without reexamination, and which has profoundly affected the administration of military justice in our Army. I refer to the practice of this office, adopted it seems in the early eighties, to the effect that errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction however grave and prejudicial such errors may be, are absolutely beyond all power of review. This nonuser of power which Congress authorized and required this office to exercise, has, in numberless instances of court-martial of members of our Military Establishment, resulted in a denial of simple justice guaranteed them by law. Under the rule, concededly illegal and unjust court-martial sentences, when once approved and ordered executed by the authorities below, pass beyond all corrective power here and can never be remedied in the slightest degree or modified, except by an exercise of Executive clemency—an utterly inadequate remedy, in that it must proceed upon the predicate of legality, can operate only on unexecuted punishment, and, besides, has no restorative powers.

2. The last and most flagrant case of the many recent ones which have moved me to exercise an authority of this office which has long lain dormant, perhaps denied, in respect of which I address you this memorandum, was the recent case of the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery, resulting in sentencing them to dishonorable discharge and long terms of imprisonment. Those men did not commit mutiny. They were driven into the situation which served as the basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate, which also appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years. The court had jurisdiction, and its judgment and sentence for that reason could not be pronounced null and void, but its conduct of the trial involved the commission of many errors of law which appeared upon the face of the record and justified, upon revision, a reversal of that judgment. That case showed the extreme and urgent necessity of a reexamination of my powers in such cases, and, after thorough consideration and with the concurrence of all my office associates, I took action in that case and concluded my review as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

Since this involves a departure from long-established peace-time administration of this office, I deem it my duty to acquaint you with the reasons therefor.

3. You, Mr. Secretary, and your immediate military advisers, can never appreciate, I think, the full extent of the injustice that has been done our men through the operation of this rule. Officers of our Army, howsoever sympathetic, can not approach a proper appreciation of the depth, extent, and generality of the injustice done, unless, through service in this office, they have seen the thing in the aggregate. A proper sense of the injustice can be felt only by those who exercise immediately the authority of this office. Indeed, those thus experienced can gather the full impression of the wrong done only by a complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. My entire service, during all of which I have been keenly sensible and morally certain that the office practice was wrong, my six years' service in this office during which I have borne witness to hundreds of instances of conceded and uncorrected injustice—all of this has never served to impress me with the full sense of the wrong done to the individual and to the service so much as has the experience of my present brief incumbency of this office during this war. What is true in my case is true, so they advise me, of my associates. During the past three months, in scores, if not hundreds of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency. All this, of course, has been utterly inadequate. It has not righted the wrong. It has not made amends to the injured man. It has not restored him, and could not restore him, to his honorable position in the service. It could do no more than grant pardon for any portion of the sentence not yet executed. Such a situation commands me to say, with all the emphasis in my power, that it must be changed and changed without delay. This office must go back to the law as it stands so clearly written, and, in the interest of right and justice, exercise that authority which the law of Congress has commanded it to exercise.

4. The Judge Advocate General of the Army is to revise all courts-martial proceedings for prejudicial error and correct the same. The law as it exists to-day is to be found in section 1199, Revised Statutes, wherein it is provided that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The word "revise," whether used in its legal or ordinary sense, for both are the same, can have but one meaning. It signifies an examination of the record for errors of law upon the face of the record and the correction of such errors as may be found. "Revise," or its exact synonym "review," is a word so frequently found in the law and so familiar to all lawyers that its meaning can never be mistaken. When used in connection with judicial proceedings it can involve no ambiguity. I am justified in entering upon a construction of the word only by the fact that this office for so long a time has ignored its meaning.

The word "revise" by the Standard Dictionary is defined thus:

"To go or look or examine for correction or errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

And the word "review" given therein as a synonym for "revise," is defined as—

"To go over and examine again; to consider or examine again (as something done or adjudged by a lower court) with a view to passing upon its legality or correctness; reconsider with a view to correction; as, the court of appeals reviewed the judgment; the judge reviewed and retaxed the bill of costs; to see or look over again; a literal meaning now rare."

In 34 Cys., at page 1723, the word "revise" is defined as—

"To review or reexamine for corrections; to review, or alter or amend. See also 'revision.'"

And the word "revision" is therein defined as—

"The act of reexamination to correct, review, alter or amend."

And in Black's Law Dictionary, "revise" is defined as—

"To review, to reexamine for correction; to go over a thing for the purpose of amending, correcting, rearranging or otherwise improving it."

And "review" is therein defined as—

"A reconsideration; second view or examination; revision; consideration for purpose of correction. Used especially of the examination of a cause by an appellate court."

And the word "revision" is therein defined as—

"To reexamine and amend; as, to revise a judgment, a code, laws, statutes, reports, accounts. Compare 'review.'"

And the word "review" is defined in the same dictionary as—

"viewing again; a second consideration; revisement, reconsideration, reexamination to correct, if necessary, a previous examination."

And in the same dictionary a "court of review" is defined to mean—

"A court whose distinctive function is to pass upon (confirming or reversing) the final decisions of another or other courts."

And in "Words and Pharses" (vol. 7) the word "revise" is defined as follows:

"To revise is to review or reexamine for correction, and when applied to a statute contemplates the reexamination of the same subject-matter contained in a prior statute and the substitution of a new and what is believed to be a still more perfect rule." Citing Casey *v.* Harned, 5 Iowa (5 Clark) 1, 12.

"Revise as contained in the Constitution, Article XV, section 11, providing that 'three persons learned in the law shall be appointed to revise and rearrange the statute laws of the State.' means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence." Citing Visart *v.* Knoppa, 27 Ark., 266–272.

"A law is revised when it is in whole or in part permitted to remain and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect or to fit it better to accomplish the object or purpose for which it was made, or some other object or purpose." Citing Falconer *v.* Robinson, 46 Ala., 340, 348.

5. I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, 30 Stat. 553 (bankruptcy law) provides in part as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

The word "revise" as used in the bankruptcy act is universally held to be something broader than the power to review by writ of error. In In re Cole, 163 Fed. 180, 181 (C. C. A., first circuit), a case typical of all, the court, after adverting to the usual limitations upon the power to review by way of writ of error, contrasted that method with the statutory power to revise, as conferred by that act, saying:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And the court then said:

"We feel safe to adopt the broader view, and it is our present opinion that it is our right so to do—"

And concluded that, upon revision—

"We can revise any question of law as to which we may justly infer that the district court reached a conclusion, whether formally expressed or not and whether or not formally presented."

The language of that statute is the very language of this except that the revision there is expressly limited to matters of law. Inasmuch as in the statute before us there is no such express limitation, it could hardly be held that the revisory power of this office is less than the revisory power conferred by the bankruptcy act. The word "revise" as used in the bankruptcy statute has always been held to signify power to reexamine all matters of law imported

by or into the proceedings of the case, and a very liberal view has been taken of what constitutes the record and proceedings in such matters. (See the many cases cited in Federal Reporter Digest. "Bankruptcy," vol. 5, from secs. 349 to 448.) The revisory power there conferred is something broader than that invoked by writ of error, though, of course, not so broad as to justify a reexamination of mere controversies or questions of fact. Doubtless, in any view of the case, the question whether the evidence sustains the verdict, that is, whether there is any substantial evidence at all upon which the verdict may rest, is a question of law which may be reviewed under this power, and such at least must be the power of this office.

6. The history of the legislation, the early execution given it, its historic place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word "revise" in the present instance. It is not necessary now to say whether such revisory power existed in the judge advocate in the early days of our Army, though, especially in view of the English military law, this seems to have been so; nor to advert to the fact that after the War of 1812, and also after the Mexican War, the duty of the Corps of Judge Advocates seems to have been primarily that of military prosecutors.

Nor is it necessary, except to indicate the proper setting, to say that military prosecution had ceased to be the primary function of the Corps of Judge Advocates at the beginning of the Civil War, if not before. Nor is it more than suggestive that the Judge Advocate General of the Army has always presided over both the Corps of Judge Advocates and the Bureau of Military Justice, and that this corps and this bureau were consolidated by the act of 1884 (23 Stats., 113) into what is now the Judge Advocate General's Department. It is important to note that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War and expressly invested its head, the Judge Advocate General of the Army, with this revisory power; and it is important to note that Congress redeclared this power in 1864 (13 Stats., 145), and in 1866 (14 Stats., 334), and again in section 1199, Revised Statutes, of which the former acts were the antecedents. Now, taking up these antecedents: In the act of July 17, 1862 (12 Stats., 598), which was an act "calling forth the militia to execute the laws of the Union, to suppress insurrection, etc.," it was provided—

"That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry, to whose office shall be returned, for revision, all records, and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

This provision speaks very plainly. It not only directs the Judge Advocate General to revise the records and proceedings of courts-martial, but it further directs that officer to keep a record of "all proceedings had thereupon"; that is, upon the revision. It is clear that this intended something more than a perfunctory scrutiny of such records, and that it in fact vested this office with power to make any correction of errors of law found to be necessary in the administration of justice. The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated.

The next legislative expression is found in the act of June 20, 1864 (13 Stats. 145), of which sections 5 and 6 are as follows:

"SEC. 5. There shall be attached to, and made a part of, the War Department, during the continuance of the present Rebellion, a bureau to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and militay commissions of the Armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

"SEC. 6. That the President shall appoint, by and with the advice and consent of the Senate, as the head of said bureau, a Judge Advocate General, with the rank, pay, and allowances of a brigadier general, and an Assistant Judge Advocate General, with the rank, pay, and allowances of a colonel of Cavalry. And the said Judge Advocate General and his assistant shall receive, revise, and have recorded all proceedings of courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and perform such other duties as have heretofore been performed by the Judge Advocate General of the Armies of the United States."

Just as the title of the judge advocate is in itself significant in this connection, so is the title of the bureau thus created—the Bureau of Military Justice. It will be noticed that this act reserves all the requirements of the act of July 17, 1862, supra, concerning the duty of the Judge Advocate General in the matter of revising the records of general courts-martial, and keeping a record of "all proceedings had thereupon," meaning, of course, proceedings upon such records in revision. And at the close of the war, in the legislation looking to the peace establishment, Congress enacted the act of July 28, 1866 (14 Stat. 334), the same being "An act to increase and fix the military peace establishment of the United States," in section 12 whereof it was provided—

"That the Bureau of Military Justice shall hereafter consist of one Judge Advocate General, with the rank, pay, and emoluments of a brigadier general, and one Assistant Judge Advocate General, with the rank, pay, and emoluments of a colonel of Cavalry; and the said Judge Advocate General shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the Judge Advocate General of the Army * * *." This act does not change the duties of the Judge Advocate General with reference to the revision of records of courts-martial. It omits the phrase found in the two acts immediately preceding to the effect that "a record shall be kept of all proceedings had thereupon," but introduces for the first time the direction that in addition to revising and recording the proceedings of all courts-martial, the Judge Advocate shall "perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." It will be observed that this last cited expression, as carried into section 1199 of the Revised Statutes as quoted above, still remains the law on the subject. In referring to the duties "heretofore performed by the Judge Advocate General of the Army," the statute included, inter alia, the duties prescribed by the statute, for the presumption is that the duties thus prescribed were in fact performed. It follows that included within this direction is the mandate that a record be kept of all proceedings had in the revision of courts-martial proceedings in the office of the Judge Advocate General, and the force of this mandate must be added to the ordinary meaning of the word "revise" in determining the scope of the duties of the Judge Advocate General as now defined by law.

7. The legislative history of all the antecedent acts, brought forward as 1199, R. S., shows that the word "revise" has the meaning here indicated. As to the act of 1862, see Congressional Globe, part 4, second session Seventeenth Congress, pages 3320, 3321. This was especially true of the debates upon the act of 1866, of which there was considerable owing to the objection taken to the legislative recognition contained in that bill of military commissions. An effort was made to strke out, and otherwise defeat, the entire provision for the Bureau of Military Justice during peace, and the strongest argument made in support of its retention was found in the fact that it had, and had freely and satisfactorily exercised this revisory power. The whole tenor of the debate clearly shows what Congress understood had been the revisory power of the Judge Advocate General of the Army since the act of 1862. It was said by one Senator (Mr. Lane of Indiana)—

"It is utterly impossible for the President in the multiplicity of his duties to look into all these cases; it is physically impossible for the Secretary of War to do so; and to facilitate the administration of criminal justice, it was found necessary to establish this bureau."

And another Senator (Mr. Hendricks) said:

"I am not prepared to vote to abolish the court of military justice. If that court be properly constituted and discharges its duties legitimately within its jurisdiction as the court was organized under the act of two or three years ago, it will be a blessing, and I will not vote to abolish the court because of such wrong decisions that it may have made."

And further on the same Senator referred to the case of one officer in whom he was interested in which there had been an erroneous conviction, and said in that connection—

"I went with him to see the Judge Advocate General. The case was called up before the Judge Advocate General and reviewed, and at once he decided that the testimony was not sufficient, and restored the young man to his position in the Army."

Further on, referring to this power, the same Senator said:

"I think it is a protection to the military men of the country to have such a court. It will come to be, when the hour of passion, to which my colleague

has referred, shall have passed away, a court deliberate in its proceedings and, I hope, and have no doubt, wise in its adjudication. Then it will be a blessing to the country and a protection to our military men. Necessarily, when our Army shall come to be 50,000 strong, there will be many military trials for military offenses of military men. There ought to be a court of appeal; and this is intended to be a court of appeal; a court in which the judge of the courts-martial may be reviewed, and, if improper, revised. Such a court seems to me ought to be in the Army."

(See Cong. Globe, p. 4, 39th Cong., 1st sess., 1866, pp. 3672–3676, et passim.)

It was these legislative antecedents that were brought forward, without substantial change of language, as the existing law (sec. 1199, Rev. Stats.) now under discussion.

8. This office, while ignoring its right and duty to revise for prejudicial other than jurisdictional error, has with strange inconsistency been quick to assert its power to declare a judgment and sentence null and void on the ground that the proceedings were, in its judgment, coram non judice. After the large armies of the Civil War had been demobilized and their activities were no longer a matter of immediate concern to this department, and the Army had become, in point of size, but a small national police force, this office, for reasons unexpressed and unknown, restricted itself to the correction of such jurisdictional error alone. The practice seems to have been adopted without thoughtful consideration of the law or policy involved or the resulting injustice. The opinions of this office, beginning with the early eighties, assume, without argument or reason, that the office was so limited. It can not fairly be said that upon this specific question the office has ever fairly and thoughtfully expressed itself. Extracts from two of the opinions, typical of all, will be sufficient to show the general character and nature of these holdings.

In an opinion under date of August 10, 1885, approved by the Secretary of War, the Acting Judge Advocate Gen. Lieber held as follows:

"As the whole matter is understood to be recommitted to this office for examination, including the letter referred to, I beg to remark that in acting upon the sentence of a court-martial, the reviewing authority acts partly in a judicial and partly in a ministerial capacity. He 'decides' and 'orders' (Army Regs. par. 918). Without his decision the sentence is incomplete. His decision is an exercise of judicial functions, and is as much beyond the control of other constituted authority as the findings of the court are beyond his. He can not be ordered to revoke it, and, if it be adhered to, the sentence can be removed in no other way than by the President in the exercise of his pardoning power (or set aside by the President when void by reason of a want of jurisdiction)."

In the case of Lieut. J. N. Glass, tried by general court-martial, this office in a review under date of July 20, 1886, signed by Acting Judge Advocate Gen. Lieber, concluded as follows:

"The proceedings, findings, and sentence in this case having been approved by the reviewing officer in the exercise of his proper functions, they are beyond any power of revision on the part of higher authority, but the President by the virtue of his pardoning power may remit the unexecuted part of the sentence. The latter course is respectfully recommended by this office."

In the opinion first above cited, which is a fair sample of the many that have followed, the then Acting Judge Advocate General took the view that the proceedings of a general court-martial could be set aside for a want of jurisdiction. But whence came that power? In declaring it to be competent to declare the proceedings of a general court-martial void for want of jurisdiction he evidently overlooked the fact that in declaring a trial void for want of jurisdiction some functionary must sit in an appellate capacity for which there must be some statutory or common-law authority. As a matter of fact, no statutory or other authority can be found for the exercise of the power to declare a trial for want of jurisdiction unless it can be found in that provision of section 1199, which confers a general revisory power upon the Judge Advocate General. If the power to revise includes the power to declare proceedings void for want of jurisdiction it must also by any fair construction include the power to declare a judgment wrong as a matter of law and reverse it. If this office has the one power it necessarily has the other, and if it has not the latter power it has not the former. By the plain language of the statute this office has both.

9. Nor has the power here contended for ever been questioned by the civil courts or other civil authority. To be sure, there are many expressions in adjudicated cases to the effect that the duly appoved sentence of a court-martial when the court has proceeded within its jurisdiction and the rules governing its

procedure is as final and unassailable as a decision of a civil court of last resort. But is must be remembered, of course, that in each of these cases the court was speaking of collateral attack in the civil courts on the proceedings of a court-martial and did not have in view the power of the department itself to correct court-martial judgment by way of direct revision of it. I have also examined many expressions of opinion by the Attorney General and find that these expressions have had to do generally with cases in which the final approval has been by the President himself and go only to the question of whether such cases can be reopened by the President or his successor for the purpose of undoing what he has once legally done. I have not found that any authority has ever questioned the revisory power of this office to correct errors in law in court-martial procedure when they amount to a denial of justice. And I may be permitted to say that should I find such holdings by any authority other than the highest court of the land, I should not hesitate to question the soundness of the decision.

In this connection, I may say that it was suggested to me by the present Judge Advocate General himself that the finality attributed by the Articles of War to the power of the several reviewing authorities might be thought to militate against or negative the view I advance. This could hardly be true. The statutory power of the Judge Advocate General of the Army conferred by 1199 Revised Statutes stands unaffected by anything said in the law as to the power of appointing authorities. Indeed, the statutes are not in pari materia. They exist for entirely different purposes. They establish different functions, all of which have independent spheres. The general powers of correction conferred upon appointing authorities of the Articles of War existed prior to the enactment of the statutes now brought forward in 1199 Revised Statutes and also concurrently with them, without thought of conflict. There is, of course, a field of operation for each. The concept of finality referred to is the finality within the system, the finality with which all lawyers are familiar, and which must exist in order that there may be a review at all. A judgment of an inferior court must be a final judgment before it can be subjected to review in an appellate court. The action of the appointing or confirming authority directly giving effect to the judgment of the court itself gives finality to that judgment, that is, that completeness and integrity without which there could be nothing for this or any other authority to review. Such judgments are operative as final until and unless revised upon review. This concept of finality is so familiar to lawyers as to require no further discussion.

10. Such is the law, and there is a pressing necessity at this time that we go back to it, revive it, and act under it. Daily this office reviews records which show that in the trial some substantial rights of persons standing before courts-martial accused of crime have been flagrantly violated or that convictions have been secured on wholly insufficient evidence. Others show that charges and specifications are sometimes laid under the ninety-sixth (the general) article of war for acts that are not properly to be regarded as military offenses at all. And quite frequently cases are encountered in which men have been convicted of serious offenses where upon the evidence the offense committed was not the offense charged or for which they were tried. Officers of the Army, even of the Regular Army, are persons unlearned in the law, and, as fallible beings, may be expected from time to time to commit such errors in court-martial procedure as operate to deny the accused right and justice and result in his unlawful punishment. And such errors are even more to be expected now, as our Army is expanding and thousands of new officers are brought into the service who have had no military training and no familiarity with military law and the customs of the service. For this reason alone there should be the closest supervision.

But the situation may also be viewed from another aspect. As an American institution our Army must be maintained under law. Our Army can never be the most successful Army it is capable of becoming except it have the highest regard for the rights of the enlisted men, as those rights are established by law. Indeed, the higher the regard for those rights the greater will be the popular confidence in the Army. For the first time in the history of this country we have in fact a truly democratic and popular Army. It has come from the people. Tens of thousands of homes have been affected. In the welfare of the Army millions are concerned directly and the entire public interested generally.

Expediency, in the highest sense of the term, as well as law, requires that the Army itself be quick to see that justice is maintained within it. The men

now drafted from all walks of life and placed, whether they will or not, in the military service of the country are wholly without previous military training and it is only natural to expect many transgressions against discipline, certainly in the early days of their service. They are entitled to justice as established by law, and those who are giving them up to the service of the country have the right to feel, to know, that they will not be lightly charged with military offenses, nor branded while in the service of their country as criminals, except after a fair and impartial trial and on proof which can meet the legal test.

11. There is a revisory power here, which must be exercised. It will, of course, be exercised with all due regard for the proceedings and strictly within the limitations of the war.

S. T. ANSELL,
Acting Judge Advocate General.

NOVEMBER 10.

Inasmuch as this opinion is the result of long and thorough conference with my associates in this office, I would prefer that each of them read it, and, for the benefit of the record, express his concurrence or dissent.

S. T. ANSELL,
Acting Judge Advocate General.

Concurring.—James J. Mays, lieutenant colonel, J. A.; George S. Wallace, major, J. A., O. R. C.; Guy D Goff, major, J A., O. R. C.; William O. Gilbert, major, J. A., O. R. C., Lewis W. Call, major, J. A., U. S. A.; Edward S. Bailey, major, J. A., O R. C.; William B. Pistole, major, J. A., O. R. C.; E. M. Morgan, major, J. A., O. R. C.; Eugene Wambaugh, major, J. A., O. R. C.; E. G. Davis, major, J. A., O. R. C.; Alfred E. Clark, J. A., O. R. C.; R. K. Spiller, J. A., O. R. C.; Herbert A. White, lieutenant colonel, J. A.

Dissenting.—None.

ANSELL EXHIBIT B.

MAJ. GEN. E. H. CROWDER'S MEMORANDUM IN OPPOSITION TO THE REVISORY POWER, AND THE SECRETARY OF WAR'S DISPOSITION OF THE INSTANT CASE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 27, 1917.

Memorandum for the Secretary of War.

On November 10, 1917, there was presented for your personal consideration by Gen. Ansell, Acting Judge Advocate General, a memorandum brief in support of his action on the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery. In the discussion of the record of the case itself, Gen. Ansell had come to the conclusion that the evidence did not warrant a conviction of the offense of mutiny, that many errors of law appeared on the face of the record, and that, while the court had jurisdiction and "its judgment and sentence for that reason could not be pronounced null and void," errors in law and the unfairness of the trial "justify, upon revision, a reversal of that judgment." Gen. Ansell, first inviting attention to section 1199, Revised Statutes, providing that—

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army"—

concludes his review of the case as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

I shall not address myself for the present to the merits of the case or to the proper administrative action that should be taken in respect of it, but rather to the statement of Gen. Ansell in his memorandum brief, that an ill-considered and erroneous change of attitude on the part of the Judge Advocate General's Office that occurred within a score of years after the close of the Civil War has profoundly and adversely affected the administration of military jus-

tice in our Army; that "errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review"; that you and your immediate military advisers can never appreciate the full extent of injustice that has resulted to our soldiers through the operation of this rule; that a proper sense of the injustice can be felt only by those who exercise immediately the authority of the Judge Advocate General's Office; and that even those thus experienced can gather a full impression of the wrong done only by complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. Gen. Ansell adds:

"During the past three months, in scores, of not hundreds, of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency."

In handing the memorandum brief to me for my study, you asked my attention to these statements and expressed your surprise that such a situation as is here depicted could have existed in the face of an express grant of power to the Judge Advocate General, which Gen. Ansell finds in section 1199, Revised Statuts, to modify or reverse the approved proceedings of courts-martial. You directed me to examine the brief and make a report thereon. I have had a limited time in which to do this, but the results of my study, which I think is complete enough to answer the main propositions, follows:

The logic of Gen. Ansell's brief converges to its conclusion in these distinct channels:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning confers upon the Judge Advocate General not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General with the power to modify or reverse the same.

2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.

3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period and apparently until the early eighties.

4. That the power has never been questioned by the civil courts or other civil authority.

5. That the power is, and for a long time has been, vested in the judge advocate general of the British Army.

Since the brief concededly purports to overturn the established practice of over one-third of a century, and to advance a doctrine as to which there is little or no previous expression or any authority or pinion utside of the brief itself, it will be well to follow the outline of discussion upon which the brief is built, and to address ourselves first to the contention that the word "revise" in section 1199, Revised Statutes, confers upon the Judge Advocate General the power to review and then to modify or reverse the approved proceedings and sentences of courts-martial.

1. *Meaning of the word "revise."*—Practically the whole fabric of Gen. Ansell's argument is built upon an interpretation of the meaning of this single word "revise." In support of the broad meaning which he gives this word, his brief collates definitions of the word by lexicographers and jurists. On the authority of the Standard Dictionary, which defines the word "revise"—

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform"—

he classifies the word "review" as a synonym of the word "revise" and upon this justification indiscriminate definitions of the words "revise" and "review" are quoted throughout the brief. I think the deductions he makes in this part of his brief are unauthorized.

In essential etymology the word "revise" means "to look over." It has acquired a special meaning going to the purpose of the "looking over," and imports a purpose of suggesting, or making amendments. Thus a proof reader

revises copy and suggests changes. But he does not effect changes. Special committees of men learned in the law revise statutes and codes by special legislative commission, but their revisions do not give legal life to the result of their labors. The legislature must enact the revision as a law. In the same sense the "looking over," the "reexamination" of the proceedings of an inferior tribunal by an appellate court is not the reversal or the modification of the judgment, albeit the revision is for the purpose of making such a change. All this is most significant, since in the statutory grant of so wide a power as that contended for we should expect, by all the analogies of grants of appellate power, to find something more than authority "to look over" or "to examine." Such brief survey of the field of statutes conferring appellate power on the various tribunals of the several States and of the United States as I have been able to make in the limited time I have had to prepare this paper fails to disclose a single instance in which the power to modify or reverse the judgment of inferior courts is deducted from the words "review" or "revise" without the addition of apt words specifically conferring the power to reverse or modify.

Gen. Ansell's brief purports to find one such statute, which he describes as analogous with section 1199. Revised Statutes, granting the power to modify or reverse by the use of the single word "revise." Gen. Ansell says, in part:

"I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898 (cpa. 541, 30 Stat., 553, bankruptcy law), provides, in part, as follows:

"'The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankuptcy within that juisdiction.'"

Gen. Ansell's brief then proceeds to cite a case interpreting the bankruptcy statute (in re Cole, 163 Fed., 180, 181; C. C. A., first circuit), which he describes as "a case typical of all," in which the court says:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the isues which that court considered."

And from this quotation it is inferred that the court was finding in the word "revise" a broader power to "modify or reverse" the procedure of the lower court. This legislative precedent, as judicially applied, would, if it were properly and accurately set forth in the brief, be most persuasive, and for this reason I have had recourse to the statute itself. I find that the quotation of the bankruptcy act of July 1, 1898, in the brief is incomplete, being a quotation of only a portion of the section conferring appellate jurisdiction on the Supreme Court and the circuit courts of appeal and the supreme courts of the Territories. The portion quoted is from the latter part of the section, the earlier part of the section having conferred general appellate jurisdiction; the words quoted by Gen. Ansell, "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law," following that part of the section which confers general appellate jurisdiction. In order that you may be fully advised in the premises, I quote the entire section:

"SEC. 24. Jurisdiction of appellate courts. a. The Supreme Court of the United States, the Circuit Court of Appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The concluding paragraph, marked "b," quoted by Gen. Ansell, follows the underscored language which invests the courts with appellate jurisdiction in express terms. There was no necessity for the court to deduce appellate power out of that part of the section designated above "b" for it had this appellate power by express grant. The discussion of the court in re Cole should, I think, be so understood.

I do not think this part of the reply would be complete without some reference to the manner in which appellate jurisdiction has generally been conferred by statute, exemplified in the following:

(*a*) The act of February 9, 1893, establishing the Court of Appeals for the District of Columbia provides:

"SEC. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia * * * may appeal therefrom to the court of appeals * * * and * * * the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just."

(*b*) The Judicial Code of March 3, 1911, provides for the exercise of appellate jurisdiction in the following sections:

"SEC. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error, decisions in the district courts," etc.

"SEC. 130. The circuit courts of appeals shall have the appellate jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy,'" etc.

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question, etc., may be reexamined and reversed or affirmed in the supreme court upon a writ of error."

"SEC. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: * * *"

"SEC. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy," etc.

In the light of what has been said, I think it will be perfectly apparent to you that the court, in re Cole, was in no sense discussing its power to give effect to its conclusions upon revision. It was discussing only the scope of the matters that could be inquired into upon the petition, and found the definition of that scope in the words "revise in matters of law the proceedings of the several inferior courts of bankruptcy." It becomes, therefore, quite impossible to follow the brief we are here reviewing in its assertion that—

"The language of that statute (bankruptcy act) is the very language of this (sec. 1199, R. S.) except that the revision there is expressly limited to matters of law."

There is not even a shadow of analogy between the words of the Federal bankruptcy act investing the circuit courts with specific appellate jurisdiction and the words of section 1199, Revised Statutes, relied upon to invest the Judge Advocate General with appellate jurisdiction.

But I can not conclude this part of the brief without inviting your attention to the definitions which are quoted from Words and Phrases, volume 7. It seems to me that not a single one of the definitions quoted in the brief was addressed to grants of appellate power to courts, but that all are addressed to grants of legislative power to revise statutes, or to the scope of the authority granted to special commissions to revise codes, where it goes without saying the power to revise confers no power whatever to give effect to the revision. There was, however, one definition of the word "revise" on that cited page of Words and Phrases that does go to the meaning of a grant of power carried to a court by the word "revise," but I do not find that this definition is in Gen. Ansell's brief. It is as follows:

"Revision, as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice requires a revision of the decree appealed from, does not mean reversal or modification, but simply review, reexamination, or looking at again."

I may add, in closing this part of my memorandum, that a rather complete survey of statutes vesting appellate power in tribunals, administrative as well as judicial, fails to disclose a single case where the power to modify and reverse is left to be deduced from such an inapt and single word as the word "revise," without the addition of appellate power granted in specific and unequivocal terms.

2. *History of the legislation.*—Gen. Ansell's brief asserts that—

"The history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word 'revise' in the present instance."

It is said that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War, and expressly invested its head, the Judge Advocate General of the Army, with this revisory power. Gen. Ansell's reference

here is to the original statute, the act of July 17, 1862 (12 Stats., 598), in which it was provided that:

"The President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned for revision the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The same words were carried forward in the act of June 20, 1864, and no further grant of power is found in the latter statute. In the act of July 28, 1866 (14 Stats., 324), the granting word is still "revise," the only change being the omission of the words found in the earlier statutes, "a record shall be kept of all proceedings had thereupon"; and so the same words were carried forward in section 1199, Revised Statutes, where they remain to base the ground of this contention.

I find nothing in the legislative development that is even worthy of remark in this connection. The word "revise" (or "revision") is the only granting word now as it was in the beginning. There is precisely the same power, no greater and no less. If history is to be invoked, therefore, we must look to the administrative and not to the legislative history of the statute. And this brings us to—

3. *Administrative history of the departmental practice.*—This administrative history has been appealed to in Gen. Ansell's brief to the extent that it is asserted that—

"The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated."

Judge Advocate General Holt was Secretary of War before he was Judge Advocate General. His position at the bar of the United States was an enviable one. If this statement of his construction of the law is accurate, it would be most persuasive upon me, as I think it would be upon you. Gen. Ansell, however, cites no instance from the records of the Judge Advocate General's office where Judge Holt has indicated such a view, and such examination of the records of Judge Holt's action upon courts-martial proceedings during the Civil War period as I have been able to make does not disclose a single instance of the kind mentioned. Candor compels me to state that in the limited time that I have had to prepare this memorandum no systematic search of the hundreds of records bearing the stamp of Judge Holt's action could be made, and therefore the positive assertion that there exists no single instance of this kind would not be warranted. However, there was revealed from these old and interesting books very significant circumstances most emphatically indicating that Judge Holt never contended for nor exercised the power that Gen. Ansell says was vested in him by the statute, exemplified in the following reference to Judge Holt's opinions:

(*a*) I find on page 269 of volume 11 of the Records of the Bureau of Military Justice (Dec. 16, 1864), over Judge Holt's own signature, a short review of the case of Pvt. Hiram Greenland, who was tried by a court-martial convened by Gen. Howe. The record failed to show the date of the trial or whether there was present a quorum of the court. If Judge Holt had been exercising an indigenous power, such as it is contended he could exercise, he would have taken the action attempted to be taken in the instant case that raises the present contention and would have reversed the judgment. Instead of doing so indorsement "To the President" reads:

"There are fatal irregularities invalidating the whole proceedings and rendering the sentence inoperative, and it is recommended that it be so declared by the President."

(*b*) Again I find Judge Holt writing to Col. W. N. Dunn, Assistant Judge Advocate General, under the caption "Bureau of Military Justice," and under date December 27, 1864, in reference to the case of James Scott, corporal, Ninth Michigan Cavalry, in which the record was fatally irregular in that the arraignment of the prisoner and the reception of his plea had been accomplished prior to the administration of the oath to the court. Instead of reversing the judgment, as he, of course, would have done had he deemed that the power was in him to do so, he writes as follows:

"In similar cases returned from this office, to the officer charged with the duty of revision or executing of the sentence, it has been found advisable to direct his attention to the fact that a proper course to pursue with irregularities of proceedings which can not be corrected, rendering the sentence

noperative, is to revoke the order of execution, and if the parties are not liable to be subjected to another trial to release them."

(c) In the case of W. H. Shipman, in which the charge has been drawn under the general Article of War for an offense clearly recognizable under a specific article, Judge Holt expressed the opinion that such an irregularity rendered the sentence void, but instead of reversing the judgment or attempting to give inherent effect to his own opinion he addressed the Secretary of War, under date December 22, 1864, in part as follows:

"If this opinion is concurred in, the pleadings in the case must be held to be fatally defective and the sentence imperative."

In no single case of perhaps 100 consecutive cases examined by me has there been found an instance in which Judge Holt ever attempted to reverse the judgment of a court-martial. Other cases similar to those quoted from were found in abundance.

Gen. Ansell's brief asserts that the power contended for was utilized during the Civil War period and beyond the Civil War period until the early eighties, when it was abandoned without apparent cause, argument, or reason. A rather hasty examination of the records from 1864 to 1882 fails to disclose a single instance of the exercise of such power. I shall not prolong this brief by citing the cases that I have examined. They cover the administration of Judge Advocate General Dunn and Judge Advocate General Swaim.

4. *Rulings of civil courts.*—This brings us to the culmination of the whole argument in a refutation of the statement in the brief that "Nor has the power here contended for been questioned by the civil courts or other civil authority." This statement evinces a failure to make a thorough search of the records and precedents. In his "Military Law and Precedents," the leading work on the subject, Winthrop, for many years in the office of the Judge Advocate General, and for a time Acting Judge Advocating General during the incumbency of Judge Holt, in the Civil War period, and hence familiar with any course of procedure followed by him, says:

"The accused always has an appeal from the conviction and sentence by court-martial to the President (or Secretary of War); but, in entertaining and determining such appeal, he is assisted and advised by the Judge Advocate General of the Army. Thus, as the tribunal is an executive agency, the appeal therefrom is to a superior executive authority."

And a footnote, on page 51, adds that—

"The Judge Advocate General, under the authority vested in him by section 1199, Revised Statutes, to receive, revise, etc., the proceedings of courts-martial has, of course, no power to reverse a finding and sentence, was held in Mason's case, United States Circuit Court, Northern District of New York, October, 1882."

Mason's case still stands as the undisturbed pronouncement of the Federal courts upon the precise point at issue. Mason, a sergeant, had been convicted by a general court-martial of discharging his musket with intent to kill Charles J. Guiteau, the assassin of President Garfield. The findings and sentence were approved by Maj. Gen. Hancock, the reviewing authority, and the Secretary of War designated as the place of confinement the Albany County Penitentiary. In his review of the case the Judge Advocate General came to the conclusion that the court was without jurisdiction and that the sentence was therefore void. It is important to note that in communicating this conclusion to the Secretary of War the Judge Advocate General did not (as it is here contended that he had the power to do) reverse the decision of the court, but he recommended that the Secretary of War should revoke the order for execution of the sentence.

In this case, however, the Secretary of War declined so to do, and apparently adhered to the opinion that the court was not without jurisdiction and the sentence was valid—an opinion that was substantiated by the decision of the United States Supreme Court on a writ of habeas corpus addressed to the jurisdiction of the court. The prisoner, it seems, was not at the end of his resources. After being delivered to the warden of the penitentiary he sued out a new writ of habeas corpus based on other grounds. His contention was precisely the contention made in Gen. Ansell's brief; that is, that the Judge Advocate General is vested with an appellate power and that his decision against the validity of the proceedings of a court-martial has the effect of reversing the judgment.

His petition alleged, among other things:

"5th. That the Judge Advocate General of the Army recently reviewed the evidence adduced on the trial before said court-martial and on or about August

28, 1882, transmitted to the Secretary of War his report on the said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"1. No jurisdiction in a court-martial.

"2. Employment of the prisoner illegal.

"3. No evidence of guilt, but, on the contrary, proof of innocence.

"6. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, or reverse or affirm the findings and sentences of all courts-martial, and that his dcision is the ultimate judicial judgment in all such cases.

"That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings of said court-martial the further imprisonment of the petitioner is unlawful and wrongful.

"Further, that his conviction and sentence, and the orders carrying the same into execution, are each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of said courts-martial."

In addressing itself to the contention thus made, the opinion of the court proceeds as follows:

"The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might risk our decision here, but as it has been strenuously contended by the council for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it is the duty of that officer to 'receive, revise, and cause to be recorded the proceedings of all courts-martial' that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word 'revise.' Applying the rule 'noscitur a sociis,' the word 'revise' is to be read in connection with the words that precede and follow it, and thus read, 'the duty it imposes is analogous to the duty of receiving and recording the proceedings.' Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of the officer, and to convert a staff officer of the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

"The rule is discharged and the application for a writ of habeas corpus is denied."

I think this memorandum might well close here and with the statement that both civil and military opinion sustain the view that the appellate power in the Judge Advocate General contended for in Gen. Ansell's brief does not in fact exist. However, I have noted a further statement, which constitutes part 5 of this memorandum to wit:

5. *The appellate power of the judge advocate general of the British Army.*—The jurisdiction of the judge advocate general of the British Army in such matters is so obscurely stated in the books which I have examined that I am not entirely clear that I understand his precise relation to the administration of military justice. It appears to be true, from the authorities I have examined, that under the British system this official has the power to reverse and modify the proceedings of courts-martial, but that he does not find that

power in any specific statute, but rather in his relations as a member of the ministry of the British Government. Such authority as he exercises in this regard seems to be not a grant of executive authority to an administrative official, but to arise out of an executive power of the sovereign himself, delegated in this instance to a member of the ministry.

You are aware, of course, of the power you have by statute law to grant upon proper application an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you. I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief, so that, instead of issuing a simple order of restoration, you may, by direction of the President, modify or disapprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are that the court-martial jurisdiction is and always has been an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given to subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision. Immediate relief, however, should not await the completion of a study of this kind or the concurrence of the Attorney General, which I think you would wish in view of the consideration his office has heretofore given the general subject.

E. H. CROWDER,
Judge Advocate General.

NOVEMBER 27, 1917.

As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER.

ANSELL EXHIBIT C.

BRIG. GEN. S. T. ANSELL'S BRIEF FILED IN SUPPORT OF HIS OFFICE OPINION, TOGETHER WITH NOTE OF TRANSMITTAL.

DECEMBER 11, 1917.

Memorandum for Gen. Crowder:

1. Here is my brief, which, with his verbal permission, I file with the Secretary of War, and which I hope you will place before him at your convenience.

2. It has been prepared under circumstances which militate against literal accuracy, but it, together with the opinion, substantially and with sufficient accuracy expresses my views.

3. The subject, as I conceive it, is one of tremendous importance. I am quite sure that if the department could change its view of the law and come to concur with me, a practical scheme for the exercise of such power could be established, to the great benefit of the administration of military justice.

4. I fear that this office under the prevailing practice, is exercising too little supervisory power over courts-martial. I cite in my brief, as I mentioned to you the other day, that in the Civil War an Assistant Judge Advocate General was established independently of military command, so that as a representative of the reviewing power of this office he could pass preliminarily on proceedings and thus prevent the execution of illegal sentences. I apprehend that something like this will have to be done again.

5. If you and the Secretary of War, upon thorough reconsideration, can not accept my view of the law, and if it should be thought advisable to seek legislation establishing this power in the department, I hope its exercise will not be subjected to General Staff supervision. Such supervision, it seems to me, would necessarily destroy the judicial character of the power.

S. T. ANSELL.

BRIEF FILED BY PERMISSION OF THE SECRETARY OF WAR IN SUPPORT OF MY RECENT OPINION CONCERNING THE REVISORY POWER OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OVER JUDGMENTS OF MILITARY COURTS.

Statement.—From my earliest interest in military law and the administration of military justice, and especially during my service in the office of the Judge Advocate General, I have seen the evident embarrassment of the department and its consequent failure to do justice according to established legal principles, brought about by the limitations imposed by the view and practice of this office to the effect that if the court had jurisdiction, no matter how flagrant and prejudicial its errors, and no matter how bad its judgment and sentence when tested by established legal principles, no corrective power existed in this office or this department or elsewhere. From time to time the officers on duty in this office, faced by such a dilemma, have turned their minds to the power of revision conferred by section 1199 of the Revised Statutes, in the hope of finding there the necessary remedial authority. But, since the Army has heretofore been small and the cases calling for such revision therefore have been comparatively few, the exigent need for such a revisory power has not until recently been sufficiently manifested to make the question an all-impelling one; and so, in the end, we have all accepted the practice, dissatisfied with it but without sufficient impulse to go to its bottom and overturn it. I should expect the other officers who have been on duty in this office with me and interested in the subject to confirm me in the statement of this attitude.

During this war, for patent reasons, the revision of the proceedings of military courts in this office has taken on an importance which it did not heretofore have. If one essential branch of administration of this office can be transcendently more important than another, it is to be found—at least while this large Army is maintained—in the supervision over these proceedings; that is to say, in the close supervision of the administration of military justice throughout the Army. If the revision is worth the name, it should be a revision for gross and prejudicial errors of law that make a conviction bad, as well as for those that make the judgment void. It should be done with such thoroughness as to carry conviction to all concerned and to secure the respect of the Army and the confidence of the people. It should be so expeditiously done as to make the remedy timely and prevent any great measure of unlawful punishment.

For reasons so obvious as to merit no allusion, our new Army must be expected to administer military justice more crudely than did our small peacetime establishment of experienced Regulars. My experience in this office thus far has shown that this is and will be true. Many cases already have been passed upon and reported to me by Maj. Davis, in charge of the Military Justice Division, and his assistants which admitted of no doubt whatever but that, on indisputable principles of law and justice, the judgments and sentences therein were based on error and ought to be revised and set aside if the power to do so existed. So flagrantly and patently illegal were many of these that I presented them to the entire body of my associates in an endeavor to discover, with the help of their counsel, some means whereby, in consonance with law as well as with the practice of the office, the judgment might be modified and the innocent victims restored, unblemished by wrongful conviction, to their honorable places in the service. It was the passing upon such cases which marked the obvious necessity for the power of revision in this office. We were driven to take up, and we did take up, for consideration with a seriousness that seems unappreciated the question of the proper construction of the statute in question, with the result that I and my office associates concluded with the utmost confidence and conviction that that statute does adequately confer upon the Judge Advocate General of the Army this very just and necessary power.

The case that of many others served most to indicate the exigent need of such power and its exercise in the interest of law and justice was the so-called mutiny case. It was upon this case we expressed the views and conclusion which the department finds unacceptable. This was an alleged mutiny of the noncommissioned officers and others of a certain battery of Field Artillery. The errors of law and the consequent injustice, as revealed by the proceedings in this case, were so palpable and prejudicial that it is difficult for me to see how any fair-minded official, having the duty to pass upon the record, could have failed to perceive them and exert all his power to remedy the error and injustice. These men did not commit mutiny. A youthful and capricious officer was responsible for the entire situation. He himself was guilty of tyrannous and oppressive conduct. Notwithstanding this, charges were pre-

erred, not against him for his tyranny, but against these men for mutiny. The charges were referred to the proper convening authority, an officer of high rank, who ordered the court for the trial of these men. A court tried and convicted them and sentenced them to long terms of imprisonment, and the reviewing officer approved the convictions and sentence. Where such chain of action as this can occur there is left no room for the surprise that I otherwise should have felt at the failure of the proper authorities to court-martial the young officer himself. I frankly confess my fear that such a failure of justice as this, under such circumstances, involving so many officers whose concern it was to see that justice was done, is symptomatic of more general deficiencies that are the usual concomitants of that institutional formalism which in my judgment so hinders our military development.

It was to correct such errors that the entire force of this office, including able and distinguished lawyers recently coming to us from civil life, devoted itself to a thorough study and consideration, extending over a period of more than three weeks, and reached the conclusion that the statute clearly confers upon this office revisory power necessary to do justice in such cases. Accordingly, convinced of the legality of that course and apprehending that no objection could be taken thereto, I set aside the judgment of conviction in this and other pending cases and recommended that orders issue restoring these innocent men to their places in the Army.

Inasmuch, however, as this action was a reversal of an administrative practice in this office which had never before been thoroughly considered or examined so far as I knew, I sent to the Secretary of War for his personal consideration a copy of the opinion, scarcely doubting that the action taken by me would merit his entire approval as well as that of the Judge Advocate General, so necessary and expedient was the authority, so clear the law, and so humane and righteous its application.

The Secretary of War having sought his advice, the Judge Advocate General has disagreed with me, and finds no such power. Upon his advice, therefore, the judgment of conviction in this case is to stand, though it is proper to add, quite a number of other instances in which I likewise set aside erroneous judgments have been, due to advinistrative methods, approved by the department and action taken accordingly.

Believing that our people who are giving up their sons to the national cause could not be content with, if they were apprised of, a system of military justice that is admittedly without power to correct conceded wrong and injustice to the most sacred rights of man and soldier; conceiving that the question is fundamental and far-reaching in its import; convinced that existing law places us in no such humiliating position and that the action of the department was wrong beyond all question and can be shown convincingly and almost to the point of demonstration to be so; and mindful that undue deference to past peace-time views and administrative practices will defer the adoption of better methods and prove highly harmful to our new Army, in an earnest desire to be helpful to the extent of my ability and use whatever of strength I have to aid in the establishment of an adequate and efficient administration of military justice, I file, with the permission of the Secretary of War, this brief of my views:

First, as to the action taken in the mutiny case.

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction, and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime, which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of executive favor.

The Judge Advocate General, advising the Secretary of War, said:

"You are aware, of course, of the power you have by statute law to grant, upon proper application, an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you."

And immediately thereupon the Secretary wrote, adopting the suggested action, as follows:

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for

future consideration, informed by the further study which the Judge Advocate General is giving it."

This action can not be "a convenient means of doing justice." The Secretary, for the moment, has failed to distinguish between executive action in the nature of a partial pardon and judicial action, which goes to the erroneous judgment of conviction itself and modifies it, reverses it, or sets it aside. The statute under which the proposed action is to be taken is to be found in the statute relating to the military prison and the prisoners therein, and is as follows:

"SEC. 1352, R. S. The commandant [that is, of the military prison] shall take note and make record of the good conduct of the convicts and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

And the modifying act of March 4, 1915 (38 Stat., 1074), as follows:

"Whenever he shall deem such action merited, the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein, and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty and may authorize the reenlistment of those who have been discharged or upon their written application to that end order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment contract for a period equal to the one not served under said contract. (Par. 7, sec. 2.)

And—

"The authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States Disciplinary Barracks and its branches, shall be extended so that such restoration may be given to general prisoners confined elsewhere; and the Secretary of War shall be, and he is hereby authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe."

The action thus authorized was never intended to apply in cases of an unlawful conviction, and this the terms of the statute clearly indicate. It expressly applies to convicts and general prisoners dishonorably discharged from the service. It was enacted by Congress under its power to make rules and regulations for the government of the Army and to prescribe the eligibility of those who enter or are in the Army and the conditions under which they serve. Looking at it from the executive viewpoint, it is but executive favor. As I pointed out in my former opinion, in cases of such restoration the conviction stands. The restoration itself is predicated upon a lawful conviction and a dishonorable expulsion from the Army in consequence of it. It can be taken only upon the application of him who has been thus expelled. An executive action partaking of the nature of the pardon is not the proper remedy in a case where a man, concededly, has been unlawfully convicted, if there be other means of doing justice. A pardon does not proceed upon the theory of justice, but of mercy. The man who seeks a pardon does so upon an express or implied admission of guilt. The pardon itself conclusively implies guilt. A pardon is no remedy for wrong done the innocent.

Speaking to the present case these noncommissioned officers, soldiers of excellent record, were, when judged by universally recognized legal principles, erroneously, unjustly condemned; they stand convicted of an offense than which none, in a soldier, can be more heinous. Restoration to the Army does not change the judgment of conviction. Restored to the Army they ought to be; not, however, as an act of grace and mercy, but as an act of right and justice. Such a restoration is but an attempt to forgive these men for an offense which none of them ever committed; and, notwithstanding such restoration, the record against them is made and there it stands. They have been expelled from the Army unless the judgment be reversed; they have been out of the Army since the day the sentence was executed. All rights and honors incident to their service they have lost, their records as soldiers largely ruined. In such a case the right thing to do is to set aside the conviction; to reverse the judgment of the court; to declare that these men had never been lawfully convicted; and that they have never been lawfully out of the service—a service

which they had never dishonored. The power to do the right thing is to my mind unmistakably found in the section to be discussed. I hope and request that final action differing from that here prayed will not be taken until after this brief shall have been given the consideration which the subject of which it treats well merits.

The Secretary then continued to express the following general view with respect to the power to be deduced out of this statute—

"Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes, with settled and practical construction, is unwise. A frank appeal to the legislature for added power is wiser."

I think it will be shown by this brief that the well-established general principle here enunciated has no proper application to the action taken by me under this State. It can have no application where this statute never has been interpreted by the courts; where the practical construction is not settled, but palpably inconsistent and confused; where there is such overwhelming necessity for an exercise of the jurisdiction. That these things are so can be shown quite convincingly.

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

(1) *The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.*—The opposing arguments follow administrative practice blindly and, for the most part, are but mere professional absolutisms developed under the conditions obtaining in our country since the broadening activities of the Civil War period passed away. I poignantly regret the concurrence of the Judge Advocate General, who habitually and constitutionally entertains far more progressive views. The reasoning that comes from the office of the Chief of Staff and Inspector General is but the apprehension of those who are counseled by their fears and who mistrust all that disturbs an absolute order of things. Opposition of that kind has manifested itself against every suggestion of progress throughout the development of institutions. Such argument proceeding on narrow military principle is adduced to the support of power rather than to the human individual rights offended by an abuse of it. In its essentials it is this: The battery commander was a commissioned officer with the power of discipline over his battery; he exercises his power under an amenability to his superiors in the hierarchy, and they all, tacitly, at least, approved of what he did; military justice was appealed to to vindicate his power through a court composed of excellent officers of experience and rank, and the court did vindicate him; all these officials were wise, experienced, and just, and therefore their judgment must not be impeached. The whole structure of government recognizes the fallibility of human administration and endeavors to minimize its evil effect by placing upon it the check to be found in the thoughtful and well-considered review of those who have been trained to the detection of those fallacies.

It is only the mind of the extreme professionalist that fails to see that a man's judgment may be impeached without reflecting upon his integrity. In this case the gross misconduct of this commanding officer is conceded; and yet it is said that these men, subjects of his misconduct, must have their cases determined without reference to his oppressive and tyrannous action. The legal mind, trained to a consideration of the elements of every offense, and appreciating that mutiny must consist of an opposition to lawful authority with an intent to subsert it, could not have failed to perceive that this was not a case of opposition at all in the sense that makes mutiny, nor was there any evidence of the necesssary intention to overcome and depose constituted authority. My own sense of right and justice and discipline would have impelled me to court-martial, not the men, but the officer himself, and I still think that that should be done. The human error that marked this case, judged according to established principles known to every lawyer, has marked and is daily marking others.

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view. In any event, it is difficult to maintain that the judgment of this, the crudest of all courts, exercising

such an extent of jurisdiction, is entitled to greater deference than those of the civil tribunals, the review of which, to insure correction, is fundamental in our law. So much as there is of summariness in courts-martial procedure is solely attributable to military necessities. But this Government should never take the life of any soldier or apply to him extreme penalties without the certainty of the correctness of judgment. If the judgment be sound and the punishment certain, nothing more should be demanded. This case in itself is of comparative little importance, but the questions raised and to be determined by it are fundamental in the administration of military justice.

(2) *The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.*—The Judge Advocate General deduces out of the power of revision which belongs to his office no substantial meaning whatever. Obviously he is led to this restrictive, indeed extinguishing, interpretation because of his fear of obtruding judicial functions within a field of authority that in his judgment properly belongs to the power of command. He would prefer to believe that such revisory power does not exist; otherwise this office must sit in revision upon the judgments of convening and reviewing authorities based upon their power to command on one hand, and in turn be controlled by the power of command of the Secretary of War and Chief of Staff upon the other. In my judgment, it is too clear for argument that courts-martial having once been brought into being their proceedings and judgments when properly completed and all that is incident thereto, are not based upon, but indeed are independent of, the power of command as such. Winthrop thought otherwise, and he has been followed blindly ever since by the War Department, though more recent decisions of the Supreme Court of the United States have exposed the fallacy of his views.

(*a*) Winthrop's theory was wrong in reason. Winthrop in a double-leaded heading in his work on military law says that a court-martial is "not a part of the judiciary, but an agency of the executive department." This is the beginning and the cause of the difficulty. The only authority he quotes in connection with the assertion is a statement from Clode to the effect that in the British Army the power of courts-martial comes from the Crown, where, of course, differing from here, the King in theory is the fountain of justice. His text continues:

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power provided by Congress for the President as Commander in Chief to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

The non sequitur here is absolute and obvious. "Not belonging to the judicial branch of the Government," he says, then courts-martial must necessarily belong to the executive department, are merely instrumentalities of Executive power and utilized under his orders. Since the days of Winthrop this has been the height of orthodoxy; and we have all been steeped in the teachings that follow upon that illogical and fallacious syllogism.

It is rather surprising that an unsupported text-book statement, sustained by so little logic, should have gone so long unexamined by those in military authority, even if judicial decisions had not exposed the fallacy. To be sure, courts-martial are no part of the judicial system referred to as such in the Constitution, but this does not place them under the Executive power. They are courts all the same, with their bases deep down in the Constitution. The courts of the several Territories have never been courts of the United States in the constitutional sense, nor have they ever had any other constitutional basis than the power of Congress to make rules for the government and disposition of the territory of the United States. But who would contend that they are under the Executive power? The courts, both Federal and local, of Porto Rico and Hawaii, and the courts of Alaska and the Philippines, indeed the courts of the District of Columbia, the United States Courts of Customs Appeals, and the Court of Claims, are not constitutional courts of the United States, in the strict sense, inasmuch as in them is deposited no part of the judicial power as defined in the Constitution; they constitute the courts, however, provided for by Congress under other grants of power. But no lawyer would contend, for that reason, that such courts are subject to Executive power.

(*b*) Winthrop's theory was wrong on principle and precedent. Courts-martial as a means of military adjudicature long antedated the Constitution. They are recognized in the fifth amendment in the exception there made as to cases arising in the land and naval forces, and elsewhere in the Constitution. As they exist to-day in our land, and as they have ever existed here, they have been creatures of legislative enactment, under the power of Congress to make rules and regulations for the government of the Army and Navy. The king as a fountain of justice, military and otherwise, finds no counterpart here in our Chief Executive except to the extent that supreme powers are conferred upon him by the Constitution. Here the fountain of justice, indeed all prerogative of sovereignty, is in the people, except where conferred by them on their representatives. Except for the pardon power, Congress here is rather the fountain of military justice. Courts-martial are authorized by Congress. The powers that bring them into being are designated and authorized thereto by Congress. The offenses which they may try and the law which they apply are prescribed and enacted by Congress. Their procedure is regulated under the law of Congress. Their sentences and judgments must be in accordance with the law of Congress. All this has been said too frequently by the Supreme Court of the United States to be doubted. They are, then, tribunals created by Congress, administering the law of Congress, and responsible to that law alone. It is established by an unbroken line of decisions of the Supreme Court that a court-martial is the creature of Congress, and as a tribunal it must be convened and constituted in entire conformity with the provisions of the statutes, or else it is without jurisdiction. (Dynes *v.* Hoover, 20 How., 82; Keys *v.* U. S., 109 U. S., 340; McCloughry *v.* Deming, 186 U. S., 62.)

(3) *The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Suprme Court of the United States, though this department still clings to them.*—Those teachings were:

(*a*) That courts-martial were not courts at all in any proper sense of the term;

(*b*) That, therefore, they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(*c*) That, therefore, judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(*d*) Being executive agencies, they are subject to the power of command.

Those teachings were all wrong, and the sooner we abandon them the better.

(*a*) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (Runkle *v.* United States, 122 U. S., 543, 555; McCloughry *v.* Deming, 186 U. S., 49, 68; Ex parte Reed, 100 U. S., 13, 21; Swaim *v.* United States, 165 U. S., 558; Keyes *v.* United States, 109 U. S., 336, 340; Grafton *v.* United States, 206 U. S., 333, 348; Smith *v.* Whitney, 116 U. S., 167, 178.)

(*b*) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (Ex parte Mason, 105 U. S., 696; Carter *v.* Roberts, 177 U. S., 496; Carter *v.* McCloughry, 163 U. S., 365; Grafton *v.* United States, 333, 348.)

(*c*) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land, is a bar against a second trial in any court of the United States. (Grafton *v.* United States, 206 U. S., 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the Grafton case had regarded it as settled law and justice, and sternly opposed the contrary view, that a soldier, though tried and punished by court-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and his rights to justice.

(*d*) The functions of courts-martial are inherently and exclusively judicial and therefore are not subject to the power of command as such, but only to judicial supervision established by Congress.

It has been said that the President has the power to establish a system of courts-martial, and that in deference to that power, therefore, courts-martial are subject to his control. This I deny. I do not say that if the Constitution had not spoken, the power and necessity of the Commander in Chief to maintain discipline in the Army would have been sufficient to authorize some system of

military adjudicature; and it may be that if Congress had not spoken under its power to make rules of government for the Army, the President could have filled the void. But when Congress does speak out of its power, the President may not speak within the same field. He may not array himself in opposition to the legislative rules governing the administration of military justice. Congress has designated what commanders subordinate to the President may convene courts-martial, and the President can not say otherwise. Congress has said what law they shall apply, and the President may not prescribe another.

Congress has regulated the punishment, and the President can not prescribe different penalties. The most that can be said is, inasmuch as Congress has not endeavored to deprive, even if it could deprive, the Commander in Chief of his power as a convening authority, the President may himself still convene a court-martial, and his name may, therefore, be added to that list of convening authorities designated by Congress. But that power is limited to him; he may convene courts-martial, but when convened they will be subject to all the law of Congress; he can not, by reason of that power, control courts-martial convened by others.

As was said in a report by the Judiciary Committee of the Senate, quoted with approval by the Supreme Court in Swaim *v.* United States (165 U. S., 558), with respect to the acts of Congress authorizing the constitution of general courts-martial by officers subordinate to the President, such acts are not restrictive of the power of the Commander in Chief, but—

"* * * merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who without such legislation would not possess that power, and that they do not in any manner control or restrain the Commander in Chief from exercising power which the committee think in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

His power of control over the judgments of courts-martial not convened by him comes itself from Congress, and on principle he can add nothing to it.

It is a fallacious reasoning to say that Congress, under its power to make rules and regulations for the government of the Army, may not confer any authority upon a subordinate official without conferring it upon the President as Commander in Chief, especially when the power conferred is inherently judicial. Such an argument was advanced by the Court of Claims, but it is to be observed that the Supreme Court did not adopt that view. On the other hand, it quoted with approval the report of the Senate Judiciary Committee, which was to the effect (1) that the subordinate authorities would not have had such judicial power without the authority of Congress, and (2) that the President did have the power to convene a court in the absence of legislation to the contrary.

(*e*) Court-martial procedure being judicial from the beginning to the end (Runkle's case, 122 U. S., 588, and all subsequent cases cited), the power of revision, if it exists, is also judicial and therefore not subject to the power of command.

It is a maxim of the law that judicial power can not be restrained; which means to say, it can be controlled by no power except by superior judicial authority drawing its power from the same source. This course of the judicial power of courts-martial is Congress; and only by Congress alone, or by some authority appointed by Congress, can a court-martial be controlled. A supervisory judicial authority Congress conferred upon the Judge Advocate General by the section discussed. The fact that the Judge Advocate General is in a military hierarchy and in an executive department does not subject his judicial or quasi judicial functions to the power of command. It is established by the decisions of the Supreme Court of the United States that an officer of an executive department charged by Congress with judicial or quasi judicial duty is not subject in the performance of such duty to any executive authority. Thus, the decisions of the Commissioner of Patents stand as the final judgment of the executive departments beyond the control of the Secretary of the Interior (Butterworth *v.* United States, 112 U. S., 50.)

The supervision which a superior in an executive department may have over an officer in the same department who performs judicial or quasi judicial functions is on principle limited to administrative and executive functions, and does not relate to the quasi judicial. It may be that the legal relation between the head of the department and the officer performing judicial functions is such as to make the decisions of the latter subject to the former's judicial review

but certainly not to the review of another and nonjudicial bureau of the same department.

(*f*) Such judicial revision is not subject, therefore, to the usual General Staff supervision.

The practice which obtains in the General Staff of passing upon the opinions of this office in such matters of pure law is, obviously, as hurtful to proper administration as it is inconsistent with legal principles. From the common-sense point of view alone, how futile it is to direct the attention of the General Staff, military experts presumably knowing nothing of technical law, to the control and supervision of the judicial functioning of the Judge Advocate General, who presumably is thoroughly skilled in matters of law and trained to judicial functions. I can conceive a large field in the realm of military conduct and policy—not of detailed administration—in which as I see it, the General Staff was created to function and in which good results will be achieved only when they are thus confined and devoted to larger tasks. I address myself to a situation and not to sporadic instances of such administrations. Considerable time of that great body and also of this office is consumed in conferences and discussions required by reason of such assumed power of supervision of the decisions of the office in matters of technical law and judicial duty. I can recall distinctly my inability to get a General Staff officer to grasp the usual technical significance and the propriety of applying the legal principles usually expressed in damnum absque injuria; res inter alios acta; generalia specialibus non derogant, and like technical concepts. I can recall a recent instance of a plain case of a lack of jurisdiction in which the Chief of Staff personally functioned for a considerable part of three days in an endeavor to make up his mind whether the error was jurisdictional, rendering the judgment null and void, or was error of law, simply requiring a reversal in my judgment. No war of any consequence can properly be conducted with such General Staff administration.

III. The whole argument on the other side is found in the contention that the word "revise" has no substantial meaning but has reference only to clerical corrections—One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view—That fact is this: The word "revise" is an organic word, which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

It is true that the word "revise" as descriptive of the duty of the Judge Advocate General is found associated in the Revised Statutes with other words that are not of an organic nature. But in construing the Revised Statutes, if there be doubt enough to justify construction, as there is not in this case, the antecedent legislation may and should be examined; and when examined, it can be seen that there can be no application of the doctrine of noscitur a sociis here; indeed, because of the established meaning of the word "revise" there could have been no application of the doctrine under any circumstances.

The act of July 17, 1862 (12 Stat., 598), was an act establishing anew the office of the Judge Advocate General, and no functions were established for that office other than that enjoining that—

"To his office shall be returned for revision all records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The declared purpose of having the records returned to this office was that the Judge Advocate General should revise them and make a record of his proceedings in revision.

Again, the act of 1864 (13 Stat., 145) created a separate bureau of the War Department for this special purpose in the following language:

"SEC. 5. There shall be attached to and made a part of the War Department during the continuance of the present rebellion a bureau, to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all courts-martial, courts of inquiry, and military commissions of the armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

And in the following section, descriptive of the duties of the Judge Advocate General, the statute uses the words, "He shall receive, revise, and have re-

corded all proceedings of courts-martial," etc. These words describe his duties, but the extent of revision is, of course, to be found in the fact that it was the sole and single purpose of the creation of the bureau. The duties established for that bureau in its origin are still included within those of the office of the Judge Advocate General. Is it not opposed to common sense and reason to say that the Congress of the United States went to the great length of creating a separate bureau of this War Department for no purpose at all, or, at most, in order that some inconsequential clerical change might be made upon the record?

It is to be observed that the unreported decision in the Masons case, a case which I have been familiar with since 1902, and which for the moment, and perhaps because of its utter lack of authority, I had forgot, holds that upon the doctrine of noscitur a sociis the word "revise" imports but clerical duties. All that that judge said was said without evidence of any study of the statute and without reference to antecedent legislation; and, furthermore, it was the most patent dictum.

But there is another reason why the word "revise" can not be applied to any substantial clerical change in the record. The record is made by the court; it can not be changed except by the court. The record can not be made elsewhere. There is, then, no field for any clerical revision.

To be guided by this line of argument would be to hold that Congress created an entire bureau, whose sole duty should be to dot the "i's" that had not been dotted, and cross the "t's" that had not been crossed, and correct errors of spelling and perhaps of grammar, and to substitute one's personal view of correct punctuation for that which the court reporter had adopted. In other words, Congress went to ridiculous length of establishing a bureau of the War Department where sole objection was to correct the clerical inaccuracies of a court reporter.

But Winthrop accepted this dictum, without examination, and we are engaged to-day in nodding acquiescence to a proposition which, had it come less well sponsored, would have been greeted with impatience.

IV. "Revise," in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

The Judge Advocate General's brief, though concurring in the argument that the word "revise" represents purely clerical duties, does in a rather incidental and delicate way suggest that the word "revise" as here used may mean a review for the purpose of correction. If that were the acceptable view of the statute, then Congress must have contemplated that the power of correction existed somewhere. But he does not follow that definition up or rely upon it to locate the power of revision. The Judge Advocate General, so far as I can find, has no real authority for any such definition. His own illustrations fail completely. If a proof reader revises a copy, he himself changes it so as to make it conform to some standard. The committee who report a proposed revision of the law to Congress do not revise the law; Congress does it. The committee do not revise the law; the legislature does, making the desired corrections as revised. Those were the practical examples the Judge Advocate General chose to rely upon.

(*a*) The ordinary meaning of the word "revise" is not to review for the purpose of corrections, but to perform the act of correction. Look up the word in the ordinary dictionary; look around your library at the "revised editions"; look at the "Revised Statutes," or "Revised Codes," and no doubt whatever can be entertained of its meaning. It is an active, decisive power that results in a change in modifications of the proceedings revised. Ordinarily "revise" is a broader word than "review," especially so in the literary sense; and the two may be distinguished in that the former is active and decisive, the latter passive, informatory, and advisory. In a legal sense, "revise" while less commonly used in Anglo-American law than "review" as establishing supervising or appellate power, seems to be synonymous with it.

(*b*) In its legal sense the meaning of the word, as evidence by a multiude of examples of its use, is unmistakable; and if the single example heretofore given of its sinifigcance when used in statutes were "persuasive" at all, those to be given now should prove absolutely convincing.

The Judge Advocate General says that such examination as he has been able to make of legislative precedents "fails to disclose a single instance in which the power to modify or reverse the judgments of inferior courts is deduced from the word "revise" without the addition of apt words specifically con-

ferring the power to reverse or modify." And then, after referring to the use of the word in the bankruptcy statute cited by me, he said:

"This legislative precedent as judicially applied would, if it were properly and accurately set forth in the brief, be most persuasive."

My reference and reliance upon the word "revise," as used in the bankruptcy statute, was quite justified as showing that the word "revise" as there used means exactly what is here contended for—changing the proceedings of the civil inferior courts of bankruptcy so that they shall conform to law. And the appellate power thereinbefore conferred in the statute was not what challenged the attention of the court as a measure of their power over inferior proceedings, but it was the word "revise."

But I submit the following, which ought to be conclusive:

(*a*) The word "revise" is the sole word used in the Constitution of Oregon to confer full appellate jurisdiction upon the supreme court of that State, and that court has given the word a fulsome meaning, even in the face of legislation evidently designed to limit it.

(*b*) The word "review" is used by the Constitution of North Carolina as the sole word for conferring full appellate power upon the supreme court of that State.

(*c*) The word "review" is used by the Constitution of New York to confer full appellate power upon the court of appeals of that State.

(*d*) Randolph's plan for the Supreme Court of the United States was contained in the following resolution:

"*Resolved*, That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate." Madison's Journal of Federal Convention, p. 62.)

(*e*) Section 24 of the Constitution of Illinois, 1818, provided "that the general assembly may authorize judgments of inferior courts to be removed for revision directly to the supreme court." This language is peculiarly similar to the language here discussed and none other was needed to confer appellate power upon the supreme court of that State.

(*f*) "Revise" has a meaning here contended for in Constitution of California, Article X, 1849, 1879; Constitution of Alabama, section 3, 1819, and Article IX, 1865; Constitution of Florida, Article XIV, 1838 and 1865.

(*g*) The Court of Customs Appeals has final appellate jurisdiction over decisions of the Board of General Appraisers, all of which is deducible out of the word "review." (Judicial Code, sec. 195.) The word as there used includes the usual appellate powers, including the reversal of the Board of General Appraisers when the court is satisfied that the finding is wholly without evidence or clearly contrary to the weight of evidence. (See U. S. *v.* Riebe, 1 Customs App., 19; Holbrook *v.* U. S., 1 Customs App., 263; Carson *v.* U. S., 2 Customs App., 105; In re Gerdau, 54 Fed., 143.)

(*h*) The decisions of the Comptroller of the Treasury over settlements of accounts by the decisions of auditors is described by the statute (act of July 31, 1894, 28 Stat., 207), as "a revision" and his decisions are referred to as "decisions upon such revision."

(*i*) Section 271, Revised Statutes, defining the power of the first comptroller, provides as follows:

"The first comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the first and fifth auditors of the Treasury forthwith to audit and settle any paricular account which such officers may be authorized to audit and to report such settlement for revision and final decision by the first comptroller."

(*j*) Section 482, Revised Statutes, defined the powers and duties of examiners in chief in the Patent Office and provided as follows:

"The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases; and, when required by the commissioner, they shall hear and report upon claims for extensions and perform such other like duties as he may assign them."

(*k*) Section 4914, Revised Statutes, defining the jurisdiction of the Supreme Court of the District of Columbia, provides:

"The court, on petition, shall hear and determine such appeal and revise the decision appealed from in a summary way on the evidence produced before the commissioner at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. * * *"

(*l*) "Review" is the sole appellate word used in section 330 of the Code of Arizona establishing jurisdiction upon the supreme court of that State.

(*m*) "Review" is used also to confer appellate jurisdiction upon the supreme court in section 4824, Code of Idaho.

(*n*) "Review" is thus used in section 7096, Code of Montana.

(*o*) "Review" is so used in section 654, Code of Utah.

(*p*) In State *v.* Towery, 39 So. 309 (Ala.), the question was as to the meaning of the word "revision" as used in a clause of the constitution requiring the legislature periodically to make provision for the revision of the statutes. The court there construes the word in the usual sense of review, alter or amend, and said with reference to the meaning of the word—"Such changes as are admissible are within the purview of the section."

(*q*) In State *v.* King County, 37 Pac. 489, 491 (Wash.), the court deduced its authority to review by way of certiorari an inferior court's decision out of the revisory." Even the dissenting justice in that case admitted that the word "revision" included the power here contended for, but held that in this case it had reference only to those judgments which were already within the jurisdiction of the court by virtue of some other appellate power.

(*r*) The word is, apparently, habitually used as defining the power of courts over municipal corporations, taxation boards, and insolvency proceedings (34 Cyc. 1723); and the word is used in that publication as indicating a revisory power over criminal sentences (12 Cyc. 783.)

The Supreme Court frequently alludes to its power "to revise the judgments" of inferior courts. (See E. G., the Dred Scott decision, 19 How., 453, etc.)

Of course the fact that appellate power is frequently conferred with great particularity in such terms as "revise, reverse, remand, alter, aemnd, and set aside" places no logical or legal restriction upon the word "revise," certainly not when it is used alone.

Eleven of the State constitutions confer full appellate power in one or two words, using none of those enumerated.

The term "revise" and "revision of proceedings," having this general significance, has been known to military law and procedure from time immemorial.

It was known to the early mutiny acts prescribing that no proceedings should be returned to be revised by the court more than twice.

In Tytler's Military Law (1806), page 173, it is said with reference to British military law that the King has no power of revision, but that that function belongs to the courts of justice. He further says—

"All, therefore, that is competent for His Majesty to do, if the sentence of a court-martial shall not meet with his approbation, is to order the court to review their proceedings, and even this power, as above stated, is limited; for the mutiny act declares 'that no sentence given by any court-martial and signed by the president thereof shall be liable to be revised more than once.'"

It is to observed that even at English law the power of revision of court-martial proceedings and sentences is clearly distinguished from the Crown's power of pardon.

"Revision of proceedings" and "proceedings in revision" are terms well known to Anglo-American military law with reference to the power of courts to reconsider and correct their own proceedings, judgments, and sentences.

In 6 Op. Atty. Gen., 203, Attorney General Cushing discussed this power of revision with great thoroughness, saying in that connection:

"It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence,"

citing for that authority Hough on Courts-Martial, page 29; McArthur on Courts-Martial, page 136; Griffith's Notes, page 90; Kennedy on Courts-Martial, pages 229, 290; Anon., Observations on Courts-Martial, pages 38-65; Tytler's Military Law, pages 170–338; James's Collection, page 556; Simmons's Practice, 389; De Hart on Courts-Martial, page 203; O'Brien's Military Law, chapter 23.

This procedure with the word "revise" as descriptive of it, is an established part of our own military procedure, which occurs in daily practice, is treated of in all texts and is recognized by that name by all our courts.

See Macomb (1809) Duane's Mil. Dic., 1810; Scott's Mil. Dic., '864; Benet's Military Law under "Revision"; also all military texts.

V. The word "revised," as a matter of fact, is in no sense ambiguous, and there is no room for construing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least, pronounce sentences invalid, and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

The meaning of the word is not fairly questionable. Furthermore, Senators in debate referred to the power conferred as that of a court of review. Congress seems to have had no doubt about it. In such a case practice can not govern.

In writing the opinion I went through the record books of a part of 1863, and my notes of that search reveal that Judge Holt's reviews very frequently terminated with a declaration which, by its form and tenor, indicated, so far as his office was concerned, judicial finality. It was common to conclude with the statements: "Therefore the sentence is inoperative," "therefore this fatal defect must prevent a confirmation of the record," "the sentence is fatally defective," "for error of law committed by the reviewing authority the sentence is inoperative, notwithstanding the confirmation of Maj. Gen. Hooker," "the sentence as it stands is inoperative," "the sentence is invalid and should not be enforced," "the sentence rested upon such a record should not be carried into execution," and such like expressions.

"Sentence is therefore inoperative" occurs eight times; record is fatally defective, and sentence should not, or can not, or must not, be enforced, or carried into execution, or confirmed, sixteen times. The record shows that, in the administration of those days, the Judge Advocate General was regarded both by the President and the Secretary of War as the law adviser upon matters of military administration and justice, and at least no power of command stood between him and those supreme authorities. It also shows that the Judge Advocate General very frequently, indeed one might say, habitually, returned the record direct to the reviewing authorities with instructions as to errors of law and pointing out the necessity for correction where correction could be made in order that the sentence be held operative. That the examination, if not revision, of the records might be the more expeditiously made an Assistant Judge Advocate General, representing preliminary the Judge Advocate General and his power, and not connected with any commander's staff, was stationed in a central situation with duty, as to proceedings, "to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commanders, that sentence may not be illegally executed." (G. O. 230, A. G. O., Aug. 16, 1864.)

VI. The Judge Advocate General of England certainly did have this power of revision. (I am not advised of his present authority.)

Clode (1869), vol. 2, pp. 359, 364, 360. While his letters patent do not clearly define his duties, it was prescribed therein—

"He exercises the powers of a supreme court of review, as regards the proceedings of all district, garrison, and general courts-martial whatsoever and whensoever."

The following is quoted from Jones's Military Law (1882), p. 94:

"The J. A. G. and his deputy are always civilian lawyers, while the deputy judge advocates, who in England attend at B. C. M., are always military men.

"The J. A. G.'s Department forms a final court of appeals and has the power of upsetting or 'quashing,' as it is called, all proceedings of C. M. and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

"The J. A. G. is a member of the Privy Council. He is generally chosen from among barristers who are members of Parliament, and they stand or fall with the Government to which they are attached.

"All the proceedings of G. C. M., which at home must be confirmed by the Sovereign, are sent to the J. A. G., and the Sovereign confirms on his responsibility as a Minister of the Crown, and acts on his recommendation.

"The J. A. G. is responsible to Parliament, hence a prisoner, if wronged, can appeal at law against him, for 'the Sovereign can do no wrong.'

"The duties of the J. A. G. are confined to the examination of the proceedings as to their legality, whether the sentences are within statute laws, etc. The expediency of carrying out the sentence, or as to remission, etc., is not his province; the C. in C. advises the Crown on these points." (Pp. 94–95.)

It must be remembered, too, that the civil courts of England exercise a far larger power over the judgments of courts-martial than do our own.

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

Nobody essays an answer. Doubtless a reviewing authority, by statute, may "disapprove" a sentence because it is null and void or because it is bad for prejudicial error of law, and I think that frequently it is said in our texts and in our practice that a sentence is "invalid," though not for jurisdictional error. The larger power, in practice, is exercised here in the department. It is extremely difficult for me to comprehend any reason that concedes to this department the larger power but denies to it the lesser one.

VIII. The necessity, in the name of justice, of locating this power in this department, and preferably in this office, where logically, and I think legally, it belongs, must be apparent to all who are familiar with the administration of military justice.

In the first half of November, while I was in charge of the office, I set aside the judgments and sentences in the cases of 19 enlisted men because of prejudicial other than jurisdictional error invalidating the judgment. The number in which on established principles such reviewing power should be invoked should be expected largely to increase.

Courts-martial are courts dealing with the right of life and liberty of all who are subject to their jurisdiction, a number already beyond a million, doubtless soon to pass into many millians, of our citizens. They are courts of law administering the law of this land, in accordance with the law of the land, for a great national purpose. Their judgments are judgments of law. Can it be said that their judgments are beyond all legal inquiry; that though they may be arrived at in contravention of all law, if the court, according to the usual narrow jurisdictional tests had jurisdiction, the judgment, though concededly wrong for error of law, is beyond all correction?

There is to-day, as never before, an urgent, impelling necessity for such revisory power; if not here, then elsewhere. It will not do to say that such errors of law affecting the proceedings to the great prejudice of the accused and rendering the judgment bad because thereof, are rare and for that reason may be ignored. That doubtless was the reason why the power was permitted to remain not fully used or to drop into desuetude. But this day finds the Army increased tenfold. A few more months hence it will have been increased twentyfold, and obviously a year hence the Army of the United States must necessarily, if we are to take the part in this war that this Nation purposes to take, consist of three millions of men. The officers of that Army must necessarily be largely untrained officers, conscious, of course, of their great power, required necessarily to exercise it, and exercising it necessarily without the most enlightened judgment or consideration. It will consist of men just come from the shops, the factories, and the farms, unused to Army life, with its peculiar customs and its rigorous duties, willing but uninformed. With such elements, errors upon the part of the officer on the one hand exercising disciplinary authority and on the part of the enlisted man on the other subjected to such authhority, must be exceeding numerous and resort to the disciplinary actions through the agencies of the court-martial frequent. The triers of the case will be officers of the same class, and so frequently will be the reviewing and approving authorities. Opportunity for resort to court-martial and opportunity for error in the courts-martial poceedings themselves will be largely multiplied over those that obtain in normal peace conditions. There is chance for grave error in the most enlightened legal system, but still greater chance in a legal system which necessarily must be administered by men uninformed in the law, and an immeasurably greater chance in the case of such an Army as ours must necessarily be. I must assume that no man with the interest of the Army and the country at heart and with the ordinary conception of the neces-

sity of maintaining justice in our institutions could doubt the advisability and the necessity of establishing here or elsewhere such revisory power.

I have no shame in confessing that I feel strongly about this, and not in any contentious way. I am not impelled to file this brief because the Judge Advocate General of the Army disagrees with me, nor the Chief of Staff, nor other authority. I am entirely out of the field of contention. I feel strongly about it as a matter between a man and his fellow men, between an officer and the men whom he should protect, between a man and the Army in which he serves, between a soldier and his Nation. What happened to these men can happen to me. A soldier has nothing but his service. He is honored by his professional reputation or dishonored by the lack of it. Society has established certain rules, which are its law and by which human conduct is tested. All lawyers, at least, understand the methods of applying those tests. If the test be not applied in accordince with the law, there has been no test. It is not sufficient to say that a system of administration of criminal justice may not be a fair and just system, though it provide for no appeal, though the fact remains that no enlightened system has ever permitted a judgment to remain as final when reached in contravention of the rules of law. The question here is whether or not, when, according to the well-understood principles of law and justice, a judgment is concededly and palpably wrong, it must remain and persist as the law of the land in condemnation of an individual while it is concededly wrong. It seems to me that a soldier, before suffering the extreme penalty of death or other serious punishment, should, on principle, be entitled to have the proceedings of his trial examined, not solely by the commander convening the court in the field, but by a separate and independent authority, who, skilled in the law, properly circumstanced, can with the necessary deliberation and considerateness pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such a remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed, I think, requires it to take.

CONCLUSION.

This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance, to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relations of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

S. T. ANSELL.

DECEMBER 10.

ANSELL EXHIBIT D.

COL. WAMBAUGH'S PROPOSED DRAFT OF REGULATIONS TO GOVERN THE COURT OF REVISION.

NOVEMBER 10, 1917.

Memorandum for Gen. Ansell.

Subject: Draft of an executive regulation establishing a national military court of revision.

1. Under the authority of section 1199 of the Revised Statutes of the United States there is established hereby in the office of the Judge Advocate General of the Army a national military court of revision with authority to revise the proceedings of all courts-martial, courts of inquiry, and military commissions.

2. The national military court will consist of three officers from time to time designated by the Judge Advocate General.

3. The national military court will take into consideration for purposes of revision such general court-martial cases as may be brought to its attention by any party in interest, or by any member of the court, or by the trial judge advocate, or by the officer having power to approve or disapprove the sentence, or by any judge advocate, whether identified with the case or not.

4. The national military court will take into consideration for purposes of revision such special or summary court-martial cases as seem to be of peculiar importance.

5. The power of revision belonging to the national military court shall not include the power to deal with a case before the officer appointing the tribunal has finally dealt with it and shall not include the power to admit new evidence; but it shall include (*a*) the power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense which in its opinion the evidence of record requires a finding of only the lesser degree of guilt, (*b*) the power to approve or disapprove the whole or any part of any sentence, and (*c*) such other powers as may be assigned to the court hereafter.

6. The national military court will disregard such irregularities as are not clearly shown to have injuriously affected substantial rights.

7. The Judge Advocate General will appoint from time to time officers to serve as counsel on each side of the cases considered by the national military court, and parties in interest shall also be entitled to counsel chosen by themselves.

8. The national military court will announce from time to time rules for its own procedure, not in conflict with regulations prescribed by the President, and not in conflict with the Constitution, statutes, and treaties of the United States.

9. The mere considering of a case by the national military court will not serve to suspend the execution of the sentence.

10. A decision of the national military court will not have validity until approved by the Judge Advocate General.

11. If so ordered by the Judge Advocate General a decision of the national military court will be made public and will be accompanied with an opinion stating the case and giving the reasons for the decision.

EUGENE WAMBAUGH,
Major, Judge Advocate.

ANSELL EXHIBIT E.

COL. WAMBAUGH'S SPECIAL BRIEF IN SUPPORT OF THE REVISORY POWER.

1. Section 1199 of the Revised Statutes of the United States, taking its language from acts of 1866 (14 Stat., ch. 299, sec. 12, p. 334), and of 1874 (18 Stat., ch. 458, sec. 2, p. 244), that:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

2. What is included within the power and duty of the Judge Advocate General to revise the proceedings of courts-martial?

3. The answer must depend upon the language of that section; and if the language be ambiguous or scanty, the meaning attached to it must be affected by the attitude of mind in which the language is approached. The language certainly is not verbose, though, as will be pointed out later, the chief word used is significent and enlightening, and there may be reason for discussing in a preliminary way, whether the power of the Judge Advocate General over the proceedings of courts-martial would be intended by Congress to be narrow or to be wide.

4. In favor of a narrow consideration there are at least two things to be said. In the first place, the testimony upon which the results of a court-martial are based can not receive from the Judge Advocate General the exact weight to which it is entitled, for stenography can not communicate the appearance of

witnesses, their hesitation or eagerness, and the impression by them fairly made upon the members of the court—in short, the atmosphere of the court room. In the second place, to interfere with the findings of the court-martial and of the appointing and reviewing authority may not unreasonably be deemed as endangering of the prestige of the officers thus overruled, and hence a procedure to the detriment of good order and military discipline.

5. Those considerations in favor of a strict construction of the Judge Advocate General's power and duty have been mentioned in order that they may be seen not to have been forgotten.

6. The considerations on the other side are much more weighty. To begin with, this is a remedial statute, and hence it is to be construed liberally in the light of the perceived evil or danger and in the light of the intended result. Notice the danger. It is, briefly, that skillful justice may not be received by persons peculiarly appealing to the desire of Congress that justice be done and be perceived to be done. The persons in question are, most of them, private soldiers, very young men, far from home, and from ordinary advice and influence, on the average not highly educated, not rich, performing, whether by reason of volunteering or by reason of drafting, a service which is of the highest importance to the Government. Whether language tends to achieve careful justice for such persons must be perceived to be intended by Congress to be construed liberally. Again, courts-martial, though their members are unquestionably conscientious, are composed of men not skillful in law or in the weighing of evidence, and these men sit amid surroundings not well adapted to the achieving of accurate results in such matters as these—surroundings not of books and of leisure, but of military cares, physical discomfort, and haste. In our Army the difficulties surrounding a court-martial have always been perceived; and, in consequence, the proceedings of a court-martial are, by our system of military law, inefficacious unless and until there is an approval by the authority appointing the court. Indeed, the court-martial itself—that is to say, the persons who are designated by the appointing authority, but who are commonly deemed the only members of the court—may not unreasonably be said to be treated by the law as no court at all, but as the equivalent of a commission making examinations and reporting recommendations. As the Articles of War of 1806 said (A. W. 65):

"No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same or the officer commanding the troops for the time being."

The articles of war in the Revised Statutes (A. W. 104) are to the same effect, viz:

"No sentence of a court-martial shall be carried into execution until the whole proceedings shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The words in the present article of war are substantially the same (Art. 46):

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

7. To refine, one might say that the war court is composed of both the court-martial and the appointing authority or, conceivably, that it is composed of the appointing authority alone. To go into refinements is unnecessary. What is important is to notice that though the court-martial and the appointing authority undoubtedly constitute a tribunal as regular as any other known to the law and a tribunal both argumentatively and expressly recognized in the Constitution of the United States, nevertheless, the tribunal, in each of its parts, needs supplementing.

8. It has already been pointed out that the proceedings of the members who participate in the hearing need and receive investigation by the appointing authority. It must now be pointed out that the appointing authority, though certainly deserving high respect, can not be said to be ideal for the present purpose. The appointing authority is a busy military officer whose specialty is not the ascertaining of law and the weighing of evidence. Although he has the assistance of a department or division judge advocate, the surrounding circumstances are not perfect; and, hence, it is easy to believe that Congress contemplated as desirable a substantial power of revision to the end that the soldier may find himself dealt with as carefully and skillfully as is a civilian offender. Further, even though the appointing authority be expert and full of leisure, there is a substantial danger that the appointing authorities throughout

the Army will not bring to pass equivalent sentences for equivalent offenses, and that thus, taking a wide view of the whole Army, there may be such lack of uniformity as may amount to grave injustice.

9. Further, it must not be forgotten that military tribunals are administrative in their nature, and that when customs officers and other administrative officers rule upon rights—though merely rights of property—it is not uncommon to hear that due process of law requires an appeal—whether an appeal to the courts or merely an appeal to a superior officer.

10. These are reasons enough for expecting Congress to establish for military tribunals some sort of appellate precedure, bringing the whole matter ultimately before an expert.

11. Such considerations furnish the atmosphere surrounding the statute, and they show that one should receive with cordiality the provision that the Judge Advocate General shall "revise" the proceedings of all courts-martial.

12. Yet, is not the word "revise" clear? Does it not mean some active procedure by the Judge Advocate General, and some procedure regarding matters of consequence? Can the word mean that the Judge Advocate General is merely to correct spelling, punctuation, and grammar; and if he is to do something more than that, who shall say that he is to stop before he has done the whole of the task which the foregoing discussion has shown to be desirable?

13. The word "revise" is not a technical word of Anglo-American law. It is used now and then in statutes. The construction which has been given to it in statutes not dealing with military matters shows that as regards procedure the word "revise" or the word "revision" has a wide meaning. It is enough for the present purpose to notice what is the meaning given in military law to the word "revise" and to its related word "review." It will be found that the word "review" has a wide meaning in military law, and that the word "revise" has a still wider meaning. The power of the appointing authority, called in military books the reviewing authority, is thus described in the present article of war 47:

"The power to approve the sentence of a court-martial shall be held to include:

"(*a*) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(*b*) The power to approve or disapprove the whole or any part of the sentence."

14. Wide as is the power of the reviewing authority, the power of revision is still wider. When the reviewing authority refers the case to the court-martial for revision—though, to be sure, that procedure is not mentioned in the Articles of War, and now rests wholly on military custom—the power of revision is understood to include a change in the finding and in the sentence. This wide meaning of the word "revision" is described in all books on military law. It is enough to cite the books from the beginning of the nineteenth century to the year of the adoption of the statute in question. The citations are as follows: Tytler's Military Law, 1806 edition, pages 169 and 338; McCombs' Martial Law, 1809 edition, page 32; Duane's Military Dictionary, 1810 edition, page 600, under the word "revise"; Scott's Military Dictionary, 1864 edition, under the word "revision"; Benet's Military Law, 1868 edition, page 169.

15. In the light, then, of the circumstances and of military custom, the Judge Advocate General's power regarding the proceedings of courts-martial, as now given by the Revised Statutes through the word "revise," goes beyond the mere examining and filing which was the power before this statute was passed. It is not surprising to find that the statute used a word which enlarged the Judge Advocate General's power, for the statute itself recognizes that it enlarges the Judge Advocate General's duties, since it expressly says:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

EUGENE WAMBAUGH,
Major, J. A., O. R. C.,
Assistant to the Judge Advocate General.

DECEMBER 1, 1917.

ANSELL EXHIBIT F.

GENERAL CROWDER'S SECOND BRIEF IN OPPOSITION TO THE REVISORY POWER.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 17, 1919.

MY DEAR MR. SECRETARY: Herewith is Gen. Ansell's reply brief on the question of whether or not appellate power to revise, modify, and affirm findings and sentences of courts-martial is, by the terms of section 1199, Revised Statutes, vested in the Judge Advocate General of the Army.

You will recall that on November 10 Gen. Ansell submitted, for your personal consideration, a brief which purported to find in said section this appellate power in the Judge Advocate General. His conclusion was reached on five main points of argument:

(1) That the legislative history of the statute shows that the intent of Congress was to vest the Judge Advocate General with his power;

(2) That the administrative history of the statute disclosed that the power had been actually exercised by Judge Advocates General of the Army during the Civil War and until about 1882;

(3) That the word "revise" (which was the only word that could be considered as such a grant), as used in other statutes, specifically in the Federal bankruptcy statute, had been discussed by a United States court as having sufficient amplitude to convey appellate power;

(4) That the courts of the United States had never passed upon the power; and

(5) That the Judge Advocate General of the British Army is vested with an analogous power.

You passed Gen. Ansell's brief to me and asked me to submit to you my views.

I replied to each one of the foregoing propositions, in substance as follows:

(1) That the legislative history of the statute was without significant incident;

(2) That the records of the Judge Advocate General's Office showed no exercise of this power by Judge Advocates General; but, on the contrary, disclosed many instances where such power, if it existed, would have inevitably been exercised had it been contended for, but which was not exercised.

(3) That Mr. John Tweedale, chief clerk of the War Department, in 1882, had made an affidavit for use in the case of In re Mason, to the effect that he, as chief clerk, knew of no instance where the Judge Advocate General of the Army had in any official communication or report relative to the proceedings of general courts-martial, proceeded to act as an appellate judicial authority; but that his action was only to revise; in other words, to examine and make recommendations, either to the general of the Army, when that officer had appointed the court, or otherwise to the Secretary of War.

(4) That the word "revise" was not relied upon in the Federal bankruptcy act to confer appellate power, which power was granted in express terms elsewhere in the same section cited in Gen. Ansell's brief, and that in its commonly accepted definition the word "revise" did not import such a grant.

(5) That the United States Circuit Court for the Northern District of New York had considered the question almost in the precise terms in which it was presented for your consideration, and had explicitly denied that section 1199, Revised Statutes, granted any such power to the Judge Advocate General.

(6) Finally, that a study of the organization of the British Army disclosed that the judge advocate general of His Majesty's forces had not exercised such powers.

Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addressed himself to the evils he would remedy. He shows that a great number of officers, not familiar with court-martial procedure, have lately been included in the Army, and that there is danger of grave error in court-martial proceedings, even when reviewed by judge advocates and approved by duly constituted reviewing authorities. He shows that the exercise of the pardoning power is often not sufficient to restore an officer or a soldier, who has been wrongfully convicted, to his full rights. He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors

of courts-martial and reviewing authorities. He cites again the mutiny case, to which your attention has heretofore been called, as an example, and says, I think justly, that there are other cases, happening particularly since the outbreak of war, which demand the exercise of such corrective power; and down to this point I follow him with substantial concurrence without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes.

Gen. Ansell's argument presents, about as strongly as it could be presented, the necessity for an appellate power. But this question is not a new one. Whether such a power should be created and whether the service would gain or lose by such provision has been discussed in service literature since 1885; but never, so far as I can inform myself, has it been suggested in this prior discussion that this appellate power could be deduced from section 1199, Revised Statutes.

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often, and too clearly to require citation of authorities that it is no objection to a grant of jurisdiction that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedure, if it attain its primary end, discipline, must be simple, informal, and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our Armies. Such a proposition should hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be given to the necessity of doing that very thing.

You have recently issued orders which will be corrective of some of the embarrassments referred to by Gen. Ansell, and I shall shortly submit for your consideration further orders which will, I think, carry corrective action still further and perhaps afford the measure of relief called for.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

ANSELL EXHIBIT G.

THE SECRETARY OF WAR'S RULING.

DECEMBER 28, 1917.

Memorandum for Maj. Gen. ENOCH H. CROWDER:

I have read with interest and close attention the vigorous brief of Gen. Ansell on the question as to whether or not appellate power to revise, modify, and affirm findings and sentences of court-martial is conferred upon the Judge Advocate General of the Army by section 1199 of the Revised Statutes.

It is impossible not to admire the earnestness and eloquence with which Gen. Ansell presents his view. For the most part, however, the argument runs to the necessity of the power rather than to its existence. It may very well be that this power should exist, either in the Judge Advocate General or in the Secretary of War, advised by the Judge Advocate General, but if I were asking Congress at this time to give that power, I should feel the necessity of so limiting the language of the donation as not to paralyze the disciplinary power of the commander in chief of the Expeditionary Forces who, it seems to me, is in a situation where grave consequences might be entailed by inconclusive action on his part.

Generally, the administration of justice is a compromise between speed and certainty. The close cases and majority-of-one decisions of our supreme courts would justify the belief that, if there were other courts more supreme in many of these cases different results might finally be obtained; and yet somewhere there has to be an end to litigation, and to that end, therefore, finality is always a question of judgment, resting in legislative discretion. There is nothing intrinsically abhorrent in the idea of finality in judgments of courts-martial

approved by the reviewing authority. Whether or not, however, injustices are likely to arise from such a course which would outweigh in gravity the delays necessary to perfect a complete review on appeal is a question about which differences of opinion may well exist.

These considerations have little to do with the immediate question, which is whether or not the use of the word "revise" is legally a donation of appellate jurisdiction. Gen. Ansell cites the act of July 17, 1862 (12 Stat., 598, p. 20 Ansell brief), as directing the return of records of courts-martial to the office of the Judge Advocate General for purposes of revision—on page 21 of his brief, he cites the act of 1864 (13 Stat., 145) generally to the same effect. It would be interesting to know whether summary execution of judgments of courts-martial was at that time also contained in the laws of war. Obviously, if such summary executions were authorized, the subsequent return of the record for revision could not be held to be for appellate review, since it would be a vain thing to review the record after the execution of judgment.

If the word "revise" is to be held to confer appellate jurisdiction, as distinguished from jurisdiction in error, what provision has been made for a retrial or trial de novo, for the summoning of witnesses, and for doing what justice may require in the case. For instance, a report may come to the Judge Advocate General's office which contains radical errors of law. Has the Judge Advocate General the right to set aside the proceedings and direct a new trial to be had before the same or a different court, or may he summon the parties before him with the necessary witnesses and become himself a court-martial, or is he remitted to a quashing of the whole proceedings and restoration of the defendants to their original status, protected from subsequent prosecution by the bar of former jeopardy? In other words, just what procedure is contemplated in the cases which Gen. Ansell has in mind?

I have not the facts in the mutiny cases in mind, but as I recall it, Gen. Ansell ordered the discharge of those convicted of this mutiny, and I assume he felt himself without power to direct the trial of the officer whose misconduct caused the offense. I presume he felt equally without power to examine into such minor derelictions as may have attended the conduct of the men tried for the mutiny, who, even though they may have been guiltless of mutiny, may yet have been derelict in other ways with regard to that incident, which a complete administration of justice could be in a position to take notice of.

I would be glad to have your views upon the two questions suggested here: (1) With regard to the coexistence of the power of summary execution with the power of revision in 1862 and 1864, and (2) The sort of appellate procedure involved in the power to revise, according to the view accepted by Gen. Ansell and his associates.

I am not undertaking to decide this question at this time, but I would be glad to have the further orders to which your memorandum of December 17 refers brought to my attention as early as possible, with your own recommendations as to how far we should go in this matter by executive order, and to what extent legislating redress should be sought.

I am sure that you and I both sympathize with Gen. Ansell's main purpose, which is to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of judgment at the hands of those who try him for offenses involving either his property, his honor, or his life.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

ANSELL EXHIBIT H.

GEN. ANSELL'S MEMORANDUM RECOMMENDING THE ESTABLISHMENT OF A REVIEWING OFFICER IN FRANCE.

OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 22, 1917.

Memorandum for the Judge Advocate General.

Subject: Certain administrative measures affecting justice and discipline in the Army.

1. It is my judgment that you should give immediate consideration to the following matters:

(*a*) Regardless of your views or mine upon the question of the revisory power of this office, orderly administration as well as justice requires that sentences of death and sentences resulting, if executed, in immediate expulsion from the Army, should not be executed until the proceedings may be reviewed for prejudicial error by an officer of and representing this bureau, and not of the administrative staff and representing the officer ordering the court and his power. In order that there might be no delay in such review of proceedings, reviewing authorities should be instructed to forward to the reviewing officer of this bureau all proceedings without a moment of delay.

(*b*) The above consideration would require the establishment in France of such a reviewing officer, with duties as indicated. This administrative method would involve nothing of inhibited delegation of power. Assuming, as I have held, that the revisory power is in the Judge Advocate General of the Army, it is not necessary as a matter of law, as indeed it is not practicable as a matter of fact, that that officer function personally in each case. The function is a function of office; the statute originally establishing the Bureau of Military Justice clearly so indicated, provided for assistants and empowered them, in effect, to perform the duty, under the general supervision, of course, of the head of the office.

* * * * * * *

S. T. ANSELL.

ANSELL EXHIBIT I.

MEMORANDUM IN SUPPORT OF AN EXTENSION OF THE PROPOSED ADMINISTRATIVE REMEDY AND THE ESTABLISHMENT OF A REVISORY AUTHORITY IN FRANCE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 9, 1917.

Memorandum for Gen. CROWDER.
Subject: Revision of court-martial proceedings.

1. I have just been advised of the step taken by the Secretary of War to prevent the execution of possible illegal death sentences in the United States by requiring that the record be transmitted to the department and reviewed here, that its legal correctness may be assured before execution. While a step in the right direction, I deem it my duty to say that in my judgment it falls short of the requisite degree of remediality in that it is not applicable generally nor to all those sentences which, unless stayed, mean separation of a man from the Army and placing him, in a practical sense, beyond the reach of remedial power subsequently exerted.

2. I see no reason why the same measure of relief should not be extended to dismissal and dishonorable discharge; nor do I see any reason why it should not be made applicable to our forces in France, as well as elsewhere; all of which could, with the establishment of a proper and practical system of revision, be done without evil administrative result and to the advantage of law and justice.

3. This would require the establishment in France of an office representing the functions of the Judge Advocate General, the duties of which would be practically those defined in G. O. 230, July 10, 1864, establishing such reviewing office in Louisville. For your information, I quote that order.

"I, Col. William M. Dunn, Assistant Judge Advocate General, will take post at Louisville, Ky., at which place the office of Assistant Judge Advocate General is hereby established.

"All records of court martial and military commissions which are required by Regulations to be forwarded to the Judge Advocate General, will be sent by officers ordering such courts or commissions within the military departments of the Ohio, the Tennessee, the Cumberland, and Missouri, Arkansas, and Kansas to the Assistant Judge Advocate General, at Louisville.

"With reference to records of courts and commissions it will be the duty of the Assistant Judge Advocate General to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commander, that sentences may not be illegally executed. He will forward all complete records to the Judge Advocate General, but will not be expected to prepare reports on them unless specially instructed to that effect by the Judge Advocate General.

"II. The Assistant Judge Advocate General will be allowed the number of rooms as office, and fuel therefor, assigned to an Assistant Quartermaster General in paragraph 1068 General Regulations.

"By order of the Secretary of War:

"E. D. TOWNSEND,
"*Assistant Adjutant General.*"

Such an office located conveniently to our general headquarters, could give that thorough, disinterested, and judicial review of such sentences necessary to assure their correctness without considerable or injurious delay.

4. The review of all cases including those which carry sentences separating a man entirely from the service, should be expeditious—not so much that punishment shall be swift as that injustice be not suffered. The power of revision should not be limited to approval or disapproval, but should include all powers possessed by reviewing authorities. When I wrote the original opinion upon the subject I had several of the assistants suggest regulation to govern the exercise of such power and it was then generally agreed that—

"1. The power of revision shall not include the power to deal with the case before the officer appointing the tribunal has finally dealt with it, nor the power to admit new evidence or otherwise retry the facts.

"2. It shall be confined to a review of errors of law injuriously affecting the substantial rights of the accused, and as thus confined and for the limited purpose of corrections such errors of law it shall include—

"(*a*) The power to declare a proceeding, finding, or sentence void for want of jurisdiction.

"(*b*) To disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the evidence of record requires a finding of only the lesser degree of guilt.

"(*c*) To disapprove the whole or any part of any sentence.

"(*d*) Such other revisory power not exceeding the general scope and purpose herein prescribed as may be found necessary for the correction of such errors.

"3. In a case in which such power is inadequate for the correction of such errors the power shall include the right to return the record to the proper authority that the tribunal may make the necessary revision, or to transmit it to the Secretary of War with a recommendation for a proper exercise of the pardoning power."

5. I think no doubt need be entertained but that such a system of revision would be workable, nor is it of more than academic interest to determine whether the power finds its source in the inherent relation of the President to the Army, or in the statutory donation of Article 38, or in the revisory functions of the Judge Advocate General established by section 1199, Revised Statutes, though, of course, I think it is clearly established in the latter section and not otherwise.

S. T. ANSELL.

ANSELL EXHIBIT J.

GEN. ANSELL'S MEMORANDUM COMMENTING UPON THE PROPOSED ADMINISTRATIVE REMEDY.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 12, 1918.

Memorandum for Gen. CROWDER:

1. You want my views upon Maj. Davis's proposed rule of procedure.

(*a*) It is, if legally correct, a step—though a weak and uncertain step—in the right direction, in that it gives large partial recognition to the existence of a power somewhere which will prove helpful and salutary.

(*b*) It is faulty as a definition of revisory power, in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed.

(*c*) Above all, however, it is, I regret to say, fundamentally wrong as a matter of law. The theory is for the reviewing authority to approve the judgment but suspend its execution until he can be advised of the correctness of the judgment itself; and if advised of its incorrectness, then to revise it him-

self. Having once approved the judgment, it passes beyond his power to amend, and such power of amendment, if it exists, must be found elsewhere. On the other hand, if the stay of execution affects the judgment itself and makes it conditional, or holds it in gremio legis, as it were, awaiting further action by the reviewing authority, then it is not final and can not be revised here at all. If the reviewing authority does not take final action, there is nothing for this department to revise. If he does take final action, then the judgment passes beyond his power to revise. Take those sentences revised in this office in due course and without stay, which will constitute the great majority of cases. In such cases the action of the reviewing authority is unquestionably final; and if there is to be revision of the judgment at all, it concededly must be done by some authority other than the reviewing authority. In such cases surely the department would have to exercise the power. Viewed from whatever angle, it is perfectly apparent that the source of the authority is in this department and must be exercised by this department, if exercised at all. No system can be devised whereby the convening authority revises his own judgment at the mere suggestion of this department.

(*d*) The rule, even if it were unquestioned as a matter of law, is contrary to all administrative principle. The corrections to be made are corrections of errors of law discovered upon review here. What reason can there be to require this office to review for errors of law and then be denied the power of correction? In any system of law jurisdictions must be defined. Powers must be located, and they must be powers, not requests. If left undefined, or resting upon mere comity, the system is not likely to stand. The test would come sooner or later, after perhaps a multitude of disagreements. It adds to the administrative burden and the time required to finalize a judgment.

2. I wish I could give concurrence to something which, though less than the full power, would be satisfactory to you and to the Secretary of War, and would serve, at the same time, as a partial remedy. I can not. I may be permited to say, however, that the limitations which the rule seeks to place upon the exercise of revisory power doubtless have their origin in a fear of the consequence of a full exercise of that power. Not sharing that fear, I can not sympathize with the limitation. Even if I could agree, as I can not, that such limitation has a basis in law, the power, if it exists at all, should be exercised in full. Otherwise, it should be entirely denied. Safety lies in taking one course or the other, and not in a compromise.

3. I have given this question of revisory power the best that is in me. I see no reason whatever to hesitate at the adoption of that definition of revisory jurisdiction which is found in my recent memorandum and which was adopted after most thorough consideration upon the part of many of the assistants of this office as what the law requires. I do not believe, as much as I should like to believe, that what Maj. Davis proposed is sound in law or will prove safe in practice. I regret, therefore that I can not advise you to adopt it.

S. T. ANSELL.

Mr. ANSELL. The War Department disagreed with my view, they adhering to the opposite theory, that these courts are such agencies, have such a relation to the military commander, that when he once puts his stamp of approval on what they do, it passes beyond all corrective power.

There occurred, however, a rather tragic case, contemporaneously with the pendency of these two views in the department, and that case occurred in the very department that the mutiny case had occurred in, and will show you what I consider the chief defect among many great defects of the existing system. There had been a terrible crime committed on our border in Texas by negro soldiers, and those men had been tried for that crime, and, I say, while this difference of view was pending for solution before the department, we were acquainted by the press one morning with the fact that these soldiers had been executed, before we had heard of it or had received the record, notwithstanding the law provides that the proceedings must be sent to the office of the Judge Advocate General for revision.

My understanding of that case is that the portion of the official record completed daily was passed by the judge advocate of the court to the convening authority—the major general commanding that department—who looked over it daily as he received it, and when he had received the last day's record, why, he considered that he had reviewed the case. It met with his approval, and within a short time thereafter, either the next morning or the next day after the last day of the trial, these soldiers, numbering a dozen or more, were executed, leaving the Judge Advocate General of the Army to perform whatever functions he had under section 1199 of the Revised Statutes some four months after these soldiers had been buried.

That occurred to me as a useless and futile proceeding, certainly doing the condemned men little good on this earth.

Senator CHAMBERLAIN. These men in this case had been executed before the Judge Advocate General acted?

Mr. ANSELL. They had been executed before the records had been dispatched from the office of the department commander. The records were not received in the office of the Judge Advocate General until some three or four months after the soldiers had been hanged.

Now, I am not saying but that the record justified the execution of those soldiers; that is not my point. I have never examined the record myself. But the time to determine whether the record justified the execution, was before the men were executed. But, above all, whether the execution was later found to have been justified or not, if the authorities here had any statutory duty to perform in the premises, how could they effectively perform that duty?

To show you that we did move forward, in spite of the rather crystallized static views of the War Department during the war, afterwards there arose what might be called a companion case to these cases to which I have just referred. I refer to the Rockford cases of rape.

Senator LENROOT. Where was this?

Mr. ANSELL. At Rockford, Illinois. The military authorities there apparently were desirous of taking the same expeditious course in the cases of those soldiers, and besought the office of the Judge Advocate General under General Order No. 7 to make a very expeditious review of those cases in order that there might be another very expeditious expiation of the offense. I said that there would not be that kind of an examination. If there was any duty imposed on our office under the law—it would be performed in a legal, and as far as possible thoroughgoing, way. Without going into that record it is sufficient to say that under the ruling made by me we did set aside that entire proceeding, and we did order a new trial—that is, the President did, upon my advice—and the men have been retried, with what result I do not know. I will prophesy that some of them will be acquitted on a fair trial. But that case is, to my mind, illustrative of what can happen under this system, under the theory that a court-martial is an emergent, exigent court or agency.

Senator LENROOT. Do I understand that the department has reversed its view in regard to courts-martial?

Mr. ANSELL. The department has at times modified its views. It modified its views, Mr. Chairman, when, as a result of my insistence

that executions such as those that occurred in Texas ought to be suspended, at least until somebody up here could review that record, they assumed power, notwithstanding their proposition that the commanding general's power was absolute and not subject to any superior's demands or commands, to issue what is known as General Order No. 7, which was a general order published by the War Department to the effect that, notwithstanding this supreme power of a commanding general to execute these sentences of which he was the final arbiter, nevertheless in all sentences of death, the execution of which placed the victim beyond curative action, the commanding general would suspend his authority until after he had been advised by the War Department.

Senator CHAMBERLAIN. That is only in cases of death sentences?

Mr. ANSELL. Of death sentences; later amended, at my insistence, to include sentences of dishonorable discharge and dismissal from the Army. See Exhibit I.

Senator LENROOT. In the Rockford case, in which I think you said the President ordered a new trial, was that in the form of a formal order or in the form of advice to the commanding general?

Mr. ANSELL. That was in a formal order with respect to certain cases that had to come to him for confirmation anyway. In certain few cases sentences have to be confirmed by him; and my recollection is that in the other cases, not of sentences of death but of long terms of imprisonment, in the same case, as to codefendants, he directed—I think the language would justify that term—the commanding general there to have a new trial.

It ought to be said here that the War Department, quite inconsistently, I think, had assumed the power from somewhere to set aside judgments of courts-martial where the department could say that the court was entirely without jurisdiction, and the judgment was entirely void—not voidable because of error, but void; not reversible, but absolutely void—and said that in those few cases they would undertake to set aside the judgment; denying themselves, at the same time, however, the power to review the judgments of courts-martial for errors of law that rendered the judgment illegal.

Senator LENROOT. Do you think that is an inconsistent position?

Mr. ANSELL. Yes, I think it is very inconsistent.

Senator LENROOT. In one case there would be no court-martial at all; it would be entirely without the law.

Mr. ANSELL. But who can say that a thing is entirely *coram non judice?* Can one at will dispute the judgment of a court on the ground that it has not jurisdiction? It requires judicial determination. Of course, if the court has not jurisdiction, its proceedings can be attacked collaterally; but judicially, all the same. It is an exercise of a revisory power, to declare a judgment null and void.

Senator CHAMBERLAIN. Where did they claim to get that authority?

Mr. ANSELL. Nobody has ever known.

Senator CHAMBERLAIN. It must be from section 1199 of the Revised Statutes.

Mr. ANSELL. It ought to be. I do not know. I have asked that. Certainly I would not have allowed that question to pass unexpressed.

Senator CHAMBERLAIN. It gives a power to revise; that is, a power to set aside.

Mr. ANSELL. I think my brief, if the gentlemen of the committee are interested in it, will set forth clearly and fully my views, and I assume that the briefs on the other side will set forth clearly and fully the opposite views. I only call your attention to the fact that the War Department would stay its hand in a case where they could say that the court was without jurisdiction. In other words, they necessarily would exercise some supervisory jurisdiction over courts-martial.

Senator CHAMBERLAIN. But they did not exercise that same power where there was no evidence to sustain a judgment?

Mr. ANSELL. No, sir. I have tried to do justice by calling much error jurisdictional error. For instance, I have held in some flagrant cases—and I think I would be backed by authority in doing so—that notwithstanding the fact that the accused nominally had counsel, if that counsel were so incompetent that by reason of that the man did not get a fair trial, that his defense was not presented, he was denied the substantial right of counsel. If in such cases the commanding officer details a man whom he designates as counsel, but the man performs none of the duties, and whatever he does perform is injurious to the case of his client, I would say in that case that the accused had been denied the substantial right to the assistance of counsel. Now, if a man is denied, by administration of the court, this great right, in my judgment it is tenable to say that that court becomes deprived of jurisdiction from that moment on. It may be disputable, but I would hold so; certainly in our situation, where no other means could be employed for correction of that judgment.

Let us take, for instance, the case that I have called the companion case to the cases in Texas. You saw that the soldiers in Texas were hanged before the War Department even knew, officially, of the trial; that is, before the records were received at the department. But we exercised the supervisory power to stay the hand of the commanding general by law until we could look at the record in these Rockford cases, in my judgment a partial exercise of this very power that I contended for. If an appellate court should undertake to order an inferior court to stay its judgment, or issue a supersedeas to that court, it would surely be exercising a revisory, supervisory, or appellate power by so doing.

I mention these cases because they are analogous; they are companion cases. One of them marked the beginning of the war, and the other nearly the ending of the war.

In the one case a great number of soldiers were hanged before their cases had been reviewed. In the other case the military authorities wished to hang a great number of soldiers upon a very expeditious review of their cases, which review would not have taken place at all except for this partial exercise of this appellate or revisory power. In that case some twenty-odd men were to be tried jointly for the single alleged offense of rape. Counsel was notified by the commanding officer on Saturday afternoon at 3 o'clock, over the telephone, that he was to perform the duties of counsel for all these men; on Sunday at noon the court convened and proceeded with the trial of these cases; and at the convention of

the court, as I understand it, for the first time counsel was advised of the charge and furnished copies of the charges; they were proceeding to a summary trial of twenty-odd men jointly charged with a capital offense. Counsel moved, naturally, properly, for a continuance, that he might prepare his defense. "Not granted"; on the ground that the division was needed in France, that it soon had to go, and it would be very embarrassing, administratively, to have any delay in this case; and the commanding general had communicated his desire to the court that it should proceed forthwith to a trial and conclusion of the case; therefore the motion for the continuance was denied.

The first session of the court lasted until well after midnight on Sunday night, so that counsel had no time whatever to prepare. And then, as might have been expected in these cases, there were variant defenses, of course, and conflicting defenses, and we had the situation of a single counsel undertaking to represent these codefendants who were presenting conflicting defenses. We had there the spectacle of a counsel cross-examining his own client, for instance, as must be the case where such conflicting defenses are presented by single counsel.

Every error in the calendar of errors was unquestionably committed in that trial; and yet, without this power to review that proceeding, the result must, of course, have been in accordance with the sentence—death for these men.

Senator CHAMBERLAIN. Were they convicted?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And it was approved by the commanding officer?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And then it reached the Judge Advocate General?

Mr. ANSELL. Yes; and it was set aside. And nobody could have done otherwise—no lawyer.

Senator CHAMBERLAIN. It was not for lack of jurisdiction?

Mr. ANSELL. In order that I might be on the safe side, I held that the error was annihilating as well as simply reversible. I said that when men were railroaded—using, of course, language that was more judicial than that—as these were; when men had no counsel, as these had not—referring, of course, not to the competency of the counsel, but the situation in which he found himself—that the court was ousted of its jurisdiction from that point on, and its proceeding was not a trial at all. I said that these and other numerous errors were so fundamental as to annihilate the judgment, presenting a case for the civil judiciary to take a hand in, if it chose, by way of habeas corpus.

But I said even if it should be held that this error was not annihilating error, it was clearly such as to require a reversal of that judgment, and in such a case the power to reverse ought to be execised, and surely the power to reverse included the power to order a new trial. I put it up on both points.

Senator LENROOT. Have you any precedent where a court having once acquired jurisdiction it was held that it should be ousted from its jurisdiction because of conduct during the trial?

Mr. ANSELL. Yes; I have had occasion to brief that question. Without referring to the authorities now, because I am not sufficiently familiar with them, I will say they exist. If a mob, for instance, should take charge of the court room, I presume that nobody would doubt that that court ceased to be a court from that moment. I should say that, notwithstanding an arraignment, and not disputing the attachment of jurisdiction originally, and not disputing the general jurisdiction of the court to try the case, if the court should deliberately say, "You shall not have counsel," there a fundamental right of that man is denied. If the court should proceed after that—I am not referring merely to the failure to grant a continuance, which lies within the jurisdiction of the court, but to the flagrant denial of the right to have counsel, or the flagrant denial of a man's right to witness under the law and the Constitution—it would thereafter proceed without jurisdiction. I think we have many cases of that kind.

My understanding is that if during the progress of the trial what may be defined to be a fundamental or constitutional right of the man on trial, be denied him by the court, that error may become annihilating error to which habeas corpus might lie. Naturally the court would not lean to declaring it to be such a denial of justice as to work an ouster of jurisdiction except in the most flagrant instances of violation of constitutional provisions designed to protect the rights of a man throughout the trial. If, for instance, he were excluded from the court room during the trial of a felony—excluded by the power of the court, and unlawfully so—I presume that that would work an ouster of jurisdiction.

There are, I assure you, many cases where it has been held that a criminal court may so conduct itself as to deprive a man of a constitutional right of protection during the progress of the trial, resulting in annihilating error; not mere error or law, but an error in regard to a fundamental right, rendering the judgment void.

Senator LENROOT. Yes; I understand that; but I was not aware of the fact that it would go to the extent of an ouster of jurisdiction. But that is neither here nor there.

Mr. ANSELL. Of course that question, as I recollect, was brought up in the Frank case. It would have been conceded there, I suppose, that if mob rule had dominated the proceedings, the proceedings would have been proceedings beyond the proper jurisdiction of the court.

Senator LENROOT. I think the court would have ceased to exist, in that case.

Mr. ANSELL. Of course I do not mean physical displacement of the court. I do not think that would be required.

Well, in any event, the situation when this war began was this: No matter how illegal the judgment, it could not be reviewed. I myself believe if we could have established any revisory power, the exercise of that power, and the incidental power to issue rules and orders requiring the courts to keep within reasonable legal limits, would have gone far to prevent and correct what I call the gross injustice due to court-martial procedure during this war. Whether all will agree with me that there has been such gross injustice, I know not. It seems to me to be now a fact well established. I am

satisfied of it. But if we could have established this power there would have been much less of it, because these courts would have been controlled by principles of law instead of by the arbitrary power of military command.

You gentlemen have a bill before you the origin of which is, briefly, this: These gross injustices could not be kept inarticulate even during the war. Complaints were made to Congressmen, to me, and to others. Finally those complaints found congressional expression through the then chairman of this Committee on Military Affairs, and a bill was introduced by him the chief purpose of which, as I recall it, was to establish beyond any dispute this revisory power, and otherwise to subject the power of military command, in its relation to court-martial procedure, to government by legal principles. When that Congress was about to expire and the bill had not been passed, I was asked by the chairman of the Committee on Military Affairs to draft a bill expressive of my views, and what seemed in a large way to be his; and I was subsequently asked by the Secretary of War, in an era of good feeling, to do the same thing.

On April 2, having been invited by the Secretary of War to express my views suggesting remedies for the existing court-martial system, I communicated with the Secretary of War as follows, indicating what I believe to be the defects of the existing system, and enunciating the principles upon which the bill before you is based. [Reading:]

[First indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
April 2, 1919.

TO THE ADJUTANT GENERAL
(Through military channels; for consideration by the Secretary of War):

I. Availing myself of the authority of the above memorandum, I will state here briefly my observations, as they may be found in various memoranda and statements of mine within the department, concerning the deficiencies of the existing system of military justice:

(*a*) First, speaking generally, and of vices which in my judgment destroy every assurance of justice:

(1) The laws of Congress of an organic character should accord with and proceed in furtherance of the fundamental theory that courts-martial are inherently courts, their functions inherently judicial, and their powers must be judicially exercised; and such laws should, under penalty if need be, forbid the department and the Army to disregard the sacred character of these judicial duties and functions.

(2) Organic statute should require that the system be law-controlled, and not controlled as it now is by men, and military men at that, whose training is rather away from judicial appreciations.

(3) Organic law should require that the fundamental rights of an accused, declared in our bill of rights, be recognized and protected throughout the proceeding.

(4) Organic law should abolish the do-as-you-please character of this penal code. Please look at the 42 punitive articles and you will observe that they neither define the offense nor the penalty. In every article the offense is to be punished "as the court-martial may direct" or "with death or as the court-martial may direct" or "with death." Congress tells the courts to do as they please. Such delegations of penal power are intolerable.

(5) Such legislative delegations and legislative indefiniteness are invitations to military authorities, from the President down, to take unrestrained action in specific cases and to resort to mere administrative palliatives to meet a general situation. Administrative expedients which, whether good or bad, may be undone as easily and by the same authority as they were done, should not be accepted as remedies for fixed perversions of military justice;

for these can never be corrected within the department within which they arise and by which they are warmly supported.

(6) Such lack of legal control, with the corresponding subjection of judicial functions to the will of military authority, has led to an Army attitude of mind which is intolerant of those methods and processes which are necessary to justice.

(7) Organic law should restrain commanding officers in their altogether too frequent resort to court-martial in general and their too frequent reference to a general court of trivial charges which ought not to be tried at all, or tried by an inferior court, and not referred to a general court with its unlimited power of punishment, and the statutes should compel, by applying penalties if need be, a recognition of the substantial rights of an accused at every stage of the proceeding.

(*b*) The statute should require that no charge be referred to any inferior court-martial until the commanding officer convening the court shall have made a thorough investigation of the charge and make minutes of the evidence, or shall have had an especially qualified officer to do the same for him, nor until he shall have certified that, in his judgment, the case can not be properly disposed of without trial by court-martial.

(*c*) The statute should require that no charge shall be referred to a general court-martial for trial until after the judge advocate on the staff of the convening authority shall have certified on the charge that the papers show that a thorough investigation has been made and that, in his opinion, the charge sufficiently alleges an offense triable by court-martial, and that the evidence is prima facie sufficient to sustain the charge.

(*d*) The statute should abolish the present position of judge advocate as a prosecutor, and should require the assignment of a specially qualified officer to prosecute in the name of the United States.

(*e*) The statute should make it mandatory that an accused should have military counsel before special and general courts-martial, and authorize him to have civil counsel; and the officer convening the court should be required to assign as military counsel the officer selected by the accused, and in case the accused makes no choice should be required to certify for the benefit of the record that he has assigned to that duty that officer within his command whom, by reason of legal qualification, experience, and rank, he deems best qualified therefor.

(*f*) The statute should require that an officer of the Judge Advocate General's Department should be assigned to sit with every general court-martial, and should empower him to rule upon all questions of law raised during the proceeding, to sum up the evidence for the court, and to perform generally those functions which are usually performed by a judge sitting with a jury in the trial of a criminal case; and the statute should also require that wherever practicable a specially qualified officer be detailed to sit as a law-member of a special court-martial.

(*g*) The statute should require that the court and the judge advocate shall function independently of the convening or any other authority, and it should forbid the convening or any other authority to return to the court any record for reconsideration, except for such reconsideration as must operate to the benefit of the accused. The statute should forbid any reconsideration that could result in the changnig of a finding of not guilty to one of guilty of any offense, or changing a finding of guilty of a lesser included offense only to a finding of guilty of an offense of higher degree or of a different offense, or increasing the punishment.

(*h*) The statute should require that the convening authority take no action upon the proceedings of a general court-martial until he shall have had the views of his judge advocate thereon in writing, and no convening authority shall approve any proceeding or sentence of a court-martial pronounced illegal or void by his judge advocate.

(*i*) The statute should place beyond question the revisory power of the Judge Advocate General of the Army, who should be specifically authorized upon a question of law raised (1) to pronounce the proceedings, findings of guilty, or sentence, in whole or in part, invalid; (2) and in a proper case to recommend to the proper convening authoritties that a new trial may be had.

(*j*) The statute should make offenses and penalties more nearly specific.

(*k*) The statute should so establish the office and duties of the Judge Advocate General that in their performance he shall not be subjected directly or indirectly to military supervision of any kind, but kept free from that military influence which I regard as offensive to justice.

II. In addition, I respectfully ask you to reconsider your refusal to receive my communication officially, and give it the same publicity you gave the statement of Gen. Crowder and your own letter in support of the existing system. The reason specifically assigned by you is that it involves a personal controversy between me and Gen. Crowder, and that, therefore, it is "obviously useless and improper for publication." I ask your reconsideration on these specific grounds:

(*a*) The controversy is personal only in the sense that it involves the views and attitude of that officer and myself upon the existing system of military justice. You wished that the people be acquainted with, in order that they might be reassured by, his views and his attitude in support of the system; my statement is designed, in part, to show that the views and the attitude of that officer are not of such credible and bona fide character as to convey any such assurance, and that they would not convey such assurance if their character were understood. Unless my statement is published, the people will not be in a position to judge whether or not the information contained in Gen. Crowder's statement is worthy of public credit.

(*b*) As a matter of common fairness, inasmuch as you published Gen. Crowder's aspersions upon me in a statement which you invited him to make and then made public, you should not deny me but accord me my right of defense before the same public forum.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate.

The Secretary of War, notwithstanding the fact that in the morning press we find evidence that now he is of an entirely different state of mind, replied to that memorandum as follows.

Senator CHAMBERLAIN. Under what date?

Mr. ANSELL. Under date of April 5. [Reading:]

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, April 5, 1919.

From: The Adjutant General of the Army.
To: Lieut. Col. S. T. Ansell, Judge Advocate.
Subject: Indorsement of April 2.

The Secretary of War acknowledges the receipt, through military channels, of the first paragraph of the indorsement made by Lieut. Col. Ansell, under date of April 2, dealing with the subject of proposed changes in the system of military justice. The suggestions made by Lieut. Col. Ansell are entirely appropriate in form and substance and merit earnest consideration, which they will receive. With many of the suggestions the Secretary of War finds himself in hearty concurrence, if, in fact existing statute law is defective in the particulars suggested by the proposed changes. In order that the subject may be fully considered and the views of Lieut. Col. Ansell adequately studied, it is directed that Lieut. Col. Ansell prepare and submit to the Secretary of War at the earliest possible date a draft of such a bill as in his opinion would be adapted to carry into effect the ideas expressed in the first paragraph of his indorsement.

Now, coming down, as I presume logically we ought to come down, to discuss the vices of the existing law, I would like to state those vices as I see them, as I have observed them, under the following propositions.

Senator CHAMBERLAIN. May I ask whether you submitted to the Secretary of War a draft of a bill?

Mr. ANSELL. I did; which is the bill that you have here.

Senator CHAMBERLAIN. Have you ever gotten a reply from him?

Mr. ANSELL. I have not.

The following propositions present the vices of this system:

1. Our code of military justice (technically known as the Articles of War, section 1342 of the Revised Statutes as amended), is thoroughly archaic. It is substantially the British code of 1774, which code was itself of much more ancient origin.

2. The so-called revision of 1916 was but a slight verbal revision, and made not a single systematic or substantial change; and such changes as were introduced but accentuated the vicious principles underlying the code.

3. Our code is a vicious anachronism among our institutions, coming to us, as it did, out of an age and a system of government which we properly regard as intolerable.

4. It came to us through a witless adoption, and our interests in, appreciation of, and attitude toward military matters have never been such as to lead to any systematic change or to any thorough congressional investigation or other fair inquiry into its utter inadaptability to our conditions.

5. The hearings held upon that revision demonstrated that committees of Congress are not well advised when, in investigating military matters of this kind that involve the citizen and his rights when he becomes a soldier, they confine their sources of information to the War Department and the Army.

6. Our code is in sharp conflict with these principles of government, which, in my judgment, our Constitution evidently contemplated should apply to our Army.

7. It is in equally sharp conflict with any adequate military policy that is consistent with the principles of this Government. In my judgment an army of citizens can never again be subjected to such an ill-suited system.

8. The code is not a code of law; it is not buttressed in law, nor are legal conclusions its objective. The courts applying it are only agencies of military command, not courts of law; their proceedings are not regulated by law; their findings are not judgments of law.

9. Setting up and recognizing no legal standards, no lawyers, no judges—in a word, being lawless—it contemplates no errors of law and makes no provisions for their detection or correction.

10. Military autocracy is the frankly expressed fundamental theory of our code. By it our soldiery is governed not by law but by the unregulated will of a military commander. It is, in its entirety, a government by man and not by law. No finer example of such is to be found in any modern government.

11. By the adoption of this code Congress abdicated its constitutional prerogative to make the rules for the discipline of the Army, has authorized military command to make those rules and to do as it pleases in applying them, restrained by no law, no judge. The Judge Advocate General of the Army and his office, the head of the Bureau of Military Justice, the only lawyer and the only legal establishment contemplated by the law of Congress, are by the laws of Congress made expressly subject to the "supervision" and control of the highest military authority, the Chief of Staff of the Army.

12. The result has been, as when men are subjected to the power of other men unregulated by law the result must ever be, a large measure of oppression, gross injustice, and discipline through terrorization.

13. Notwithstanding the tenacious adherence of our War Department to the existing system, it may be well for us to remember that even in times past it has been the subject of criticism of those of

our most distinguished soldiers who have studied it—among whom may be mentioned Sherman, Fry, and Lee and the other leaders of the Confederacy—to the effect that it is a system unsuited to our armies.

Now, I presume that going over this may be rather tiresome to the committee. I do not know whether it is as old a story to them as it is to me, but I would like to take up these points, if I might, and develop them as best I can.

Senator LENROOT. Yes; certainly.

Mr. ANSELL. We, of course, while we were British colonies, had the law of the motherland, including the law military; though it ought to be said, because I think it is somewhat significant, that the colonies of that day, before the Revolution, governed their armies, their provincial troops, by a rather different and more liberal local system, which nevertheless regarded the British articles of war, doubtless, as their pattern.

When we came to the Revolution the State levies or quotas were each governed by their local laws.

In the beginning, the Continental Army, of course, had to be governed as best it could by our generals through their knowledge of the only systems they knew—the British system, and the differing local military codes.

Early in the war communications went from Gen. Washington to the Continential Congress to the effect that discipline was unsatisfactory—due largely, doubtless, to the fact that the Continental Congress had not legislated on the subject, that there was not a single code—and that generally the situation was unsatisfactory and something had to be done. This communication came to the attention of Mr. Adams and Mr. Jefferson, the communication having come from Gen. Washington through his judge advocate general. Doubtless the Congress was very much exercised, and these two leaders certainly were, and they resolved that something should be done immediately. Mr. Adams took charge, and I think what happened can be as well described in his own words as in anybody else's. He said:

> There was extant, I observed, one system of articles of war which had carried two empires to the head of mankind, the Roman and the British, for the British articles of war are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British articles of war totidem verbis. * * * So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and they have governed our armies with little variation to this day. (History of the adoption of the British articles of 1774 by the Continental Congress; Life and Works of John Adams, vol. 3, pp. 68–82.)

He indicates that Mr. Jefferson, though appreciating the necessity for doing something, and apparently having pledged himself to help Mr. Adams to see it done, did not well toe the scratch when the moment for performance came. Mr. Adams, himself, said:

> It was a very difficult and unpopular subject, and I observed to Jefferson that whatever alteration we should report with the least energy in it or the least tendency to a necessary discipline of the Army would be opposed with as much vehemence as if it were the most perfect; we might as well, therefore, report the complete system at once and let it meet its fate. Something perhaps might be gained.

Afterwards he said that he was really surprised that such a stiff system of discipline should have passed so easily. There may have been a legislative situation that permitted them to put it through with none too much comprehension, for it was put through very rapidly, word for word with the old British code of 1774.

Now, I contend that we have still got the British code of 1774, and I believe that if there is any one thing demonstrable in law it is this thing; it can be shown conclusively by comparing our present-day articles of war, which is the best proof, although requiring considerable time, with the articles of 1774; it can be shown historically by the most eminent writers on military law, the most eminent being Winthrop; it can be shown, indeed it is conceded by all, including the Judge Advocate General, that unless the revision of 1916 changed the code of 1774 then we still have the code of 1774.

There was the "Crowder revision" in 1916, but revisions are of two kinds. The revision of 1916 did strike out some archaic language, it did dress up the articles in language a little more modern than that of Rome or Gustavus Adolphus, or of England of 200 years ago, retaining, however, much of the archaic language but retaining all of the system and all of the substance.

All military writers on the subject—and they are Army men—take pride in the fact that the Articles of War do have this ancient origin. They say truly, and take pride in saying, that probably there is no written law known to us, except portions of our Bill of Rights, that retains so closely the original language and its substance and system as our Articles of War.

Winthrop calls attention to that fact and comments on it as being a wonderful virtue. Now, of course, ordinarily the mere age of a system of law that can stand all these years, and stand satisfactorily and do justice, is evidence of its worth. But this is a penal code, a military penal code, and I think, prima facie, we are justified in looking askance at any penal code that has its origin in England in 1774 and centuries anterior to that time; and I think that in its military aspect we are also justified in looking askance, because we know that the armies of England and of the Continent of that day, from 1500 up to 1774, and even until recently, certainly can not be made to serve as patterns for an American Army of this day.

Senator CHAMBERLAIN. Why, in a general way?

Mr. ANSELL. In those days there was no such thing as popular control of an army. The people had nothing to do with the army. The army did not come from the people, and was not supported by the people. The army was, indeed, the enemy of popular rights. It was the strong arm of the ruler, king or emperor, by whatever name he might be called.

That was so in England even up to the time of our separation. The armies of those days were armies of feudal retainers. They were armies that belonged to the king. The men in them took, not oaths to support a constitution or the state generally, but oaths of personal fealty obligating them to the king and his military subordinates. They were mercenary armies. We know all this as historical fact. The king hired the men; he bought them and he paid for them, and he did with them as he pleased. Their obligation was not to the state; their obligation was not established and regulated by law or

popular will; it was an obligation of personal fealty or loyalty to this feudal superior.

Now, the result was that the king governed those men just as any overlord governed his retainers; more so, because there was no law whatever other than his will. The king was the commander in chief of this army, and he was more; he was the legislator for his army. He was the chief executive, the judge, the legislator, the executioner, the whole thing. The King of England, at the time of our separation, himself performed every duty for the army that the Constitution confers upon Congress. He, and he alone, made all the rules and regulations for the discipline of his army. He prescribed the law, the offense, and the penalty. He appointed the courts; and those courts appointed by him were his agents, or the agents of his under military officers. They were agencies to secure discipline according to the will of the king, or this military subordinate of the king. He told them what to do; he governed their proceedings. If he did not like what they did, then he either did it himself or, when the administration became so extensive that he could not exercise personal control, he did it through others.

The articles of war of 1774 and all antecedent British articles of war were not laws of Parliament. They were not expressions of popular will. They were not the result of common counsel. They were the King's articles of war. He made them. He prescribed what the courts should consist of; he prescribed the offenses; he prescribed the procedure; and without restraint applied such code to his officers and men.

Senator CHAMBERLAIN. After the adoption of those same articles of war under the Articles of Federation of the Continental Congress, to whom was that kingly power transferred in our system?

Mr. ANSELL. The executive power in those days was, of course, lodged in Congress, but as a practical matter the power was placed in the Commander in Chief, subject to the supervision of the Continental Congress. The Congress made just enough verbal change to make the system of Britain fit in with our Government as constituted.

But the point is, Congress itself did not legislate. Simply by adoption it took these British articles of war and turned them over to Gen. Washington and to his successors. And there we have them to this day—articles of war that were made by a king and for a king's army, in which he combined all the functions of government, for a set of mercenary soldiers. These same articles are in force in our Government to-day. When our Constitution came along we said, "We are not going to inherit over here any of the quarrel that they have had in all times past in England, indeed, in every country, between the people and the King as to who controls the Army. It is true we are going to make the President of the United States the commander of the Army, but we are going to subject that Army and its government to popular control, to the control of Congress."

I observe in the report that has just been gotten out by the Kernan Board, and which the press this morning quotes the Secretary of War as approving in toto, there are some 8½ of the 16 pages of the report devoted to arguing the proposition of law that the power to prescribe rules of discipline, the rules of government of

the Army, is not solely and exclusively in Congress, but that the Commander in Chief of the Army, under the Constitution, has inherited some of these ancient military prerogatives of the British Crown, the prerogative to make articles of war and to convene courts of his own. I say it with no disrespect, but from looking at the personnel of that board, nearly all of them professional military men—two Regular Army officers, one a National Guard officer who devotes most of his time to military service and but little of it, I imagine, to law—I judge that they really must come under the terms adopted by them to describe the right kind of army officer, "a man who knows much of the military and is a lawyer by a sort of courtesy."

If there is any one thing that seems to me to be established beyond all question and dispute, fundamentally fixed, it is that when the Constitution of the United States said that Congress shall have the power to make rules and regulations for the government of the Army, it conferred that power solely and exclusively upon the Congress. It never, so far as I know, has been disputed before. It would be a very distracting and disturbing state of affairs if it should be held at this late day, as these gentlemen so startlingly argue, that the President of the United States had inherited so much of this kingly prerogative over the Army of the United States that it is not within the power of Congress to create a court of review, whether of Army men or civilian judges, and that if you undertook to do so you would be depriving the President of the United States of some of his kingly prerogative over our Army. They announce that the President of the United States by inheritance has this prerogative power to convene courts-martial and give to such courts instructions, and it is not within the power of Congress to deny it to him.

But they say more, that Congress can not create this superior court-martial, to review the judgments of other courts-martial created by Congress; all deducible out of the fact that he was expressly made Commander-in-Chief of the Army by the Constitution, and all ignoring the fact that the same Constitution expressly and purposely took away from him the power to make rules and regulations for the government of the Army and conferred that power upon Congress.

Senator LENROOT. Do you know how the department reconciles that view, as set forth in its report, with its position with respect to the conclusiveness of courts-martial?

Mr. ANSELL. I was going to bring that up at a later time, Mr. Chairman. Inconsistency is the department's only virtue on this subject. The department held, you see, at the beginning of this war, that, in the absence of further legislation, there was no power on earth that could review the sentence of one of these courts-martial, and they said "this is not resident even in the President of the United States by virtue of any power, but is in Congress;" and they proposed a bill to Congress which I think it might be well for this committee to look at when it comes to take this question up for a more nearly final consideration. If the President had the power which the Kernan Board, with the approval of the Secretary of War, now finds he had, his neglect to use it is responsible for most of the injustice of this war.

Senator CHAMBERLAIN. It is a short bill. That is the bill of January, 1918?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. I wish you would have that inserted in the record at this point.

Mr. ANSELL. Very well.

(The bill referred to is here printed in the record, as follows:)

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

[The new matter is in italics.]

The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, *and report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided, and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall* perform such other duties as have been heretofore performed by the Judge Advocate General of the Army.

(Following is the letter submitting said bill:)

WAR DEPARTMENT,
Washington, January 19, 1918.

Hon. GEORGE E. CHAMBERLAIN,
Chairman Senate Committee on Military Affairs.

MY DEAR SENATOR: I am inclosing herewith a draft of a proposed amendment of section 1199, Revised Statutes, which has my complete approval. I hope that it will likewise meet with the approval of your committee and that an opportunity may be found of securing its early enactment into law.

The general purpose of the proposed legislation is to vest in the President revisory powers in respect to sentences of courts-martial and other military tribunals. It has been the subject of thoughtful consideration by the Judge Advocate General, and in the light of the new conditions which now confront us, it is believed to be both wise and necessary.

The proposed amendment involves three propositions, viz, (*a*) vesting in the President the power to disapprove, modify, vacate, or set aside either in whole or in part any finding or sentence, and to direct the execution of such part of any sentence as has not been vacated or set aside; (*b*) the power to suspend execution of sentences in such classes of cases as he may designate until there has been opportunity to consider and act thereon; and (*c*) the power to return any trial record to the court through the reviewing authority for reconsideration or correction.

The first proposition finds its analogy in the civil courts, in the appellate power lodged in a supreme court. The second is a related power to suspend execution of a judgment pending appellate review, in order, when deemed advisable, to preserve the status quo. The third is to enlarge the power now exercised by the President so as to embrace cases coming to him for consideration under the provisions of the proposed amendment. At the present time the President exercises the power of returning to the court, through the reviewing authority, the record of any trial which has been forwarded to him for confirmation.

I believe that it would be wise public policy to lodge these powers in the President. He is the Commander in Chief of the Army, the supreme military authority, and bears to the Military Establishment and to the administration of military justice a relation analogous to that occupied by the Supreme Court in the structure of a civil judiciary. Upon him devolves the duty of securing efficiency and maintaining discipline in the military forces, and at the same time so to adjust the operation of the machinery of the military courts that, so far as possible, instances of injustice to the individual soldier will be reduced to a minimum.

The present Articles of War authorize any officer, competent to convene a general court-martial, to approve and carry into execution any sentence affecting an enlisted man, including noncommissioned officers, excepting the death sentence; and, in addition, the commanding general of a territorial department, or territorial division, or of any army in the field in time of war, as the present, may approve and carry into execution a sentence of death in certain enumerated cases, or the dismissal of an officer below the grade of brigadier general (arts. 46–48). In these cases no confirmation seems to be authorized or contemplated by the President, although the officer approving the sentence may, if he sees fit, suspend execution until the pleasure of the President is known (51st article of war). In these respects the present Articles of War do not differ essentially from the prior compilations of 1806 and 1874, although in 1862, during the Civil War, it was provided by independent legislation that a sentence of death, or of imprisonment in a penitentiary, should not be carried into execution until approved by the President. (Sec. 5, act of July 17, 1862, 12 Stat., 598.) The legislation which is now found in section 1199, Revised Statutes, originated in 1862 and thereafter went through sundry changes without affecting its essential characteristics. (Sec. 5, act of July 17, 1862, 12 Stat., 598; sec. 5, act of June 20, 1864, 13 Stat., 145.) Throughout the whole period that this legislation has been in effect it has been the practice for the Judge Advocate General of the Army to examine the records of trial by general courts-martial and other military courts primarily with the view of determining whether the proceedings were regular and valid, and to make report thereon through the Secretary of War to the President. During that whole time it has been the settled construction and practice of the War Department and its officers to regard as final and beyond appellate or corrective action the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice or for other cause void ab initio. Thus it has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority, was final and could not be revoked or set aside by the President or by any department of the Government unless the court was without jurisdiction or the proceedings were invalid, and that relief could be had only through the exercise of the executive power to pardon.

We are now assembling a large Army. Our young men are being drawn from the homes of the Nation and placed in military service, both in the ranks and as officers. A very large percentage of the officers of the new Army are of necessity drawn from civil life, and it is no reflection upon them to say that they have had little, if any opportunity to acquaint themselves with the history, usages, or principles of military law, or the practice of military tribunals.

In our new Army, more than ever before, it is not at all unlikely that sentences may be imposed by courts-martial and approved by the reviewing authorities which, if carried into execution, will work great injustice to the individual soldier. In practice and under existing legislation the trial records now come to the office of the Judge Advocate General for review. In that office cases may be examined with deliberation far removed from the immediate atmosphere of apparent military exigency. It is the purpose of the proposed legislation, when it appears, after such examination, that the substantial rights of the accused were disregarded upon the trial, or the evidence is insufficient, or an unnecessarily severe sentence has been imposed, or for other cause the sentence should be modified or set aside, to vest in the President clear statutory authority to disapprove, modify, vacate, or set aside any finding or sentence, in whole or in part. In order that he may have an opportunity to exercise this revisory power, it is proposed to give him authority to suspend execution of such sentences until opportunity has been had for review by the Judge Advocate General and a report thereon to him. With this power conferred and this practice established, a person found to have been erroneously convicted, or upon whom too severe a sentence has been imposed, may in the one case have his innocence adjudged, and in the other the proper sentence imposed, and not, as now, be remitted for relief to the pardoning power of the Executive, which leaves the question of guilt untouched and operates only by way of Executive clemency.

It will be noted that the proposed legislation authorizes the President to designate the classes of cases in which sentence shall be suspended until the case has been reviewed by the Judge Advocate General, and report made to the President. In a great majority of cases tried by courts-martial there will be no necessity for the application of the new legislation, for instance, special

and summary courts deal with minor military offenses. These courts have but a limited jurisdiction as to the sentences which may be imposed, and as to such sentences, it is believed that there is no good reason why final action may not be taken by the officer appointing the court. The classes of cases intended to be reached are those which involve a sentence of death, dishonorable discharge, or dismissal. By leaving to the President the power of designating the classes of cases in which execution of sentence may be suspended, pending his action thereon, the practice to be followed may be adjusted from time to time to meet changing conditions in the military situation.

Under the ninety-sixth article of war, courts-martial are given jurisdiction to try persons subject to military law for "all crimes or offenses not capital." Under this grant of jurisdiction persons in the military service are now frequently tried for the commission of civil crimes, and it is obvious that the trial of these offenses by military courts, unlearned in the law, adds an element of uncertainty as to the legality of the outcome, which serves forcibly to emphasize the need of the revisory powers herein suggested for the protection of persons accused of crime, and to safeguard the administration of military justice.

When the existing Articles of War were revised in 1916 there was introduced as new matter the thirty-eighth article of war, which authorizes the President to prescribe rules of procedure in cases before courts-martial and other military courts. Under this grant of power the President has promulgated certain rules of procedure suspending the execution of sentences of dishonorable discharge, death, and dismissal until the records of trial in such cases have been reviewed in the office of the Judge Advocate General, but it is clear, for the reasons heretofore pointed out, that the exercise of this power does not meet all the requirements of the situation. In order to place the whole matter where it will be beyond cavil or dispute, and by a clear grant of statutory power to vest in the President an authority which he should, beyond all question, be authorized to exercise, the legislation requested should be enacted into law, since its whole purpose is to protect the rights of men on trial, and to remove the possibility of being compelled to say in any case that an injustice has been done for which the statutes provide no clear or adequate remedy.

I am sure the Judge Advocate General will be glad to appear in person, or by representative, before your committee, should any further explanation of the proposed legislation be desired.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.

Mr. ANSELL. There they come to Congress and ask Congress to confer out of its power, upon the President of the United States, whom they regard as the proper despository of this power if it is to be delegated to any military official or to anybody else, this revisory power; but in doing so I bid you take notice of the fact that they carry along up to this highest court, the President of the United States, the power that they insist all military commanders shall have, the power not simply to revise for an error of law, and modify and reverse—not that—but the power to set aside the finding of not guilty, an acquittal, and to substitute for it a conviction; the power to substitute a finding of a large offense for one of minor or lesser included degree and——

Senator CHAMBERLAIN. May I not interrupt you, General, because the history of it is so interesting to me that I think it ought to be embodied here, to speak of the motive which prompted the submission of those articles of war to the Senate of the United States?

Mr. ANSELL. Yes; just one more thing, if you will pardon me.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL (continuing). And the power to strike down a smaller punishment and substitute for it a larger one.

Now, this is no more than what the subordinate military officials who convene general courts-martial have, and the power for which they have ever contended, so far as I know, up to this time, although there seem to be signs of awakening with respect to some of them.

If I may be permitted to say it—and I think I may because of my intense interest in this subject and because I think that this committee ought always to know the motives and purposes back of the submission of proposed legislation of this kind—I should like to say that I have never believed, and I have good reasons for not believing, that that bill was submitted to this body in good faith. That bill was drafted and submitted by the Judge Advocate General of the Army, through and with the approval of the Secretary of War. The question is, did the Judge Advocate General of the Army and the Secretary of War at that time want any revisory power? And really, do they want any now?

In the first place, if they had actually been desirous of discovering or locating this revisory power so that the judgments of courts-martial could have been kept within legal check, they would have given far better evidence of it by accepting that construction of the statute which, even if they regarded it as doubtful, they would have been justified in accepting to reach this desirable end, when the officer who was at that time the chief law officer of the Army, or acting as such by the authority of the War Department, had, upon most thorough consideration, written an office opinion to that effect, which had been concurred in by every single lawyer in that department, without the slightest imposition upon them by me. It could not have been, I say, so far wrong, conceding it to be disputable, which I do not concede, but that they could have accepted it and established this revisory power and thereby prevented what I conceive to be the grossest injustice, during this war. The Secretary of War now finds the President has such power constitutionally.

But, too, if it be thought that they had intended a real revisory power, the bill itself is evidence to the contrary. I can hardly conceive that anybody would submit such a bill as that to the Congress of the United States expecting it to pass upon thorough investigation, because few men in touch with the people of the United States, representatives of the people of the United States, would ever give their approval to a proposition that is so un-American, so basically illegal, and unjust and unfair, as to permit any man to strike down the judgment of a court to the disadvantage of the accused, substituting harsher punishment, harsher penalties, than the court awarded?

Analyzing that bill, let us see what kind of revision we would have gotten out of that bill. That bill would have had to be construed together with that section of the act of 1903 creating and defining the duties of the General Staff. It is all well and good to say, upon paper, that the President of the United States shall be this court of appeals, or whatever else it is to be called; but we know—any man who knows anything about this Government knows—that the President of the United States himself cannot perform such functions, first and largely because of the multiplicity and volume of his duties, and because of the crushing volume of work that would be brought to him by reason of such legislation.

Think of any President reviewing that number of criminal cases, which, with such review as we have given them, have taken 108 lawyers to review in the office of the Judge Advocate General! As a practical matter, the President of the United States could not perform the duties; he would not be expected to perform the duties. But as a matter of law he need not and would not, perform the duties because, construing the proposed legislation with legislation already existing, you would find that the Chief of Staff would be substituted for the President of the United States. By the General Staff act the Chief of Staff of the Army is the trusted adviser, upon all matters military, of the President of the United States and of the Secretary of War; and we know, and it has been held time and time again, that the Secretary of War is the constitutional mouthpiece of the President of the United States, and when he acts for the President of the United States there can be no inquiry into whether or not he has the actual authority. I invite your attention to the General Staff act. So much for the necessary delegation, and the delegation authorized by statute.

Senator CHAMBERLAIN. Let me interrupt you there for a moment to say that—we have it in the record—I introduced the bill in January, 1918, at the request of the Secretary of War, as the chairman of the Committee on Military Affairs, but our committee declined to consider it.

Mr. ANSELL. I so understand, and I think it is a good thing that it was never enacted into law, because it would have carried this iniquitous system one step further.

Senator LENROOT. Was that bill accompanied with any report from the Secretary?

Senator CHAMBERLAIN. It was, was it not?

Mr. ANSELL. There were letters with it; yes.

Senator CHAMBERLAIN. I think we might as well print that bill in this record, and if we can get the letters, put them in.

Senator LENROOT. If you can get the letters, put them in; yes.

The matter referred to, with an accompanying letter, will be found printed in this record at page 108.

Mr. ANSELL. I say if that bill had passed, or if any bill is passed. I wish to assure this committee, lodging this revisory power in the President of the United States, you might as well just say that it shall be lodged in the Chief of Staff of the Army.

Now, the bureaucrats of the Army were perturbed about this revisory power. When I wrote the opinion that these court-martial judgments should be revised, the ultramilitary bureau chiefs of the War Department came to the support of the existing system, as they have ever done, with the slogan that the relationship between courts-martial and the power of military command for the enforcement of discipline must be conceded; that the courts can not be independent of the military command; that the law of the courts is the will of the military commander, and is subject to his judgment and discretion and his command; that there is no other way of getting discipline, according to their sense and meaning of that word. Their slogan—the slogan of Judge Advocate General Crowder—was that the military law finds its fittest field of application in the military camp and by the military commander, without review or supervision. Probably

the great majority of the high ranking officers of the Military Establishment agree in this. Doubtless they are honest in that. They have heard it all their lives; they have been brought up under that system; they believe that discipline can not be regulated by law, but must be regulated by the will of the military commander; that justice as determined by the application of legal principles has no place in the Army, and that such justice as we have is the justice which appeals as such to the natural sense of justice of some military commander, modified by his view of what the exigency requires.

Contemporaneously with the submission of this bill to the Congress of the United States—both Houses of it—the Judge Advocate General of the Army, its author and proponent, dispatched to his senior Judge Advocate General in France upon the staff of Gen. Pershing a letter and placed it upon the files of the War Department, apologizing for or excusing the fact that he had had to get out this general order No. 7 which withheld the hand of the executioner until there could be a sort of revision in the department. In that letter he asked that the reasons be explained to Gen. Pershing. He said it was necessary that the War Department do something in deference to popular opinion; it was necessary that the War Department do something "to head off a congressional investigation;" it was necessary that the War Department do something, or before long Congress would be talking about creating an appellate court with revisory power, which was anathema to the Army; and lastly, that it was necessary that the War Department do something in order to have the man in the ranks believe that he was getting some kind of revision of his case other than that which takes place at field headquarters.

Senator CHAMBERLAIN. Will you get that letter and put it in the record there?

Mr. ANSELL. Yes, sir; I can do that.

(Thereupon, at 12.35 oclock p. m., the subcommittee adjourned until to-morrow, Tuesday, Aug. 26, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, AUGUST 26, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present, Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Mr. ANSELL. Yesterday I was requested by the committee to put into the record a letter to which I had referred, it being a letter from the Judge Advocate General of the Army to the senior judge advocate in France, the judge advocate upon the staff of Gen. Pershing, written practically contemporaneously with the submission of his proposed legislation to the Congress, whereby there was to be established a revisory power in the President of the United States. I said yesterday that this was part of the abundant evidence to prove, to my mind, that the Judge Advocate General of the Army and the War Department were not acting in good faith in making that proposition to Congress. I said that that letter showed expressly and in terms that the adoption of general order No. 7, which was a partial and ineffectual exercise of revisory power to the extent of requiring the commanding general below to withhold the execution of sentence in certain cases, was simply an administrative makeshift, intended to head off a more thorough and drastic reform.

I submit that letter, as I promised yesterday I would do, for the record.

APRIL 5, 1918.

Brig. Gen. WALTER A. BETHEL,
American Expeditionary Forces, France.

MY DEAR BETHEL: I am going to spend the necessary time out of a very busy day in an attempt to clear up the situation in respect to the establishment in France of a branch of the Judge Advocate General's Office, regarding which matter there seems to have been more or less misapprehension at your headquarters. You are, of course, familiar with the cable correspondence which has passed on the subject. For your convenience in reference, however, I inclose a copy of a memorandum that I have had prepared for the Chief of Staff, in which that correspondence is reviewed and set out in sequence.

First, let me say that it is difficult for me to understand why, upon receipt of the two cablegrams of January 20, 1918, one cabling Gen. Pershing the contents of General Order No. 7, and the other designating you as Acting Judge Advocate General, the branch office of the Judge Advocate General was not

immediately established. I assumed that it was in operation from that time, and continued of this view until the receipt of Gen. Pershing's cablegram of February 25, 1918, wherein he says:

"Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions."

This leads me to comment upon the situation which is presented by Gen. Pershing's cablegram No. 779, which seems to imply some dissent from the action here taken in establishing the branch office. He appears to view it as a possible obstruction to the administration of military justice and as a mistake of judgment.

I wish you would assure Gen. Pershing (whom I would address directly but for the reason that I know he has no time to read letters) that every thought of this office, and I believe every thought of the War Department, is directed toward the discovery of ways and means to help him in his enormous task; that our idea was to expedite and not delay, and that he will understand better the occasion for this order if he will consider the following:

Prior to the issue of General Order No. 7 it had become apparent that, due to the large increase in commissioned personnel, which included many officers with little or no experience in court-martial practice, a large number of proceedings were coming in which exhibited fatal defects. A congressional investigation was threatened and there was talk of the establishment of courts of appeal. The remedy for the situation was immediate executive action which would make it clearly apparent that an accused did get some kind of revision of his court-martial proceedings other than the revision at field headquarters, where these prejudicial errors were occuring. At this point permit me to say that very few errors have been discovered in cases coming up from your headquarters. It was primarily with reference to errors occuring at field headquarters other than in France that this step was taken.

Accordingly we formulated the scheme of General Order No. 7. The Secretary of War gave personal consideration to the matter and on three or four occasions discussed it exhaustively with this office. He finally approved the order and contemplated, as I did, the establishment of the branch office promptly upon the receipt of our two cables of January 20. I may say here that at other headquarters the scheme has worked beautifully. It has silenced all criticism, and I believe that no invalid sentences are now beyond the reach of remedial action.

Your own intimate knowledge of court-martial procedure makes it quite unnecessary for me to enter upon a lengthy discussion of the merit of the new system which, I feel quite sure, will not fail to commend itself to you as a substantial step in the right direction. As stated in my memorandum to the Chief of Staff, it is believed that had Gen. Pershing fully understood the purpose and operation of General Order No. 7 his cablegram No. 779 of March 24, 1918, would not have been sent. I trust that the cablegram which I have recommended be sent him in reply, a draft of which is contained in the concluding paragraph of the inclosed memorandum, will serve to convince him of the wisdom and propriety of the issue of this order and that the procedure it contemplates will materially aid rather than obstruct the prompt and efficient administration of military justice in the American Expeditionary Forces.

With best wishes, I am,

Very truly, yours,

E. H. CROWDER,
Judge Advocate General.

Yesterday I was also requested to put into the record the opinions and memoranda evidencing my efforts at the beginning of the war to subject courts-martial to legal restraint through the establishment of a revisory power in the office of the Judge Advocate General or elsewhere in the War Department, and likewise the memoranda prepared by the Judge Advocate General and the Secretary of War, supported by the concurring views of the then acting Chief of Staff and Inspector General of the Army, in opposition to such a power, and in which they contended, first, that no such power did exist under the law, and secondly, that no such power ought to exist.

I regarded all those gentlemen as thoroughly reactionary, and I said so at the time, and I think the subsequent course of the admin-

istration of military justice during the war will amply justify that statement. They contended that no such power ought to exist, because in order to secure discipline a commanding general should control courts-martial and should be permitted to do with them as he pleased. These documents I have already placed in this record.

In order that this committee may more clearly see what was at issue then and what is at issue now, I would like to read the points that were made by me in this opinion—and when I say "me" I am not speaking personally; I am speaking for the office of the Judge Advocate General as I presided over it—an opinion in which every officer in the department at the time, except Gen. Crowder, who was in fact detached, agreed. I have inserted in the record this brief in support of the original opinion; but wishing you might know the points that were made, I will briefly read them, although these points, of course, need not be taken down.

(Mr. Ansell here read to the committee from page 45 of the hearings before the Committee on Military Affairs of the United States Senate on trials by courts-martial, the same being part of the hearing of February 13, 1919, which the stenographer was directed not to report.)

Mr. ANSELL. I wish to say here for the benefit of the record, that the Texas mutiny case, so called, was finally disposed of by a memorandum of the Secretary of War which will be found among these exhibits in these Senate hearings. Here it is. It reads as follows:

NOVEMBER 27, 1917.

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER."

I wish the committee to notice the confusion that obtains in the War Department, a confusion which seems to me does not do credit to a man of ordinary intelligence, not to mention a lawyer, to the effect that mercy or clemency—and military clemency is of the very mild kind known as the remission of military penalties—is or can ever be "a convenient mode of doing justice." The Secretary of War, I think, did act under a misapprehension here. At that time, I know from personal conferences with the Secretary of War, he did not appreciate the real purpose and legal effect of pardon, and especially this kind of pardon. He was content, however, to be imposed upon, to be advised that notwithstanding that he conceded this trial was all wrong, that the men ought never to have been tried at all, that the judgment was illegal and, if there had been any possible way of doing it, should have been set aside, and the whole prosecution dismissed, nevertheless he could do nothing to reverse the illegal conviction but would let it stand, and employ as a full measure of justice the convenient method of remission.

Now let us see what situation it left those men in, men of from three to twenty years' service; noncommissioned officers. If they were the right kind of noncommissioned officers—as they were—they were just as proud of their warrants, and ought to have been, as I was of

my commission as brigadier general. They are entitled to the same respect. They are an essential cog in any military machinery. Noncommissioned officers are wonderful men when they are the right kind of men; men of natural leadership, far more so than many of our officers upon whom the stamp of sovereignty has been conventionally placed, and who have not worked up or given any evidence of leadership. These men were branded as mutineers by the judgment of a court, irrevocable. Their service terminated that moment; their enlistment was cut short; the continuity of their service was interrupted; their continuous-service pay had been taken away from them.

Now, upon the advice of the Judge Advocate General—and I evidence this only to give you a fair insight into the appreciations that the War Department has for justice to the individual—the Secretary says to these unjustly convicted men: "I will do convenient justice; I will permit you to reenlist." They had been out of the service all of the time that had elapsed between the date of the trial and the time that I brought this matter to the attention of the War Department and it finally decided to take this action. The Secretary said, "I will permit you to reenlist under a statute which says that when a man has been properly convicted and the Secretary of War believes that he has actually expiated his offense and has come back and has shown that he is a good man, the Secretary may then waive the inhibitions placed upon his reenlistment by the Act of 1894, to the effect that no man who has been dishonorably discharged from the Army can be reenlisted therein." So the Secretary and his Judge Advocate General, in doing justice conveniently, proceeded upon the ground that these men were of the felonious type and had been properly discharged, and then found by way of fiction that they had rehabilitated themselves. Thus these men are graciously permitted their reenlistment as privates, in an army from which they had been illegally expelled, and in which they can start to work up again. They lose, besides, their right to continuous service and continuous service pay. So that the net result is that they are put back into the service by this straining of the statute, in order to do some justice to the men, but they lose their continuous service, they are branded, they have to start in as privates again, and they are really marked men, which I think we can all understand.

Senator LENROOT. Does that also affect their retirement status?

Mr. ANSELL. Their retirement?

Senator LENROOT. Yes.

Mr. ANSELL. No, Senator; retirement is presumed to be the most honorable of——

Senator LENROOT. No, but I mean as to the benefits after retirement, they having been out of service and then reenlisted.

Mr. ANSELL. No; because that depends upon a certain number of years——

Senator LENROOT. Upon the number of years in service?

Mr. ANSELL. Yes.

Senator LENROOT. And it would affect their retirement as noncommissioned officers?

Mr. ANSELL. Yes, certainly; though if at the time of their retirement some commissioned officer should happen to be favorably disposed, he might promote them and pass them for retirement.

But anybody could see that men are desperately prejudiced by such a situation as this. Now, it was a strange thing to me that I should have to argue with the authorities of the War Department that this, however convenient, was not a full measure of doing justice in the instant case. I say it is strange to me that you have to argue with any man that forgiveness of sin was what those men needed, when concededly they had committed no sin; that they were asking pardon for transgression of a law they had never violated. In my mind it is absurd. Yet I use this case to illustrate what has been done already in between 6,000 and 7,000 cases, since flagrant war was over, by the special clemency board, and of which I was, until I resigned, the head, nominally at least.

I was responsible that that much justice be done the thousands illegally convicted. It is a convenient but poor meed of justice.

The War Department takes great pride in the fact that they have applied this remissive clemency to the point where they have reduced these illegal penalties 87 per cent. The average period of confinement for every person imprisoned as the result of the sentence of a general court-martial was 7.6 years, including all offenses, many of them trivial. The average was 7.6 years, excluding, of course, the imprisonments for life and those sentences resulting from commuting death sentences into imprisonment. They have reduced those sentences until the imprisonment left is less than 13 per cent of the original sentences, and the hue and cry goes abroad by proclamation, "See how lenient we are," when, as a matter of fact, applying not over-meticulous tests, but the test that a man of trained legal intelligence must apply in order to achieve essential justice, more than 60 per cent of those cases were so badly tried that no man—no fair-minded and intelligent man—could say that the records can be relied upon to sustain any punishment.

Now, the War Department hates to admit that the basic motive for clemency is to be found in the illegality or the unreliability of the proceedings, but has advertised to the world that the proceedings were correct, and that these punishments had to be given *in terrorem*. The department says that now that the war is over we can afford to reduce them. Of course, the department has been compelled to do something, and has done no more than it was compelled to do.

Senator CHAMBERLAIN. But the exercise of clemency does not remove the stigma of guilt, even where there was no evidence to sustain it.

Mr. ANSELL. I am glad you brought that up, sir, because the proclamation goes forth now that the sentence of dishonorable discharge is, as a rule, remitted.

Senator LENROOT. I suppose it would be true, would it not, that in time of war a very much more severe sentence in a given case might be proper?

Mr. ANSELL. Why, certainly, owing to the circumstances. For instance, I can conceive, as I think we can all conceive, that sleeping on post in the immediate presence of the enemy is an entirely different proposition from sleeping on post, during this war, in the southwest.

Senator LENROOT. Or being absent without leave?

Mr. ANSELL. Or being absent without leave, yes; exactly so. Therefore there must be tolerably large discretion as to penalties that will enable these courts to take care of the circumstances surrounding the offense. But in this matter I again call your attention to the report of the Kernan Board to which the Secretary of War himself has just given unqualified approval. They have abandoned what I had supposed to be not only the good old American, but the commonsense doctrine that the punishment ought to be graduated to fit the grade of the crime, and they say you can not grade military offenses.

They took, for instance, the case that I cited before the committee last spring, which was a case of a man having disobeyed the order to "stop smoking that cigarette," in the highly hostile environment of a New Jersey camp. You can picture the situation; a lot of troops, green men, undergoing training and instruction. Some of them were detailed to do kitchen police, rather removed from the formal exactions of the military requirements. They were cooks, waiters, and so on. Nothing was hardly more natural than that a boy who was used to smoking cigarettes should put a cigarette in his mouth. There was not a powder factory around there or a gasoline tank, or anything of that sort. There was simply a kitchen.

Some officer who had been in the service less than three weeks—although I will assure you that some of them who have been in the service no less than 30 years give similar orders—saw this youngster with a cigarette and said, "Stop smoking that cigarette." Offensive, I suppose, to the kitchen! He had a package of cigarettes in his shirt pocket. "Give me those cigarettes." Well, the youngster said, "What have you got to do with it? I will not give you my cigarettes, and I am not going to stop smoking this cigarette." What was the result? That boy was tried by court-martial and was sentenced to be dishonorably discharged from the Army and to 25 years' imprisonment. The Kernan Board likened that to a canker or to gangrene that the surgeon must cut out lest it spread to the whole military body and result in death to the Army.

Now, I submit that that is absurdly far-fetched, and that you can not apply any such hard and fast rule as that. That is the trouble. Whenever a government does not discriminate between disobedience of orders as committed under the circumstances designated here, and disobedience of an order to a man to take his rifle and fire or charge at the enemy on the firing line, then it is likely to lose the respect and the loyal sentiments of intelligent men.

Senator CHAMBERLAIN. A summary court-martial was all that was necessary, if anything, in a case like that.

Mr. ANSELL. Nothing was necessary, Senator, but the application of a little common sense.

Senator CHAMBERLAIN. I say, if anything was necessary.

Mr. ANSELL. They talk a great deal about the experience that a man must have had in the line before he is competent to express an opinion upon discipline and disciplinary methods, but I wish to say to the committee, and for no other purpose than attempting to qualify according to their own standards, that I, at the time I had come to Washington here, had seen as much service with troops

as any of our generals with the exception of about three. I commanded a company from the time I left the Military Academy for three years, and then for two years more; and many of these generals had done no more and many less; and I congratulate myself that I commanded it without a resort to courts-martial, even summary courts, except in the rarest instances. Now, they come here and would have you simply be impressed by their expertness. I should hope that the committee might remember the lawyer's adage that you should never be afraid to cross-examine your expert, and especially your military expert. They are the "easiest" experts in the world.

Take our generals. The mere fact that a man is a major general, or certainly the mere fact that he was a major general up to the beginning of this war, when some of them did see some service, was indicative of little more than a long time conformance to a system which in itself tended to arrest mental and professional development. It is a well known fact in the Army, a fact obvious to any man who has ever served in it, that the weakest grade in the Army of the United States is the grade of general officers. Why, the curve from the time those gentlemen leave West Point until the time they retire would run up, reaching its height probably 10 or 12 years after their graduation from the military academy, during which period the mere incapacity of youth to conform easily to these established rules, and the power of youth to retain some mental resiliency, enable a man to advance, and then drops almost abruptly downward until it about reaches the zero line. I think I might be permitted to say, because with entire accuracy it can be said, that many of our generals are jokes to everybody else in the world except ourselves and themselves.

So the very gentlemen who make this Kernan report, and who testified before the committee of the American Bar Association, have reported to the War Department, and will have the temerity to appear before this committee and tell it, that all of this criticism is uninformed opinion. That is what they call it, "uninformed opinion." Senator Chamberlain's opinion is uninformed! My opinion is uninformed! I have seen quite as much service in the line as most of them, and have had a hundred times their court-martial experience, as a member of a court, as the prosecutor, and as counsel for the accused. No man in the Army has had my court-martial experience. But, above all, as Acting Judge Advocate General, in a sense, during this war, sitting at the office where all these lines of discipline finally met, I kept tab on every division and every court-martial in every locality. Assuming a man to be a man of fair intelligence and competency and interest, what better place could he have found to observe and form an intelligent opinion upon the state of discipline in the Army than that office to which all these records came, the office charged with the duty of looking over them and ascertaining what they really meant? Ten thousand outcries from the victims, "Uninformed opinion!"

Senator LENROOT. I do not quite follow you, General, as to lack of experience of general officers in the line.

Mr. ANSELL. Where have they had experience, Senator, might I ask? Look at our Army. Up until the beginning of this war it was

scattered throughout the country in small garrisons, so that a man as a line commander seldom or never commanded anything larger than a company. From there he went to command a body of territory known as an Army post. He seldom went with troops. He engaged himself largely in looking out for the post and conforming to the thousand and one details of the care of the post, including landscape gardening. If he should have been so fortunate as to be promoted to the rank of brigadier general in his later days—and I assure you that this kind of life did not tend to develop men with the quality of leadership which must be developed to make real commanders of men—he became then a department commander, again commanding territory, and sitting in a chair at his desk, as much so as any lawyer sits at his chair at his desk, and busying himself with the thousand and one administrative requirements that simply clog our peace-time administration of the Army—red tape, as it is called.

Senator LENROOT. I understand that, but I had assumed that every general officer must have had a considerable experience as a company commander.

Mr. ANSELL. Yes; as a company commander.

Senator LENROOT. What would be the average length of time that an officer would have been a company commander before he got out of touch——

Mr. ANSELL. Since the General Staff act went into effect in 1903 the best officers of our Army have spent a large part of their time on detached duty and staff duty; but the point I was making was not so much the length of time when a man commanded as it was the number of men that he commanded and the character of the command. To say, for instance, before the beginning of this war that a major general commanded the Department of the East meant no more than to label that man as a chief administrator, a paper man, a red-tape artist, and that is all there is to it.

Senator CHAMBERLAIN. Was there a single general officer that had ever commanded a division prior to our entrance into this war?

Mr. ANSELL. Senator, we never had a division prior to our entrance into this war. We labeled that heterogeneous collection of troops on the Mexican border at one time a division, which Gen. Pershing commanded. But no professional soldier would ever call that a division.

Senator CHAMBERLAIN. Have we many general officers who had experience in the Spanish War?

Mr. ANSELL. No; very few. Your mind, of course, goes at once to Gen. Wood, who was the most distinguished of them, who was a regimental commander in that war.

Senator CHAMBERLAIN. Regimental?

Mr. ANSELL. Yes; after Col. Roosevelt. And, of course, you have Gen. Pershing, who had such command as we had in the Philippines. The command in the Philippines was not the kind of command that required general leadership such as this war required, for instance. It was a bushwhacking, guerilla, all the time.

The only point that I make is that we ought not to get the idea that merely because a man is labeled a major general he is of such superior quality that his word must be taken and he must not be subjected to the cross-examination which an expert ought to be subjected to, because I will assure you that I am quite as good a man as a

lieutenant colonel as I was when I was a brigadier general; and the experience is about the same.

Senator LENROOT. That is to say, in your opinion he is no better qualified than a captain would be?

Mr. ANSELL. Less qualified, I think I should prefer a captain who is in immediate contact with his men.

I have taken a great deal of time on this. It is a matter that I had wanted to say, however.

I had commenced reading the points of this brief. [Reading:]

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

The first of the several points under that is:

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

And they did. I have never known men to have such crystallized views. To undertake to point out the difference between the old Army and the new Army to those men was to talk to men who simply could not understand. They would not consider it. [Reading:]

(2) The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.

I have referred there to an officer whom you gentlemen will hear more of if these hearings are to include calling those who insist upon supporting the existing system—Col. Winthrop, who was, indeed, the Blackstone of the Army, a man of great capacity to express himself, and who was also a keen legal reasoner. But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of a military commander. The best reason that that author ever gave for that view—the best legal reason—was what I adverted to yesterday. He said that they are not a part of the Federal judiciary because they are not organized under the judiciary clause of the Constitution, which of course is obvious, and then he follows that with a *non sequitur*, "therefore they belong to the power of military command, an executive agency;" when, of course, that same line of reasoning would have led to the conclusion that the territorial courts are not judicial bodies at all, are not governed by law, but are executive agencies, because they, too, are not organized under the judiciary clause of the Constitution but under the territorial clause, by Congress, empowered to govern the territories and dispose of them; and since the courts of the District of Columbia here are not organized under the judiciary clause of the Constitution, but under that clause of the Constitution that empowers the Congress to set aside this District here and govern it, they, too, are not courts but executive agencies. Obviously, it would be anarchy to hold that these courts are not courts because they are not the usual Federal courts that we have. They are courts, and are governed by principles of law just as much as the Federal courts are.

I will hurriedly pass over the points in my Brief on Revisory Power. The first point of the brief was as follows:

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction, and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime, which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of executive favor.

That seems obvious. The second point is as follows:

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing. They are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

And under this point I discussed these propositions:

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

(2) The opposing legal views are anachronistic; they are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied. (See Dynes *v.* Hoover, 20 How, 82; Keyes *v.* U. S., 109 U. S., 340; McClaughry *v.* Deming, 186 U. S., 62.)

(3) The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supreme Court of the United States, though this department still clings to them.

Those teachings were:

(*a*) That courts-martial were not courts at all in any proper sense of the term;

(*b*) That, therefore, they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(*c*) That, therefore, judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(*d*) Being executive agencies, they are subject to the power of command.

Those teachings were all wrong, and the sooner we abandon them the better.

(*a*) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (Runkle *v.* United States, 122 U. S. 543, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; Ex parte Reed, 100 U. S. 13, 21; Swaim *v.* United States, 165 U. S. 558; Keyes *v.* United States, 109 U. S. 336, 340; Grafton *v.* United States, 206 U. S. 333, 348; Smith *v.* Whitney, 116 U. S. 167, 178.)

(*b*) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (Ex parte Mason, 105 U. S. 696; Carter *v.* Roberts, 177 U. S. 496; Carter *v.* McCloughry, 163 U. S. 365; Grafton *v.* United States, 333, 348.)

(*c*) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land, is a bar against a second trial in any court of the United States. (Grafton *v.* United States, 206 U. S. 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the Grafton case had regarded it as settled law and justice, and sternly opposed the contrary view, that a soldier, though tried and punished by court-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and his rights to justice.

I think there is nothing more difficult to understand in this world than the great gulf between the Army and our civil functions of government. There is nothing more obvious to the lawyer than this, that the War Department says that courts-martial are one thing, fundamentally, and the Supreme Court of the United States upon

every opportunity says diametrically the opposite; and yet the contact between civil and military authority is so remote that the military view, as a practical matter, dominates, and there is no way of checking it. There is no way that a civil court of the United States can impose its view upon a military court except in the one case where the military court is absolutely destitute of jurisdiction, and a man imprisoned by its judgment applies for a writ of habeas corpus and thus gets a collateral review of the judgment of the court-martial.

Senator CHAMBERLAIN. You mean under the law now?

Mr. ANSELL. Yes; I mean under the law now.

Senator CHAMBERLAIN. But Congress has the power to bring about a change.

Mr. ANSELL. Absolutely; it is a remarkable fact that the courts-martial of England are subject to review by the civil courts not only by way of the writ of habeas corpus but by writ of certiorari, by the writ of prohibition, and by the other common-law remedies; that the relation of military justice to the civil judicial authority there is such as to permit that course. Of course, the civil authority is rather reluctant to intervene, as, indeed, it ought to be.

Senator LENROOT. At some point in this hearing could you put in the English articles of war as they now exist?

Mr. ANSELL. It is called the Army Annual Act, nowadays. The old term has been abolished.

As showing you the inherent, fundamental character of a court-martial as reviewed by the Supreme Court of the United States I would refer you to the following cases:

Runkle *v.* United States, 122 U. S. 543, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; ex parte Reed, 100 U. S., 13, 21; Swaim *v.* United States, 165 U. S. 558; Keyes *v.* United States, 109 U. S. 336, 340; Grafton *v.* United States, 206 U. S. 333, 348; Smith *v.* Whitney, 116 U. S. 167, 178.

Ex parte Mason, 105 U. S. 696; Carter *v.* Roberts, 177 U. S. 496; Carter *v.* McCloughry, 163 U. S. 365; Grafton *v.* United States, 333, 348.

To show you how far removed we of the Army are from civil appreciation, I would cite a leading case in military law, the Grafton case. (Grafton *v.* United States, 206 U. S. 333, 348.) There was involved in that case an issue in which I was then and still am deeply interested, and that is, the very character of these courts-martial, and how far those principles of the Bill of Rights and the other principles of the law—common law, Anglo-American law—are applicable to these courts-martial, in order to secure a fair trial. I say this was the issue involved. Speaking concretely, the issue was whether a man who had been once tried by court-martial and subsequently tried by a civil court of the Philippines under the sovereignty of the United States, was entitled to the protection of that clause of the Constitution against double jeopardy. It had long been and still is the contention of the so-called lawyers of the War Department that not one single clause or legal principle in the Constitution, in the Bill of Rights, or any other of these ancient documents that have come down to us as a part of our birthright, to secure our liberties against government, not one is applicable to courts-martial—including this great protection against second trial. Here are two courts springing from a common sovereignty, the court-martial and the civil court of the Philippines. This soldier had been tried and acquitted by a court-martial of manslaughter.

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That seems obvious. The second point is as follows:

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But these young boys, under the circumstances, knew that it was very unlikely that they would be given capital punishment. Of course, they never contemplated capital punishment, because the Army did not contemplate it at that time.

Without going into the illegalities of these trials, I will say that I wrote a memorandum and an officer for whose legal ability Gen. Crowder has a very high regard also wrote another, and said that it would be the very height of injustice to execute these men.

Let us see what happened when the records got here. When the records came to him was the Judge Advocate of the Army an independent judge in this matter? No. The first thing he did when he got these records was to write up a review of all four cases, sustaining the legality of the proceeding.

Senator CHAMBERLAIN. Did he do that himself?

Mr. ANSELL. I have no idea. I only know that he signed it and acted on it. But he left the final paragraph, the recommending paragraph, blank. Then he writes a note to the Chief of Staff, saying, "I have got the four death cases from France. They are cases in which the commanding general in France is very much interested, and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing."

And in that note Gen. Crowder asked Gen. March for a conference on the subject, that they might reach an agreement.

Here was your judge speaking, "We ought to agree to uphold the hands of the commanding general, regardless of the merits."

Senator CHAMBERLAIN. Was that aside from his review of the cases?

Mr. ANSELL. Yes; that was a note that he wrote on April 5 to Gen. March, Chief of Staff, the ultra military man, of course, and as he ought to be, and a man of no judicial appreciation. I mean his office contemplates none. I am not talking about the man, of course. The Judge Advocate General said, "We ought to agree to support the hands of Gen. Pershing in these cases," notwithstanding the fact that Gen. Pershing under the law did not have any more to do with that case than you or I. The Chief of Staff and the Judge Advocate General the next day did confer on these cases, as the Judge Advocate General had requested, and the Judge Advocate General of the Army thereupon returned to his office and filled in the blank paragraph with a recommendation, "I recommend that these men die."

When I heard about this I wrote this memorandum. I had never seen the cases before, notwithstanding the contrary testimony of some of the officers before your committee last year intent upon excusing Gen. Crowder's part in such transactions, because at the time they were given this original consideration I was in Canada; and because also, not being in favor, the cases were not sent to me. Col. Mays, who was my assistant in the office, has recently returned here and testified before the Inspector General to the effect, so he advises me, that I never could have seen those records, because the officer who reviewed them brought them to him and not to me. These cases did not come

The civil courts, rather antagonistic to that course and to the military authorities, anyway, took jurisdiction, indicted the man for murder, and proceeded to try him for the same homicide. The authority of the lower courts was to the effect that courts-martial tried not for the general offense against the law of the land, but simply for a violation of the special code—the code of the Army. That is, if a soldier killed another soldier, or somebody else for that matter, and the military authorities took jurisdiction, they took jurisdiction to try him not for murder or some other degree of unlawful homicide against the general law of the land, but for that violation of this special military code here, and tried him in the military aspect, leaving the civil court to try him for the general civil aspect; and that was the general War Department view, flowing, of course, from the fact that courts-martial are not courts but are simply military agencies designed to redress the injury according to the will of some commanding officer, and that view had been so imposed, so circulated, so ably supported by organized government, namely, the War Department, that many of the lower courts had adhered to it.

So this case, the Grafton case, brought up the very question. I applied to be counsel for Grafton in that case because we were all contributing money to hire him counsel, and I was not able to contribute very much. A great question was involved and I wanted to present it; and the War Department would not permit me. But the court held in that case that a court-martial was a court; that the offense for which this man had been tried was the offense against the law of the land, notwithstanding the fact that the authority for trial sprang out of these Articles of War, and that no other court of the same sovereignty could come along and try him again for the same offense without placing itself in the way of this inhibition against double jeopardy, and dismissed the entire proceedings.

The court took occasion to say this:

> We base our decision not upon the fact that this clause of the Constitution of the United States has been carried to the Philippines by congressional enactment; we do not base this decision upon the fact that Congress has enacted, in the old fortieth article of war, an inhibition against double jeopardy. We base it upon the fact that the Constitution of the United States applies, regardless of legislation.

And yet, apparently, the Judge Advocate General's Department of the Army up until recently had never seen the great point of that case. They would not permit the disapproval of a court-martial proceeding upon the ground that the fundamental rights of the man had been violated, because they contended that the fundamental rights of a man before a court-martial were not fundamental rights: they were not rights guaranteed to him by the Constitution, at all. In other words, the measure of right that a man had before a court-martial was to be found in what Congress had mandatorily declared to be the right of the man. But the Supreme Court said that if Congress, even with its full power to make rules and regulations for the government of the Army, should undertake to say that a man could be tried a second time for the same offense, it would be restrained by this constitutional clause against double jeopardy.

Senator CHAMBERLAIN. You said that that view was entertained until recently. What did you mean by that?

Mr. ANSELL. I mean by that, that I as Acting Judge Advocate General fought, backed by the authority of the Grafton case, to the point where I have gotten a partial recognition, at least, of these rights, the right to counsel, the right to a fair trial, the right to have witnesses.

Senator CHAMBERLAIN. Only recently the President, within the last month, I understand from the press has issued an order that no commanding officer hereafter should disapprove and send back the papers in a case and order a retrial of a man who had been acquitted.

Mr. ANSELL. Yes; although that has been agitated for 18 years, I know, and the War Department has insisted that that was a proper thing, and the Judge Advocate General of the Army, in the very hearings before the committee, beginning in 1912 and terminating in 1916, insisted that that was a proper thing, that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1918 conferring this revisory power, he went before the House committee and argued for the advisability of permitting this court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to.

Senator LENROOT. I assume, General, that if Congress did in fact vest final and conclusive jurisdiction in a court-martial, it would be competent for Congress to do that?

Mr. ANSELL. Certainly, notwithstanding the Kernan learning. There is nothing fundamental about an appeal, but it is very necessary of course for the correction of error.

Senator LENROOT. Oh, yes, of course.

Senator CHAMBERLAIN. Under the decision of the Supreme Court in the Grafton case, even if Congress undertook to take away that right of a man not to be placed twice in jeopardy, the act of Congress would not be sustained by the court?

Mr. ANSELL. No; it would not be.

Senator LENROOT. Of course not.

Mr. ANSELL. But, as I say, it is very difficult to determine upon judicial authority how much of this existing judicial code is fundamentally wrong, because, again, except by way of habeas corpus we have no way of testing it. They can only say that every time the Supreme Court has spoken on the subject it has spoken a view diametrically opposite to that which the War Department insists upon adhering to.

Point 3 of the brief is as follows:

III. The whole argument on the other side is found in the contention that the word "revise" has no substantial meaning, but has reference only to clerical corrections. One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view. That fact is this: The word "revise" is an organic word which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

Gentlemen, if there ever was a plainer case of a statute speaking by history, and bearing also upon its face its unmistakable meaning, it has never been brought to my attention. Congress was so interested in military justice during the Civil War that it created separately

from the office of the Judge Advocate General a Bureau of Military Justice, so denominated, but it made the Judge Advocate General the chief also of that bureau. The only purpose it had in this world for creating that independent bureau of the War Department and equipping it with officers was to see that these court-martial judgments were revised. Congress used language that was technical and brief, and did not carry to the mind of the man who would not see its real meaning. Congress said the Chief of Military Justice should "revise" proceedings of courts-martial. The War Department at first insisted that meant a clerical revision. What in the world anybody would want clerically to revise the proceedings and judgment of any court for, unless it was going to be of benefit to the man who was undergoing sentence, I can not see.

Then, when the fallacy of that position was exposed, they said that it did confer upon the Judge Advocate General the power to study a case and make a recommendation to somebody.

Senator CHAMBERLAIN. And, in case of a lack of jurisdiction, to set it aside?

Mr. ANSELL. Oh, yes; to set it aside; but saying, inconsistently, it seems to me, that he could study and he could recommend, but if the commanding general had already approved, it had passed beyond any power of correction.

Senator LENROOT. When did the construction of this statute first arise after its enactment?

Mr. ANSELL. I have it in this brief, Senator.

Senator LENROOT. I would like to have you give it.

Mr. ANSELL. I am glad you asked the question. It arose, I think, the first time in 1887.

This is the fourth point in the brief (reading):

IV. "Revise" in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

The fifth point is as follows:

V. The word "revised," as a matter of fact, is in no sense ambiguous, and there is no room for construing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least, pronounce sentences invalid, and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

The sixth point is as follows:

VI. The judge advocate general of England certainly did have this power of revision. (I am not advised of his present authority)

The seventh point is as follows:

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

The eighth point is as follows:

VIII. The necessity, in the name of justice, of locating this power in this department, and preferably in this office, where logically, and I think legally, it belongs, must be apparent to all who are familiar with the administration of military justice.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
France, January 17, 1918.

In the foregoing case Pvt. Olen Ledoyen, Company B, Sixteenth Infantry, the sentence is approved and the record forwarded for action under the provisions of the forty-eighth article of war.

(Signed) R. L. BULLARD,
Major General, United States Army, Commanding.

(2.)

GEN. PERSHING'S INDORSEMENT.

From: The Commander in Chief.
To: The Judge Advocate General of the Army.
Subject: Trial by general court-martial, requiring action of the President.

1. I am forwarding you herewith for the action of the President four records of trial by general court-martial, in each of which cases the court has sentenced the accused to death and the sentence has been approved by the commanding general of the First Division, American Expeditionary Forces, the authority who appointed the court. In two cases the accused were convicted of willful disobedience of orders, and in the other two, of sleeping on post while sentinels in the front trenches when face to face with the enemy. Each of these cases is reviewed by Lieut. Col. Blanton Winship, Judge Advocate of the First Division. I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

2. The fact that these men were clearly guilty of offenses punishable under the law with death is not the only, or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed—especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases, in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.

(Signed) JOHN J. PERSHING,
General, Commanding.

(3)

GEN. CROWDER'S REQUEST FOR CONFERENCE WITH CHIEF OF STAFF ON RECEIPT OF RECORDS.

APRIL 5, 1918.

MY DEAR GEN. MARCH: Here are the four cases from France involving the death sentence—two for sleeping on post and two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

You will notice that I have not finished the review by embodying a definite recommendation.

It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at an early date?

(Signed) E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

tion and considerateness pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such a remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed, I think, requires it to take.

CONCLUSION.

This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relations of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

I should like to read into the record other memoranda of mine written after I was relieved in November, 1917, from my connection with the Division of Military Justice, memoranda which are closely connected with this question and in which I still sought to show the necessity and method of establishing such power, and in which I contended that the administrative palliatives could never prevent the terrible injustices which must inevitably follow any man-governed, lawless system of courts-martial.

(These memoranda appear elsewhere as Exhibits H, I, and J.)

Mr. ANSELL. Even in the early days of the war, and recognizing that commanding generals would exercise all the power that the department held to be theirs, still some of them thus early exercised the power so ruthlessly, and with such disregard for orderly administration, that I thought it advisable to call the most flagrant case to the attention of the Judge Advocate General and through him to the Secretary of War, which I did, and I should like to put that into the record. I will read you the letter. I do not like to use names, but I believe if you are ever going to correct this thing you have got to use names, and I will assume the responsibility for using the names of these officers.

Senator CHAMBERLAIN. I think they ought to be named.

Mr. ANSELL. This investigating a system and never touching somebody higher up, in my mind makes the investigation a farce.

On December 12, 1917, I filed a memorandum having to do with what I conceived to be the ill-judgment and the harshness of a major general in the Army, in command of one of our departments, an officer of my own corps, and that memorandum is this [reading]:

DECEMBER 12, 1917.

Memorandum for the Judge Advocate General of the Army.

Subject: Evidence of inefficiency of Maj. Gen. John W. Ruckman, commanding the Southern Department, headquarters at San Antonio, Tex., and of Col. George M. Dunn, Judge Advocate General's Department, the judge advocate upon the staff of Gen. Ruckman.

1. I feel it my duty to call to your attention what I conceive to be evidence of the incompetency of the two officers of the Army who are the subject of this memorandum with the intention and purpose that these views be brought by you to the attention of the Chief of Staff and the Secretary of War.

2. In a memorandum which I began work upon two weeks ago and which I completed yesterday (upon the revisory power of this office) I had occasion to advert to what I conceived to be convincing evidence of the failure of the department commander to exercise his power to prevent gross injustice to the enlisted men of his command who were charged with, tried for, and convicted of mutiny, and the proceedings of which trial were approved by him and the sentence carried into execution, notwithstanding such patent prejudicial errors as must have caused any competent official, certainly if competently advised, to discover such errors and because of them disapprove the proceedings.

3. Yesterday we were apprised, through the public press and for the first time, that Gen. Ruckman had proceeded summarily to execute the sentences of death in the case of 13 negro soldiers recently tried in his department. I shall not allude to this case further than to say that, under the circumstances surrounding this case which were such as to reveal themselves in all their bearings to a man of ordinary prudence and care, a man possessing the poise and sanity of judgment that should be necessary concomitants of the rank which this officer holds, could not have summarily carried into execution those sentences. Under the circumstances of this case the action taken by this commander was such a gross abuse of power as justly to merit the forfeiture of his commission.

4. I must assume that this general officer has sought and acted upon the advice of his judge advocate, Col. Dunn, and that this officer therefor has, in the same degree with Gen. Ruckman, manifested his incompetence at a critical time.

5. I am conscious also, though Maj. Davis will be able the better to advise you in this respect, that the administration of military justice in this command is generally below the standard of efficiency which should be required. A short while ago I was so impressed with this view that I had occasion to remark, "It seems to me the commanding general of the Southern Department never reads or interests himself in the judgments of his courts-martial."

6. The responsibility, of course, is not mine further than thus to advise you.

S. T. ANSELL.

Senator CHAMBERLAIN. Was anything ever done in reference to that?

Mr. ANSELL. No, sir; nothing.

Senator LENROOT. No reply was made to that letter at all?

Mr. ANSELL. No, sir. It is only fair to say that this particular general was not the only one. There were others who were manifesting the same tendency and disposition, even then, and they have manifested it in greater degree since. Of course, if we are once to concede that a commanding general can use these courts to do as he pleases, that he is the government and they are his agencies, I assume that, having conceded so much, we should not criticize any action that he takes; but I, for one, could never concede that.

Though it were to be considered as a War Department theory, it nevertheless seems to me that when a commanding general closes a case to-day and executes his men to-morrow morning in the cold gray dawn, in this country, 5,000 miles from the battle zone, he shows that he has not that quality which he ought to have to be a real leader of men or a worthy bearer of the major general's shoulder straps. Why, a decent regard for the orderly performance of such important duties, it seems to me, would require considerable time to intervene between the approval of a death sentence and the execution of the men. Those men, surely, assuming their utmost guilt, as I do assume it, had the right to compose their affairs. They had the right to appeal to the President of the United States for clemency. Time ought to intervene between the approval of any sentence of death and the execution of that sentence in order that a man may do these things.

Senator CHAMBERLAIN. It is not the law, now, that overrules that theory of the War Department, but an order which was issued as a result of the criticisms of the department?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. So that General Order No. 7, to which you refer, is not a law but is simply a regulation?

Mr. ANSELL. That is so.

Senator CHAMBERLAIN. And but for that regulation the commanding officer would still have the power to have a man executed within 24 hours after his sentence?

Mr. ANSELL. Yes.

Senator LENROOT. That General Order No. 7 has gone into the record, has it not?

Mr. ANSELL. I do not believe it has.

Senator LENROOT. It should go in.

Mr. ANSELL. I will put it in.

(The order referred to is here printed in full, as follows:)

GENERAL ORDERS, No. 169.

WAR DEPARTMENT,
Washington, December 29, 1917.

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. The general court-martial order publishing the result of the trial shall recite that the date for the execution of the sentence will be hereafter fixed and published in general orders; and the fixing of the date of execution and the publication thereof shall follow the receipt of advice from the Judge Advocate General that there is no legal objection to the execution of the sentence. This rule of procedure does not relate to such action as a reviewing authority may desire to take under the fifty-first article of war.

GENERAL ORDERS, No. 7.

WAR DEPARTMENT,
Washington, January 17, 1918.

I. Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be

legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date in any given case will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General. [250. 4, A. G. O.]

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file. [250.4, A. G. O.]

By order of the Secretary of War:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

Official:

H. P. MCCAIN,
The Adjutant General.

Senator CHAMBERLAIN. Can you remember, in a general way, about the date of that General Order No. 7?

Mr. ANSELL. About February; but it began—they first issued a little order, simply staying the execution of death sentences, a brief order, immediately after this affair; and then they began to work on a larger order to the same effect, which went no further than to stay the execution of the sentence of death.

Senator CHAMBERLAIN. No other sentence?

Mr. ANSELL. No other sentence. Though I had brought them to the attention of the department, I was not invited to participate in those matters. An officer in the department, however, handed me the original draft of the order, and I felt so strongly on the matter that I took it to Gen. Crowder and said, "It is true this is a step in the right direction, but it does not go far enough. I do not know what your authority is according to your view, but why not carry it to the point of giving it general application to all those sentences the execution of which would place a man beyond the Army, to which he could not return; specifically, sentences of death, dismissal, and of dishonorable discharge"? And, after some two or three weeks' argument, the order was finally amended, and probably published in February, so as to stay all sentences in cases not only of death but of dismissal and of dishonorable discharge, until we could study the record and advise—having no authority—the commanding general.

I think that when this committee come to consider punishments they ought to consider, in the light of service appreciation and military environment, the terribleness of the sentence of dismissal and dishonorable discharge.

Senator CHAMBERLAIN. Are you prepared to go into that with us; because we want to get it all together?

Mr. ANSELL. Yes; but when we come to talk of the bill, if we ever do, I will go into those matters. But right now——

Senator CHAMBERLAIN. Right in that connection: This advisory power which it is claimed that the Judge Advocate General had, of advising the commanding officer with respect to these sentences, how often was that advisory power exercised, and if ever exercised, what effect did it have?

Mr. ANSELL. Why, Senator, we did not review. I do not know why we should make any pretense about it. I had a responsibility in that office—notwithstanding the fact that Gen. Crowder was there. I had a responsibility—and I say to you, speaking out of that sense of responsibility, that we did not revise court-martial records. We revised officers' cases, we revised death cases, and we got little further. There was one man, not always the best man, and with all too much to do, who revised—that is, looked over—the other cases.

But I want you to understand that. I am as independent, perhaps, as a man for his own good ought to be, but do not think that you can take a human being labelled a lawyer and put him in the War Department and subject him to the power of military command and expect him to be judicially independent. He will not be. It may be that the military commander and the judge advocate do not disagree so much, because the judge advocate does the agreeing. In the same way the Judge Advocate General is not independent, but yields, meekly and modestly, to the Chief of Staff.

There is no better case of the deplorable situation into which the law department of the Army has dropped than that of the four death cases from France. See, briefly, what happened in those

cases. Judge Advocate General Crowder was dealing with the lives of four men, boys, who were volunteers, not yet 19 years of age. Two of them were tried for sleeping on post in the front line trench, and two were tried for disobedience of an order to get their equipment and go to drill. I will not go into the record of the cases minutely. There is not much record to go into, because I will say that the records in these cases comprise less than four loosely written typewritten sheets of paper—a record that condemned them to death.

Two, with a counsel whose incompetency I can scarcely find language to describe, a young lieutenant, were permitted to appear before this court and plead guilty to a capital offense. The only thing he did was to call a single witness and actually put the military character of his client in issue by asking that man, who was the company commander, this question, "What is the military record of my client here?" And the man said, "Bad; very bad. One of the worst in the country." That ended it, and that was the extent of counsel's service to that man.

The other two pleaded not guilty; but upon testimony, the brevity of which I have indicated, they were found guilty.

The two men who were found guilty of sleeping on post had been on that post, a cossack post, two men looking through the peephole out over no man's land and one resting for an hour, for the seventh day and night, until sheer exhaustion unquestionably had overtaken them. It was during the time when, with a small force, we were undertaking to hold a very large sector.

Senator LENROOT. Did that appear in the testimony?

Mr. ANSELL. That appeared. Not in the words I have used, Senator, but the facts appeared and these circumstances appeared.

Senator LENROOT. Yes.

Mr. ANSELL. The other two pleaded guilty to a disobedience of orders, and then immediately after this plea they made this statement, absolutely inconsistently with the plea, "We had been drilled so hard on these bleak hills of the Vosges in this severe climate, worked so hard and so long, that we finally reached the point of physical exhaustion, and we could no longer drill." Now, notwithstanding the truth or falsity of that statement, what was the duty of the court? The very moment that a man pleads guilty to a capital offense and then makes a statement of physical incapacity to obey an order, the duty of the court is, of course, beyond all argument, to enter a plea of not guilty and try out the case. The court did not do that. They just proceeded to railroad them through. Those men were not even arrested, the charges were not even preferred against them, in the customary way. The charge and the arrest ordinarily come immediately after the commission of the offense. The men who were alleged to have been sleeping on post were not even relieved. In fact, one of them had been found asleep, according to the report of the lieutenant and of the corporal, earlier in the evening. They did not relieve him; they kept him there, notwithstanding the evidence of his physical exhaustion. But they did not even proceed against those men in the usual military way. They waited for a month or five weeks after that, and in the meantime the military authorities had changed their policy. The records will show that in the same locality and the same command similar offenses

had been treated, and treated adequately, rather lightly. But having changed their policy, the military authorities said, "We have got to shoot somebody, and here we have got these four cases." They ran them before the court, and meantime with a court of five men in two cases and of six in the other, with the accused defended as I have indicated to you, the courts reached the conclusion of guilt, and sentenced these men to die. Then the record came, not as it ought to have come, directly to the President of the United States, who in this case was the confirming authority, fortunately, but Gen. Pershing had the records come through him. Gen. Pershing had nothing whatever to do with these cases any more than you have, or you, or I. The fact that he was commander of the Army in France does not, under the code, give him any power in these quasi judicial matters, and the channel of authority is straight from the division commander who convened that court and approved the judgment, to the President of the United States who is the confirming authority. Yet the Army commander, Gen. Pershing, interjected his authority, and put all his great power in a memorandum that accompanied those records, to induce the President of the United States to confirm these sentences of death, and even requested that he be given a mandate by cable so that the death sentences could be carried out very expeditiously.

When those records got here it seems to me that it would have been obvious to any lawyer that substantial justice was not done. Errors of law stood out upon the records. Notice, one court tried both men for sleeping on post; absolute similarity of circumstances, interwoven just like that [indicating]; one court, in the same evening, consuming 40 minutes on each case, tried one of these men after another. Who may believe that that court was a fair court in any but the first trial?

Senator CHAMBERLAIN. The same court tried all of them?

Mr. ANSELL. Yes; the same personnel, with the addition of a single man, or maybe two men, in two of the cases.

But I am addressing myself to the similarity of the cases, of all the facts and circumstances. Of course, when the court came to the trial of the second man he had already been tried. There they were, standing before the same loophole, and all that kind of thing.

Another thing, this counsel did not do his duty. The accused soldier did not have any counsel. I would have no hesitancy under those circumstances in saying that though he did have nominal counsel he did not have real counsel, the counsel that the Constitution speaks of.

It was perfectly obvious, also, that these men themselves did not act understandingly. Take the men who pleaded guilty—the two of them—they made improvident pleas. They did not know what they were up against. They were not advised.

Senator CHAMBERLAIN. Is there anything in the record to show that they were informed of the pleas?

Mr. ANSELL. Yes. You understand that this was a capital offense; but there are so many capital offenses in the manual. The slightest disobedience of orders, a lifting up of your hand against your superior officer, are capital offenses. There is a long list of capital offenses, but they do not get capital sentences for most of them, and frequently they plead guilty to a capital offense.

But these young boys, under the circumstances, knew that it was very unlikely that they would be given capital punishment. Of course, they never contemplated capital punishment, because the Army did not contemplate it at that time.

Without going into the illegalities of these trials, I will say that I wrote a memorandum and an officer for whose legal ability Gen. Crowder has a very high regard also wrote another, and said that it would be the very height of injustice to execute these men.

Let us see what happened when the records got here. When the records came to him was the Judge Advocate of the Army an independent judge in this matter? No. The first thing he did when he got these records was to write up a review of all four cases, sustaining the legality of the proceeding.

Senator CHAMBERLAIN. Did he do that himself?

Mr. ANSELL. I have no idea. I only know that he signed it and acted on it. But he left the final paragraph, the recommending paragraph, blank. Then he writes a note to the Chief of Staff, saying, "I have got the four death cases from France. They are cases in which the commanding general in France is very much interested, and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing."

And in that note Gen. Crowder asked Gen. March for a conference on the subject, that they might reach an agreement.

Here was your judge speaking, "We ought to agree to uphold the hands of the commanding general, regardless of the merits."

Senator CHAMBERLAIN. Was that aside from his review of the cases?

Mr. ANSELL. Yes; that was a note that he wrote on April 5 to Gen. March, Chief of Staff, the ultra military man, of course, and as he ought to be, and a man of no judicial appreciation. I mean his office contemplates none. I am not talking about the man, of course. The Judge Advocate General said, "We ought to agree to support the hands of Gen. Pershing in these cases," notwithstanding the fact that Gen. Pershing under the law did not have any more to do with that case than you or I. The Chief of Staff and the Judge Advocate General the next day did confer on these cases, as the Judge Advocate General had requested, and the Judge Advocate General of the Army thereupon returned to his office and filled in the blank paragraph with a recommendation, "I recommend that these men die."

When I heard about this I wrote this memorandum. I had never seen the cases before, notwithstanding the contrary testimony of some of the officers before your committee last year intent upon excusing Gen. Crowder's part in such transactions, because at the time they were given this original consideration I was in Canada; and because also, not being in favor, the cases were not sent to me. Col. Mays, who was my assistant in the office, has recently returned here and testified before the Inspector General to the effect, so he advises me, that I never could have seen those records, because the officer who reviewed them brought them to him and not to me. These cases did not come

to me. I saw them this way: A clerk in the department met me in the corridor and said, with tears in her eyes, "They are going to hang these four boys." I said: "I know nothing about it." She said: "You get the records; look it up, please, and look it up hastily." And I got the records and took them home with me and studied them. If we go directly to the end of the thing, I would say that no man would hang a dog on any such record. I went to the Judge Advocate General, and he was perturbed and irritated at my coming, and finally said to me: "If you have got anything to say about those cases, you submit it in writing." And I submitted in writing my reasons why they should not die.

And then did that memorandum get to the Secretary of War or the Chief of Staff or the President of the United States? No. He did cull such facts as he wanted out of that memorandum and put them and other things in a memorandum, No. 2, to the Chief of Staff, in which he says: "I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but understand, when I submit this memorandum to you, I do it with no desire to reopen this case." And he concluded with the statement that "while these facts suggest clemency, nevertheless I do not recommend it. Gen. Pershing, of course, would feel that we had not supported him, and I sympathize with his view." Now, he has stated in this public statement that was issued broadcast throughout the country at great expense to the Government, that he filed a second memorandum, which he says, to use his rather uncandid language, "looks in the direction of clemency." In the direction of clemency!

Senator CHAMBERLAIN. May I ask you there, Can you put in the record your memorandum to him and his second memorandum to the Chief of Staff?

Mr. ANSELL. With the permission of the committee, I will put the memoranda filed by him and by me in this case into the record.

Senator CHAMBERLAIN. Yes. And then you say the Secretary of War did not see it?

Mr. ANSELL. He did not see it. It was that which seems to have set, if I might speak plainly, the department firmly against me.

Senator CHAMBERLAIN. By the way, when you put those things in the record, in order that the committee may have it before them, I would like to have his first memorandum, your memorandum, and the second memorandum of Gen. Crowder, and I would like to have you put under it that portion of this propaganda that went out from Wignore—the language that Crowder used when he said it was looking toward clemency.

Mr. ANSELL. I should like to do that.

Senator CHAMBERLAIN. I would like to have them together, since I have had more or less controversy about that, myself.

Senator LENROOT. I suggest that he put in the record all of that record that he has in his possession.

Mr. ANSELL. These are copies that I have, of course.

Senator LENROOT. Yes, of course.

The matter above referred to is here printed in full in the record as follows:

LEDOYEN'S CASE.

Record.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
France, December 15, 1917.

GENERAL ORDERS, No. 162.

1. A general court-martial is appointed to meet at headquarters 16th Infantry, for the trial of such persons as may be properly brought before it.

Detail for the court: Col. W. F. Creary, Infantry; Maj. Philip Remington, 16th Infantry; Capt. J. P. Bubb, 16th Infantry; 1st Lieut. B. D. Spalding, 16th Infantry; 1st Lieut. A. P. Withers, 16th Infantry; 1st Lieut. C. L. Irwin, 16th Infantry; 1st Lieut. P. L. Ransom, 16th Infantry; 1st Lieut. A. F. Kingman, 16th Infantry; 1st Lieut. W. C. Comfort, 16th Infantry. 1st Lieut. Paul C. Green, 16th Infantry, judge advocate; 2d Lieut. H. W. Clark, 16th Infantry assistant judge advocate.

The employment of a stenographic reporter is authorized.

By command of Maj. Gen. Bullard:

WM. H. CRUIKSHANK,
Adjutant General, Division Adjutant.

FRANCE, *January 3, 1918.*

The court met pursuant to the foregoing order at 8.50 o'clock p. m.

Present: Col. W. F. Creary, Infantry; Maj. Philip A. P. Withers, 16th Infantry; 1st Lieut. B. D. Spalding, 16th Infantry; 1st Lieut A. P. Withers, 16th Infantry; 1st Lieut. P. L. Ranson, 16th Infantry; 1st Lieut. W. C. Comfort, 16th Infantry; 1st Lieut. Paul C. Green, 16th Infantry. judge advocate; 2d Lieut. H. W. Clark, 16th Infantry, assistant judge advocate.

Absent: Capt. J. P. Bubb, 16th Infantry (sick); 1st Lieut. C. L. Irwin, 16th Infantry (sick); 1st Lieut. A. F. Kingman, 16th Infantry (sick).

The court proceeded to the trial of Olen Ledoyen, private, Company B, 16th Infantry, who, appearing before the court, introduced Lieut. Black, 16th Infantry, as counsel.

Pvt. Joseph A. Shea, Headquarters Company, 16th Infantry, was sworn as reporter.

The order appointing the court was read to the accused, and he was asked if he objected to being tried by any member present, to which he answered as follows: "The accused objects to Maj. Philip Remington on the ground that he is the officer who has investigated the charges and has formed an opinion."

Maj. REMINGTON. I have investigated these charges and have formed an opinion.

The COURT. If there is no objection on the part of any member present, Maj. Remington will be excused from sitting as member of the court at this trial.

There being no objection on the part of the members present, Maj. Philip Remington was excused and withdrew.

The accused was asked if he objected to being tried by any of the members remaining, to which he replied in the negative.

The members of the court, the judge advocate, and the assistant judge advocate were sworn.

The accused was then arraigned upon the following charges and specifications:

Charge I: Violation of the 64th Article of War.

Specification: In that Pvt. Olen Ledoyen, Company B, 16th Infantry, having received a lawful command from 1st Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same.

FRED M. LOGAN,
1st Lieut. 16th Infantry.

To which the accused pleaded:

To the specification: Guilty.

To the charge: Guilty.

The paragraphs of the Courts-Martial Manual that set out the gist of the offense were read to the court by the judge advocate.

By the president of the court: "You, Private Ledoyen, the accused, understand that in pleading guilty to the charges and specifications here you admit that you committed all the elements of the acts with which you are charged, and that you committed them of your own free will, and that you were not

forced into doing it by any influence. By pleading guilty you make it not necessary for the judge advocate to prove these charges against you, the extreme penalty for which in time of war is death, or such other punishment as the court-martial may direct. In pleading guilty you throw yourself upon the mercy of the court to adjudge you this penalty. Having been thus informed, do you wish your plea of guilty to stand?

The accused: "Yes, sir."

First Lieut. Fred M. Logan, Sixteenth Infantry, a witness for the prosecution, was sworn, and testified as follows:

Questions by the prosecution:

Q. State your name, rank, and organization.—A. Fred M. Logan, First Lieut. Sixteenth Infantry.

Q. Do you know the accused? If so, state his name, rank and organization.—A. Olen Ledoyen, private, Company B, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Private Ledoyen an order?—A. I did.

Q. He did not obey that order, did he?—A. No, sir; he did not. He refused and stated that he refused.

Q. What was the order?—A. He was ordered to get his pack and get ready for drill with his squad.

Q. Was there any reason why he would not obey?—A. No, sir. He did it willfully, and was warned at the time.

Q. Did you give him this order in person?—A. I did.

Q. Did he say anything in regard to why he disobeyed?—A. No, sir.

Q. You may state any further facts or circumstances surrounding the case.—A. At the time, when he was ordered to get his pack and report for drill with his squad, he refused, and stated that he would not go to drill. I then told him of the consequences of such an act, and gave him another opportunity to go get his pack and drill, and he again refused, saying "I refuse to go to drill."

Q. You warned him of the consequences or his acts?—A. Yes, sir.

The defense declined to cross-examine the witness.

Questions by the court:

Q. State as nearly as you can remember the exact words that you used in warning the accused of the consequences of his act.—A. I told him that he was liabling himself to trial by general court-martial, which might impose a very heavy penalty. There were four who first refused to go to drill, and two reconsidered and went to drill later. I asked the accused if he understood what he was doing, and he and Private Fishback still refused to drill.

Q. Did the accused know that a court-martial might impose a death penalty for his act?—A. I think not. I do not believe that I told him that.

Q. You stated a heavy sentence?—A. Yes, sir.

Q. Did this man offer any reason as to why he refused to drill?—A. No, sir.

Q. Was it simply a positive, flat refusal with no excuses?—A. Yes, sir.

The prosecution rests.

The defense, having no testimony to offer, made the following verbal statement: "Lieut. Logan had us out on the hill the day before and we nearly froze to death, and the next day I was so stiff I could not drill."

The court was closed and finds the accused: Of the specification, Charge I, Guilty; of Charge I, Guilty.

The court was opened and the judge advocate, in the presence of the accused and his counsel, stated that he had the record of four previous convictions which were read, and copies of which are hereto appended, marked 1, 2, 3, and 4.

Judge Advocate. "Do you, the accused, admit the correctness of these charges and convictions?"

The accused: "Yes, sir."

The court was closed, and sentences accused, Olen Ledoyen, Company B, Sixteenth Infantry, to: Two-thirds of the members present concurring therein, the court sentences the accused to be shot to death with musketry.

The court at 9.45 o'clock p. m. was opened and adjourned to meet at the call of the president.

W. F. CREARY,
Colonel, Infantry, President.

PAUL C. GREENE,
First Lieutenant, Sixteenth Infantry, Judge Advocate.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
France, January 17, 1918.

In the foregoing case Pvt. Olen Ledoyen, Company B, Sixteenth Infantry, the sentence is approved and the record forwarded for action under the provisions of the forty-eighth article of war.

(Signed) R. L. BULLARD,
Major General, United States Army, Commanding.

(2.)

GEN. PERSHING'S INDORSEMENT.

From: The Commander in Chief.
To: The Judge Advocate General of the Army.
Subject: Trial by general court-martial, requiring action of the President.

1. I am forwarding you herewith for the action of the President four records of trial by general court-martial, in each of which cases the court has sentenced the accused to death and the sentence has been approved by the commanding general of the First Division, American Expeditionary Forces, the authority who appointed the court. In two cases the accused were convicted of willful disobedience of orders, and in the other two, of sleeping on post while sentinels in the front trenches when face to face with the enemy. Each of these cases is reviewed by Lieut. Col. Blanton Winship, Judge Advocate of the First Division. I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

2. The fact that these men were clearly guilty of offenses punishable under the law with death is not the only, or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed—especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases, in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.

(Signed) JOHN J. PERSHING,
General, Commanding.

(3)

GEN. CROWDER'S REQUEST FOR CONFERENCE WITH CHIEF OF STAFF ON RECEIPT OF RECORDS.

APRIL 5, 1918.

MY DEAR GEN. MARCH: Here are the four cases from France involving the death sentences—two for sleeping on post and two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

You will notice that I have not finished the review by embodying a definite recommendation.

It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at an early date?

(Signed) E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

(4)

ON RETURN FROM INTERVIEW GEN. CROWDER CONCLUDED HIS REVIEW OF CASES, AS FOLLOWS:

The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

I recommend that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

(Signed) E. H. CROWDER,
Judge Advocate General.

GEN. ANSELL'S MEMORANDUM OPPOSING CONFIRMATION OF DEATH SENTENCE.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 15, 1918.

Memorandum for Gen. Crowder.
Re Death penalty in the four cases from France.

1. After reading these records I said to you the other day that were I the confirming authority I would not confirm these sentences, and that for the same reason I could not, were I you, recommend confirmation. At your request I shall now state very briefly my reasons as I then stated them to you orally.

Ledoyen's case.—He was charged with disobeying the lawful order to fall in for drill, and was convicted upon his plea of guilty. After plea and before finding, the accused formally stated in his own behalf that he "could not go to drill" because of the extreme exposure to which he had been subjected the day before; that is, that it was physically impossible for him to drill. This statement was plainly inconsistent with his plea of guilty; accordingly, the court should have directed a plea of not guilty and tried the case on that issue. Surely in a capital case a plea of guilty, especially when, as in all these cases, the accused has not had competent counsel, should be accepted only when it was made with the utmost comprehension of all legal implications and of all consequences and only when the plea stands finally as the full, complete, and unmodified intelligent answer of the accused to the charge. Obviously the record in this case does not meet the test, and the proceedings should be disapproved.

Fishback's case.—This is in all respects a companion piece to Ledoyen's case. The military authorities have treated the two as on "all fours," and ask for the death penalty in both upon common ground. There is one difference, however. The accused in this case made no statement after his plea of guilty, and so the record does not show upon its face any statement inconsistent with the plea. Considered independently, then, the record gives no basis for the destructive opposition made to Ledoyen's case. The human facts do. The facts of the two cases are the same; the conditions and circumstances of the conduct denounced in both cases are the same. This is shown by the record and conceded and acted upon by the military authorities. Disapproval need not be based upon strict legalism. Other considerations are admissible. In view of what I have said, and following the facts of record in Ledoyen's case, I could not confirm the Fishback case.

Sebastian's and Cook's case.—The death penalty in each of these cases was awarded for sleeping on post after an inadequate defense. In capital cases extenuating circumstances are matters of defense. The defense in these cases set up, formally and without force or persuasion, however, the fact that the accused had been in the front-line trench for five previous nights from 4.45 in the evening until 6 o'clock in the morning, with an actual stand in the sentry post of two hours on and one hour off. Of course, little rest and no sleep could be had in such a brief respite. Night after night of vigilance, without opportunity for sleep, must rapidly bring exhaustion unless there be chance for rest and sleep during the day. The accused in one case testified that sleep was impossible in the dugout during the day because of the chopping of wood therein. In the other case the accused testified that little or no sleep could be had because of noise, without speaking more specifically. These are matters of ex-

tenuation, the truth of which the court made no effort to prove or disprove. A competent statement made in defense and standing unimpeached ought to be taken as true. Furthermore, in one of the cases the evidence of exhaustion is rather convincing. The accused was found evidently asleep in the early evening, around 8 o'clock. He should have been relieved then by the corporal who observed his condition. He was not relieved until discovered asleep the second time in the early morning hours.

Generally.—These cases were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. I can not help recall the British rule which requires, I think, in such cases three years' service to render an officer competent as a member of a court-martial. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (practically of none) were present. And the same court that tried Cook tried Sebastian.

The character of the record, with its brevity, is such as to leave the human understanding disturbed by the formal conviction that it carries. These were mere youth. Not one made the slightest fight for his life. Each was "defended" by a second lieutenant. Such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that means the forfeit of his life. The Government should be made to maintain its case at every point in the trial of a capital crime. Court, judge advocate, and counsel should all endeavor to see that there is a full trial as well as a fair trial, and that no matter of defense, including extenuation, be omitted.

There is another matter that, finding lodgment in my conscience, I shall express: There is an insistence upon the part of Gen. Pershing which tends to prejudice these cases. He seems to have forgot that he is not the reviewing authority. The relation between confirming authority and the President in these cases is judicial. I do not say that Gen. Pershing may not make general recommendations as to the maintenance of discipline in his command. I know he may. But his recommendation in these cases is a special thing, specially interposed in the course of justice, and characterized by great insistence. He asks that he be advised by cable of the act of confirmation, and makes a powerful argument, the gist of which, after all, is to be found in his view of the necessity of exemplary punishment in these cases. It may be the punishment made especially drastic for the purpose of example at times has its place and value; but exemplary punishment is dangerous to justice. The execution of all military offenders would very likely decrease the number of future offenses and offenders. But such Draconian methods would destroy justice without which all else in human society is of no worth.

It is only right for me to say to you that the military mind will, in my opinion, almost unanimously approve of confirmation in these cases. I do not say that the military view is to be ignored by the Commander in Chief of the Army. I myself would not ignore it. But when it offends against my well-considered sense of law and justice I can not follow it.

S. T. ANSELL,
Brigadier General.

(6)

COPY OF COL. ALFRED E. CLARK'S MEMORANDUM GIVING REASONS WHY DEATH SENTENCES SHOULD NOT BE EXECUTED.

APRIL 10, 1918.

Memorandum for Gen. Crowder.
Subject: Four cases from France involving the death sentence.

1. In addition to what appears in the several reviews of these four cases, the following additional facts are called to your attention as bearing upon the justice and expediency of carrying the sentences into effect:

(*a*) All these cases arose in the 16th Infantry. Two of the accused were not brought to trial for 50 days and upward after their alleged offenses. All of the cases were tried with an expedition which does not give on the face of the records any appearance of deliberation. In each case the defense of the accused was so indifferent as to be practically no defense.

(*b*) Upon the trial of two of the cases but five officers sat—one colonel and four first lieutenants. These two trials lasted from 8 p. m. until 9.45 p. m.;

that is, from the beginning of the first trial until the conclusion of the second trial there elapsed 1 hour and 45 minutes. Counsel for the accused made no statement or argument in either of these cases.

In the other two cases eight members of the court sat. The first of these two trials began at 1.20 p. m. and the second was completed at 5.25 p. m. In the first of these cases counsel for the accused made an argument of six lines, and the second an argument of eight lines.

(*c*) Two of the soldiers—Fishback and Ledoyen—were tried for willful disobedience of an order to go out and drill. It does not appear that their organization was near or in contact with the enemy. Both of these men were tried the same evening between 8 and 9.45 p. m.—two trials. Fishback was first tried; and it appears in the record of that case that both of the soldiers were together when the order was given. The lieutenant who claims to have given the order testified:

"Q. Did he (Fishback) make any reply to the order?

"A. Either he or Ledoyen made the reply that they refused to go to drill."

The answer leaves it in doubt as to which refused. Clearly there was but one order given, apparently directed to both. Clearly, also, when the court passed upon the Fishback case it necessarily had in practical effect decided the Ledoyen case, which immediately followed. Notwithstanding this, counsel for the accused made no challenge.

It is alleged that the disobedience occurred on November 14. The charge sheet shows that each of these men was placed in confinement on November 13. There is evidence in the record that these men were both in arrest or under guard when the order was given. Why they were in arrest and by whom placed in arrest, and whether or not they were to be released from arrest to go out to drill in obedience to the order does not appear.

(*d*) With respect to the two men convicted of sleeping on post, one—Pvt. Sebastian—is alleged to have committed the offense on the night of November 3–4; Pvt. Cook, on the following night. Cook was put in arrest November 13 and Sebastian November 14.

The length of time which elapsed after the alleged offenses and before the men were brought to trial, the expeditious and seemingly formal manner in which they were tried, the lack of any apparent effort on the part of the counsel for the accused to make a real defense, the circumstances of extenuation shown in the reviews—especially in the cases of the two men convicted of sleeping on post—altogether, and coupled with the disposition made by the same court of other cases of like nature arising in the same organization about the same time, make up a record on which it will be difficult to defend or justify the execution of death sentences by way of punishment, or upon any ground other than that as a matter of pure military expediency some one should be executed for the moral effect such action may have upon the other soldiers.

(*e*) The four convicted men entered the Army by voluntary enlistment—Ledoyen on February 3, 1917; age on enlistment papers, 18 years and 1 month. Sebastian, April 18, 1917; age, 19 years and 6 months. Fishback, February 17, 1917; age, 19 years and 2 months. Cook, May 11, 1917; age 18 years and 11 months. None had any previous military experience.

(*f*) Reference has already been made to other cases tried by the same court. These will now be more particularly referred to.

William Hindman, private, Company G, 16th Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head and, as he believed, asleep when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses by the same court.

Adam Klein, private, Company G, 16th Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. It will be noted that all these men belong to the same organization. Lieut. D. S. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

Dewey G. Brady, Company G, 16th Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than that in either the Cook or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

Pvt. Herbert Tobias, Company E, 18th Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with the view to imposing a heavier penalty. Upon reconsideration the court increased the period of confinement to 10 years, and this sentence was approved.

(*g*) A number of cases have come from other organizations in France where men were convicted of sleeping on post or willful disobedience of orders. The following are some of the sentences:

Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

Pvt. Aubrey La Lace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months and forfeiture of two-thirds of his pay for a like period. Gen. Coe reviewing authority.

Pvt. Enio J. Halonen, United States marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds off his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of these cases that the offenses were not committed in the front-line trenches. As to others, the records do not show where the offenses were committed.

A number of cases have also come in from France where men were convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, sentenced to death. The sentences run from a few months to several years.

ALFRED E. CLARK,
Lieutenant Colonel, Judge Advocate.

GEN. CROWDER'S FINAL MEMORANDUM.

APRIL 16, 1918.

Memorandum for Gen. March.
Subject: Four cases from France involving the dealth penalty.

1. Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with

a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited.

The following four cases of sleeping on post, three of which appear to have arisen in the same regiment, namely, the 16th Infantry, on approximately the same date, and one in the 18th Infantry four days later, were disposed of as follows:

(*a*) William Hindman, private, Company G, 16th Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Hindman than against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head, and as he believed, asleep, when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquited in spite of the evidence of these same witnesses, by the same court.

(*b*) Adam Klein, private, Company G, 16th Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. Lieut. D. C. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

(*c*) *Dewey C. Brady*, Company G, 16th Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than in either the Cook or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

(*d*) Herbert Tobias, private, Company E, 18th Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with a view to imposing a heavier penalty. Upon reconsideration, the court increased the period of confinement to ten years, and this sentence was approved.

2. I think, perhaps, you would also like to know something of the state of discipline in other organizations in France as evidenced by the fact that in the following cases men have been convicted of sleeping on post, or of leaving post before being regularly relieved, with sentences adjudged which are, by comparison with the death sentence, almost trivial:

(1) Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

(2) Pvt. Aubrey Le Lace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

(3) Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months and forfeiture of two-thirds of his pay for a like period. Gen. Coe, reviewing authority.

(4) Pvt. Enio J. Halonen, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

(5) Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14, 1917. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan, reviewing authority.

(6) Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months, with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed.

3. In addition to the foregoing the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement.

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

Mr. ANSELL. As I say, that memorandum did not get anywhere. Two of these cases are the cases that we saw featured in the Washington Post here on Friday or Saturday morning, where there was printed a letter written by Mr. Baker to the President, saying, in effect. "My dear Mr. President: You recall the cases of Sebastian and Cook, who were tried and found guilty last year, in France, of sleeping on post, and whom you so graciously pardoned. I wish to advise you what the happy effect of that clemency was in those two cases. They were restored to the colors, and one of them has been killed in the battle in the Argonne, and the other has been honorably discharged."

Senator CHAMBERLAIN. Twice wounded.

Mr. ANSELL. Yes; twice wounded and then discharged.

The other two cases, however, gentlemen, he did not mention, and those other cases were commuted, fortunately, by the President later to three years in the penitentiary.

And I say that these were cases where the President did not have to resort to pardon, because the President, being the confirming

authority in these cases, had the power that a commanding general below has, to set the proceedings all aside. They pardoned two of them and sent two to the penitentiary. The man who died in the Argonne, though pardoned, died with the judgment of guilt, of having slept on his post in the face of the enemy, branded upon him. As a matter of law, he was not guilty at all. The same thing is true of the man so seriously wounded.

And the men who have served in the penitentiary from that time to this are, in my judgment, serving absolutely unlawful sentences: and I so said in the memorandum that I wrote in that case before going to France, which never reached the Secretary of War. Before leaving for France, finding that it had not been forwarded, I did send that memorandum to a distinguished Member of Congress and ask him to take the matter up with the President of the United States.

Senator LENROOT. And clemency was eventually granted?

Mr. ANSELL. Clemency granted in all cases.

Senator CHAMBERLAIN. In all four cases?

Mr. ANSELL. Yes.

Senator LENROOT. I mean in all four cases.

Mr. ANSELL. Yes; two of the men were pardoned outright, notwithstanding the fact, Mr. Chairman, that the division commander said they should die, notwithstanding the fact that Gen. Pershing clamored that they should die, notwithstanding the fact that the Judge Advocate General agreed that they should die, and notwithstanding the fact that the Chief of Staff said they should die, and the entire military hierarchy clamored that they should die. But fortunately, in this case the civil view of justice did prevail to the point where though they did not set aside the sentence as they ought to have done, because that course was not called to the attention of the Secretary of War, the men did not die.

Senator CHAMBERLAIN. That was in your memorandum?

Mr. ANSELL. In my memorandum. He did not set them aside: strike down the judgments as they ought to have been struck down.

Senator CHAMBERLAIN. The Secretary of War did not approve these judgments, did he?

Mr. ANSELL. Yes; he approved of the judgments and reduced them.

Senator CHAMBERLAIN. He did not disapprove?

Mr. ANSELL. No, indeed; he did not disapprove them. He and the President approved of the sentences but granted some clemency.

Senator CHAMBERLAIN. Let me be sure about that. The Secretary of War, you say, did not see your memorandum?

Mr. ANSELL. No.

Senator CHAMBERLAIN. Do you know whether or not he approved of the final judgment of Gen. Crowder and Gen. Marsh?

Mr. ANSELL. No; I think not, entirely. I think the Secretary of War recommended clemency.

Senator CHAMBERLAIN. Do you think so?

Mr. ANSELL. Yes.

Senator LENROOT. Was that before or after the intervention of these memoranda you speak of?

Mr. ANSELL. I have not the slightest idea. You see, I went to Europe, and I only know that I got a personal letter from a reliable

source over here saying that the men would not be hanged. I did not know what happened. Whether the President ever conferred with the Member of Congress I do not know. I think so.

Senator LENROOT. That is what I wanted to know.

Senator CHAMBERLAIN. I think the President very properly addressed the Secretary of War a letter the other day commending the gallantry of these young fellows; and may I ask to have those two letters inserted in the record? They are printed in the press and we can not vouch for their authenticity, but I assume they are correct:

(The newspaper clipping referred to is here printed in full as follows:)

SAVED BY PRESIDENT, BOYS PROVE HEROES; SLEPT AT POSTS; PARDONED; ONE IS KILLED IN WAR, SECOND WOUNDED.

An exchange of letters between President Wilson and Secretary of War Baker yesterday revealed the redemption of two boy soldiers sentenced to die after a court-martial in France for sleeping on outpost duty, but later pardoned by the President. The letters, which tell the story, are as follows:

"MY DEAR MR. PRESIDENT: You will recall that early in 1918 four death sentences were presented to you from France. Two, for disobedience of orders, you remitted to terms of imprisonment, and two young boys, Sebastian and Cook, who were convicted of sleeping on outpost duty, you fully pardoned.

"It will interest you to know that upon restoration to duty both made good soldiers. Sebasian died in battle in the Aisne offensive in July, 1918. Cook was wounded in the same battle and restored to health in time to fight in the Meuse-Argonne battle, when he again fought gallantly and was the second time wounded. He has now been restored to health through medical attention and has been honorably discharged from the service.

"Respectfully, yours,

"NEWTON D. BAKER."

Here is the President's reply:

"MY DEAR BAKER: Thank you for your thoughtfulness in telling me about the records made by Sebastian and Cook, the two youngsters who were pardoned for sleeping on outpost duty. It is very delightful to know that they redeemed themselves so thoroughly, and it was very thoughtful of you to give me the pleasure of learning about it.

"Cordially and faithfully, yours,

"WOODROW WILSON."

Mr. ANSELL. The point I make in those cases is that it is bad enough that men have got to serve a term in the penitentiary when, as I say, lawyers and judges would have said that the conviction was illegal; but the point I make is that the whole military hierarchy, capped by your Chief of Staff and the Judge Advocate General of the Army, who is not independent of the Chief of Staff, clamored and entered into an agreement that these men should die.

Senator CHAMBERLAIN. By the way, General, right in that connection, even the act of extending clemency on the part of the President does not remove the stigma of conviction.

Mr. ANSELL. Certainly not.

Senator CHAMBERLAIN. In other words, the judgment still stands?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. So that the young man who was killed, and the men who were discharged, still have that stigma against them.

Mr. ANSELL. Yes. But the great point in these cases is, I called them up not only to illustrate how narrowly these men escaped death, but to illustrate the dependence under existing law of your

Judge Advocate General upon the power of military command, and the evils of it. The Judge Advocate General is absolutely dependent on the power of military command, in his case the Chief of Staff. How much more true is that of the subordinate judge advocate upon the staff of the commanding general?

Senator LENROOT. I am not speaking about the offenses punishable by death; but do you draw a distinction between the revision of a court-martial in time of war in the face of the enemy where it does appear that substantial justice has been done, but technical error has been committed—a distinction between revising that kind of a court-martial, and one where there could be injury following a mere technical following of the law?

Mr. ANSELL. You know, Mr. Chairman, I am rather glad that you asked me this question, because I have rather set views along this line, and I believe they are views that will be approved by all legally trained men; indeed, I believe by men of practical common sense.

You are drawing the distinction between a case in which you say from looking over the record that substantial justice has been done notwithstanding technical error, and the case where there is technical error and not substantial justice done.

The moment you admit such a distinction as that you are lost. If you hold that there is in the proceedings error of the kind that lawyers call prejudicial, and nevertheless permit your judgment to be overruled by the general conception that the result is a just one, you have tried that man not according to law; you have tried him according to your own personal judgment of whether the man is guilty or not. In other words, I think if a member of this committee or if any lawyer, or for that matter any other man, admits that "it is true this man was not legally tried; it is true there are technical errors which, in and of themselves, are sufficient to work a reversal of the judgment in the case, nevertheless I, because of a personal view that I have of that record and that trial, and a knowledge of the attending circumstances, believe that substantial justice will be done by affirming that judgment," you have drawn a destructive distinction between legal guilt and moral guilt. That must not be done. That is the distinction that the mob draws.

Senator LENROOT. But, General, is not the trend of the civil law—of the civil courts—more and more to disregard technical error and look to the substance?

Mr. ANSELL. Yes; certainly, Mr. Chairman.

Senator LENROOT. Yes.

Mr. ANSELL. But that involves only the question, Is error prejudicial to the judgment?

Senator LENROOT. Yes; certainly.

Mr. ANSELL. And do not let us say according to the law of the land and the precedents and authorities—the enlightened authority—that this judgment is bad, and yet insist upon its execution. Do not let us compromise with that. If we once determine that the judgment is prejudiced by error, let us have a new trial. This very question, Mr. Chairman, is one of vital interest.

Senator LENROOT. Let me see, General: Then it is your view in all cases that, although error might have been committed, unless the

revising authority finds that the error is really prejudicial it would not be ground for reversal of judgment?

Mr. ANSELL. Certainly not, sir. Nobody could deprecate more than I some of the civil decisions that I think have been not in line with sensible authorities. Some appellate decisions have shown a meticulousness that I think judges and lawyers disapprove of. I remember one court actually held that the indictment was bad because in the concluding sentence it did not contain the definite article before the word "state," and therefore the court said they could not tell what law was violated. Utterly absurd!

But when we come to the substantial things, the denial of a man's substantial rights, though I know that as human beings we frequently say from our knowledge of the record, from our knowledge of the situation and the circumstances, from what we imply from that record, that we believe that that fellow is as guilty as Cain, yet is not that the time, right then, for the law to interpose and govern our judgment? In 1849 a distinguished and eminent London barrister had cause, after he had been counsel for a Capt. Douglass of the English army, to attack the English court-martial system, as the result of which it was much improved. He fought the case through the military hierarchy, terminating, if I remember, at that time in Lord Wellington himself—it may not have been so, but I think it was—in any event, a distinguished general and statesman, through the Judge Advocate General, upon a question of competency of evidence. They said "The evidence was incompetent, but still we know the fellow is guilty." He got nowhere. Then suddenly he wrote an open letter to the Queen and published it, and I am sure that any member of this committtee, if he is interested in the beauties of legal expression that we frequently find in such productions, will find it well worth his while to read this letter. It would be well worth the while of any member of the committee interested in our present establishment and its history. He ran up against this very thing. The Judge Advocate General of England said "Why, you know, Mr. Warren, that this fellow is guilty. The whole Army knows he is guilty. It is a matter of common knowledge that he is guilty." It happened that that was one of those cases in which time proved that the man was not guilty; but the War Department and the Army insisted that he was guilty, and this lawyer went, single-handed, to the country upon it.

He ran across this very argument, you see, and I want to quote to you a striking paragraph from this letter. It is worth quoting. It might well be put in our military books, that our younger men should study and reflect upon it. I am quoting from an address that I made, and I put the statement of this British barrister in antithesis to some statement made by some of our judge advocates when they were testifying before the committee of the American Bar Association in this city: and I say as a lawyer I have sympathy, not contempt, for a lawyer who finds himself so imposed upon by military authority, that he has got to testify as these men testified. Listen to what these men testified to. [Reading:]

While in many cases the trials of enlisted men are not so elaborate as the trials of officers, and in many cases the rules of evidence are not observed, and counsel is obviously inadequate, and while in a considerable percentage of the cases we find the decision is not sustained by the fact, still I do not

recall a single case in which, morally, we were not convinced that the accused was guilty. (Testimony of a reviewing judge advocate before committee American Bar Association, Mar. 27–28, 1919. notes, vol. 1; concurred in by the others.)

I say I place in antithesis to this the only rule that lawyers can respect, the only rule that can protect a man's rights on trial, the only rule that a government can afford to adhere to, if you are going to have a government by law and not by the judgment of a mere personal being.

I quote from Warren. [Reading:]

It concerns the safety of all citizens alike that legal guilt should be made the sole condition for legal punishment; for legal guilt, rightly understood, is nothing but moral guilt ascertained according to those rules of trial which experience and reflection have combined to suggest for the security of the State at large. * * * They (these fundamental principles of our law) have, nevertheless, been lost sight of, and with a disastrous effect, by the military authorities conducting and supporting the validity of the proceedings about to be brought before Your Majesty. (Warren's letter to the Queen, p. 9.)

That made a profound impression on me, because it is a conclusive answer to this sort of rough-and-ready standard that people are inclined to adopt for the determination of the guilt of others, but never of themselves. If you want to find the sharpest critic in the world of the American system of military justice, show me an officer who has once been haled before a court-martial.

Senator LENROOT. By my question to you, General, with reference to substantial justice being done, I of course did not mean to infer that it should be made to appear de hors the record.

Mr. ANSELL. I did not suppose so.

Senator LENROOT. But could there not be such a thing as saying that there had been substantial justice done according to the record, and at the same time there was substantial error?

Mr. ANSELL. I should think not. If they could say, as lawyers, "This is not substantial error," I am willing to abide by that. But do not let them say "This is substantial error but nevertheless we are going to disregard it, because substantial justice has been done."

That brings us to another thing. If you are going to revise the Articles of War, we must not lose sight of the present attitude of the Army on these questions. We run against it all the time. Take the question of evidence; there is no man in all the world with less legal appreciation than a Regular Army officer; none. I make that statement. He is trained away from legal appreciations; and if you just talk law or legal principles or lawyers, you excite his prejudices right away. But it is not only the American Regular Army officer; he is nothing in the world but a successor of the old British officer, and I think Gen. Napier was as fine an example of a fine British Army officer as you will ever find, though thoroughly and absolutely destitute of every legal appreciation. The British, however, have gone far ahead of us in remodeling this system that we took over from them; but it has not been done with the consent of the regular army, but against them. They have been obdurate in the matter. It has been done by the lawyers of the land.

Gen. Napier undertook to take the lawyers to task for interference with military discipline—that is their great standby, discipline—and he made an attack upon the attitude of the English bar, and you will find that attack published in Napier's Notes on Military

Law; and there was not a shrewder soldier in all England than he. He just simply had a wrong mental poise toward legal proceedings. Napier got after the lawyers about undertaking to apply in the trial of courts-martial the rules of evidence as they were understood in the civil courts.

Senator CHAMBERLAIN. Is this Warren, now?

Mr. ANSELL. Yes; this is Warren again, answering Napier. There are others who have said the same thing as Napier, but his is a handy book. I want to read this to you, because, in my twenty-odd years of experience if I had not heard the same expression put this way a thousand times by our regular officers, I never heard it in my life. And I have heard it from the highest authorities; from chiefs of staff, particularly. Listen to what this distinguished British general said, to whom England owed so much. She could not follow him here. He could not stand cross-examination when he says:

And why should not a soldier commit himself? The business of courts-martial is not to discuss law, but to get at the truth by all the means in its power. We soldiers want to get at the fact, no matter how, for the sake of discipline, and I know of no better evidence against a man than himself. (Napier's Notes, Military Law, accepted and frequently quoted by officers of the United States Army.)

He was quarreling with the British bar, because the British bar had undertaken to intercede for the men who are subjected to this military third-degree method which is prevalent in our service at this very day. "We want to get at the fact, the truth:" as though army men had some empirical standard for getting at the truth which worked invariably, but that standard was not according to the law—something else than that they had! I say that I have heard that statement quoted a thousand times in the War Department: "We do not want lawyers; we do not want law; we do not want rules of evidence. We just want the plain unvarnished fact." If there is a set of men on God's earth more incompetent by virtue of their authority and environment to get at the truth other than by the rules of evidence, than the officers of the Army, I do not know where they are to be found.

I want to take the time to read Warren's classic answer. He said:

Our rules of evidence are the safeguards of every subject of your Majesty, high and low, rich and poor, young and old. Were those rules to be disregarded, anybody might at any time be found guilty of anything. They ought, of all others, to be kept inviolate, for the whole administration of justice depends upon them. They are, as I have this day seen observed in full force and eloquence, the result of the collective wisdom of generations and founded on the principles of immutable equity. (Warren's letter to the Queen on a late court-martial, p. 8, which was instrumental in revolutionizing the British military code.)

Yet your very committee, when you came to revise these articles in 1916, instead of writing into these articles that courts-martial would have to observe the rules of evidence as they are observed by our Federal courts, namely, the rules of common law as they have been changed by statutes of Congress, did what? It had been the understanding, the custom, that courts-martial would, when convenient, follow well-understood rules of evidence; which of course they did not understand, but nevertheless we had that generally accepted

standard resting upon custom and practice, and at the behest of the Judge Advocate General you struck down this rule.

Senator CHAMBERLAIN. May I say in reference to that revision of 1916, I was chairman of the committee during the hearings on that, and there were no hardships being alleged against the military system then; there was no insistence that they should be amended; there were no cases of hardship brought to the attention of the committee; and I think you will remember that the only purpose of the amendment was to give them effect in the Philippines and in our insular possessions, and possibly there were a few other changes that were insisted upon, but nobody made any objection.

Mr. ANSELL. I am not criticizing that, Senator.

Senator CHAMBERLAIN. I just wanted you to know the fact about it.

Mr. ANSELL. I do not think there was the interest in the matter that there is now. The committee did not know. These things had not been called to your attention. But nevertheless I want to show you what a committee is up against when you come to take your advice from the War Department, exclusively.

Senator CHAMBERLAIN. If I had known then what I know now—if the committee had known then what they know now—they would have been very likely to make changes.

Mr. ANSELL. Yes. One of the changes—and there were only three important changes, and I use the word "substantial" and "important"—in this revision was this. Listen. [Reading:]

> The President may prescribe the procedure, including modes of proof, in cases before courts-martial. (Articles of war enacted in 1916 upon the recommendation of the Judge Advocate General of the War Department.)

And that of course abolished the rule that then existed requiring courts-martial to recognize the rules of evidence applied in criminal courts of the United States.

But let us see the argument that was made for this revision, because it is indicative of a state of mind that I think we ought to know about.

First, you will observe that it is right in line with the old idea that the commander in chief is everything. He is the supreme court. That is what is said. They likened the commander in chief to the Supreme Court, and then they said "We will liken the administration of military justice to equity and admiralty matters, because in those matters under existing statute the Supreme Court of the United States can make these rules of procedure, including modes of proof."

The truth of the matter is that we do not regard the enlisted men of the Army as really human beings, persons, who can suffer, and who when properly appealed to can respond, can actually move mountains through that appeal but rather as property. We actually went to the statutes of the United States on the civil side of things and took those statutes that intrusted to the Supreme Court of the United States the making of rules of evidence in matters that can concern only property—equity and admiralty especially—and said that we thought it would be a wonderfully good thing if we invested the President of the United States with like power over soldiers. Now, in this little manual you will find how to prove murder and how to prove rape and arson; how to get at the gist of the thing.

And there are rules of evidence. But you have put it in the hands of the President to prescribe these rules of evidence, and the effect is this, that he has not prescribed them. Of course not! I think it would be very difficult for a man to prescribe thus briefly rules of evidence; there is so much left that goes beyond the mere expression. But still, he has not prescribed them; and under this power if he prescribed them to-day, he can change them to-morrow; and when he does not prescribe, the courts feel at liberty to follow any rule they please, very properly; and since that time—I speak out of my experience for the War Department both before and after the making of this statute—since that time we have less respect for the rules of evidence than we ever had before, because what is found in the manual rises to no greater dignity than what else is found in the manual, how many sheets of paper to use and how to fold them and how to number them, which can be violated with impunity; and of course where nothing is prescribed, there is license to the court to do as it pleases.

Going back to the efforts made during the war, I have shown that the reactionary and absolutist view prevailed, and the Judge Advocate General was reduced to making "studies" and memoranda of advice upon pure questions of law for the benefit of commanding generals, if they chose to accept or profit by them.

It was up to me to accept the situation, and I endeavored, for the office of the Judge Advocate General, to perform the duty as best I could. It was up to us so to organize the office that we could make such a strong appeal to the sense of natural justice of a commanding general that we might induce him to act justly and according to law; no authority, of course, no appeal to a legal standard; only an appeal to the power of military command to do what was right after we had failed to establish a rule requiring him to do what was right. It is the strangest thing in all the world that though I organized all of these board of review, the clemency boards, all the divisions, and so on, not through War Department orders but office orders, and that though this organization was reluctantly assented to or opposed by the Judge Advocate General and the department generally and was criticized by superior military authority on the ground that I was overloading my office, and did not need any such review, the department now relies upon the organization as the saving grace. An acting Chief of Staff told me, "Too many lawyers down there, Ansell; too many." But I organized the board of review in spite of opposition, and the first and second divisions of that board of review, and put the best lawyers I could get there, and then I instructed the board of review to point out all legal errors and to try and establish standards, in accordance with the Grafton decision and the Runkle decision and other decisions, for the government of court-martial procedure, and instructed them again and again to use all the power, the force and the persuasion of logic that they had, and to point to inexpediency when legal argument could not be made to stick, in order to induce these commanding generals to do what was right; and I would like to put in the record those memoranda establishing the office organization.

Senator LENROOT. Very well.

The memoranda referred to are here printed in full, as follows:

ORDERS ORGANIZING BOARDS OF REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

ANSELL EXHIBIT L.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 6, 1918.

There is hereby created in the Military Justice Division of this office a board of review, to consist of such and as many officers of that division as the chief thereof, after conference with the head of the office shall designate. The duties of such board will be in the nature of those of an appellate tribunal and shall be performed with due regard to their character as such. It shall be the duty of the board, under the general direction of the head of this office and the chief of division, to review all proceedings of all general courts-martial received in this office which at present are reviewed in writing. The preliminary review of any such case, after having been made and prepared by the officer to whom the record has been assigned will be transmitted to the board of review, and thereupon the members of said board will proceed to consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in reaching and expressing their decision. The board may adopt the preliminary review as its own, may modify or rewrite such review, or may direct that it be modified or rewritten so as to express their views. When a majority or more of the board agree upon a review the review shall show the names of those who concur, but not of any who may dissent, and the review thus agreed upon shall be transmitted to the chief of division, with the record. Any dissenting member may indicate the reasons for his dissent, either orally or in writing, to the chief of division, and in important cases and where he so desires to the head of the office.

The members of the board may consult freely with the officer preparing the preliminary review and the head of the division, and may discuss the case with the head of the office when that course is agreeable to him. It is preferable, however, not to discuss the case with others. When practicable the board will be assigned sufficient room space, clerical force, and any other aid necessary and available.

S. T. ANSELL,
Acting Judge Advocate General.

ANSELL EXHIBIT M.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 6, 1918.

The board of review, Military Justice Division, created therein by office memorandum of August 6, 1918, is hereby divided into two divisions, to be known as "The Board of Review, First Division," and "The Board of Review, Second Division." The present personnel of the board will constitute the first division. The Chief of the Military Justice Division will, immediately after consultation with the head of the office, designate the personnel of the second division. The organization, constitution, procedure, powers, and duties of each division will be as prescribed in said office memorandum. Each division will function separately and independently of the other and upon cases assigned it by the chief of division, who will endeavor to see that cases of the same or similar character be referred as far as practicable to the same division.

S. T. ANSELL,
Acting Judge Advocate General.

ANSELL EXHIBIT N.

INSTRUCTIONS TO BOARDS OF RIVIEW TO RECOMMEND CLEMENCY IN CASES UNDER G. O. 7.

For the Chief, Division of Military Justice:

1. No system of administration of justice can be other than patently deficient which does not provide for an expeditious and, at the same time, thorough con-

sideration of clemency; and a system which obstructs or delays the granting of clemency in a proper case is subject to severest criticism.

2. This office has within the organization of the Military Justice Division a clemency section, and this takes care of those cases which arise upon an application submitted by the prisoner himself. But this is not sufficiently general. Frequently it becomes perfectly obvious upon the review of a case in this office upon the receipt of the record, that the penalty is altogether too severe, or that for other reasons clemency ought to be granted and not deferred until an application should come from the prisoner himself. I can conceive of no better time to initiate a recommendation for clemency than upon the completion of the review of a case, when the impression of the incident of guilt is still well defined and the evidence and the circumstances of the commission of the offense are fresh in the mind. This office ought not to be limited in the performance of its functions of review to considering the strict technical question of the legality of the proceedings, but in its capacity as the bureau of military justice it should extend its consideration to include the question of clemency.

3. I have recently been advised that during my absence in Europe, it was held by this office, and the Division of Military Justice so instructed, that the functions of this office, in considering cases coming to it under General Order 7, were to be limited simply to the question of legality of proceedings and were not to be extended to the quantum of punishment and like matters affecting clemency; and that in such cases this office could not with propriety make recommendations to the reviewing authority upon matters of mitigation and remission.

4. While this may be a correct construction of the order, when it is viewed in one light, I do not think it is correct when viewed in the proper light. It could not have been the purpose of General Order 7 to impose a limitation upon this office. I am personally familiar with the origin and the administrative circumstances out of which it arose. Of course, it is to be conceded that it is the function of this office to pass upon an application for clemency after the reviewing authority shall have acted upon the receipts of our review, and his action shall have become final; and inasmuch as our review is now made before his action becomes final, it is seasonable to include within it our views upon matters of clemency. This becomes especially obvious in those cases of dismissal and dishonorable discharge which, when executed by the authorities below, pass beyond the power of clemency; and it was this very class of cases which General Order 7 reaches. If we confine ourselves strictly to the question of legality, while we have thereto assured that the sentence, if executed, is legal, it will at the same time pass beyond all restorative power.

5. I have to advise you, therefore, that hereafter your reviews shall include the consideration of clemency and your recommendations, and where, as in the case of dismissal of an officer, the authority below, even if he has the disposition, has not the power to mitigate, because of the fact that any mitigation must result in commutation, a power exclusively in the hands of the President, you will prepare your recommendation for clemency for direct presentation to the War Department.

S. T. ANSELL.

SEPTEMBER '18.

ANSELL EXHIBIT O.

INSTRUCTIONS UPON THE METHOD OF REVIEW.

JANUARY 3, 1919.

Memorandum for Military Justice Division.

1. I have heretofore advised you frequently and informally, and I take this occasion to advise you more formally, of certain views of mine which I believe to be worthy of consideration and, perhaps, observation by those who have to do with the administration of military justice; indeed, in my judgment, must be observed generally in the establishment, if that administration is to be what justice requires it to be and what thoughtful public opinion would like it to be. I advise you thus that my views may not be misunderstood and that they may furnish you with a general guide in the review of proceedings and constitute your authority for action in which you and others may not personally concur.

2. Courts-martial are courts, tribunals for the doing of justice, as much so as any tribunals in the land, and they must be fairly and impartially constituted and they must fairly and impartially function. Judicial fairness in the case of

courts-martial should be tested not only by the letter of the Articles of War, but by those principles established in our jurisprudence which are designed to secure fair and impartial trial and which are applicable to all hearings of a judicial character.

3. The former military view, which had received in this country considerable judicial support, was that courts-martial performed only executive functions and passed, in an administrative way, upon the military aspect of the misconduct of one subject to military law. The legal view now judicially established is quite the opposite, and is that courts-martial have full and complete jurisdiction over the conduct of all who are subject to military jurisdiction, with full power to try them not only for military offenses, but for crimes against the general public law. This should bring to us in the Army, and most especially to those of us more directly interested in military justice, new appreciations.

Murder, for instance, tried before a court-martial, is none the less than murder tried before a civil court and jury, with none the less serious consequences for society and the accused, and should be tried with none the less thoroughness and fairness. Thoroughness and fairness of courts-martial should be determined with less inclination to regard courts-martial as tribunals sui generis, and with greater regard for those fundamental safeguards with which the law beneficently surrounds every person placed in jeopardy. Articles of War having to do with rights of the accused therefore should be construed, both with respect to what they provide and what they fail to provide, more and more in the light of and in comparison with those constitutional principles which touch the rights of an accused in a criminal prosecution. Those principles should apply to courts-martial, except where clearly inapplicable to the military system.

4. I wish to speak now more specificaly and give the general views above enunciated concrete application:

(*a*) My views are in conflict with the view advanced at times in argument * * * to the effect that in determining the principles of fairness and impartiality to be applied to test courts-martial, those principles should be sought in the analogy of a Roman chancellor or judge. Courts-martial are criminal courts administering criminal law; they consist of from 5 to 13 members, and thus the very law of their constitution denies the analogy of the single trier of law and fact found in Roman jurisprudence, and clearly establishes on the other hand their analogy to the common law court and jury for the trial of criminal offenses; it is in that analogy, therefore, that we must seek the principles by which the fairness and impartiality of courts-martial must be tested. Applying these principles to a case now in hand, they serve, in my judgment, to prohibit the successive trial by the same court of several accused charged with the same or similar offenses, involving the same transaction, state of facts, and evidence.

(*b*) I further disagree with the view that article 37, as it exists in the military code, was designed to have, or does have, the curative effect which the Board of Review seems to me at times to attribute to it. That article does not permit us to register a legal conclusion that there was subsantial error commited, and then to over come it with the personal conclusion of the guilt of the accused gathered out of the entire case. No revisory power and no appellate court should ever reverse or disapprove, except for prejudicial error. The substance of the article appears nowadays frequently in civil codes, in which position it was clearly predicated upon the evil found in the disposition of some appellate tribunals to reverse for meticulous and fanciful errors, and was, therefore, designed to correct a bad judicial habit appearing in some places. It can not be truthfully said that the Army was ever given to meticulous disapproval or that there has ever been a tendency in the establishment to indulge too freely the power of disapproval. The contrary was quite true, in my judgment, and in this view I must think general public judgment concurs. This article, as it appears in the military code, is rather more of a grant of power than a limitation.

(*c*) In my judgment, punishments awarded by courts-martial during this war are properly criticizable in general for their undue and inexplicable severity. Frequently they are such as to shock the conscience. Such punishments violate justice and serve no proper end. They invite and merit public reproach. We frequently have to confess that nobody expects such punishments to be served. Such a confession, while true, is an admission of the injustice of the punishments, and is bound to bring courts-martial into disrepute.

I wish you would help me in determining the course which this office ought to take in making an effort to see that these unjust and severe penalties may be brought within the bounds of reason and justice.

5. The review of proceedings should be expeditious. The result should be made to turn upon substantial error, so tangible that we may have no great difficulty in discovering the principles touching it. To such and not to inconsequential error should our consideration be invited, and upon such should the case turn. With such error, however, justice will not permit us to compromise either by a resort to any assumed curative capacity of the 37th Article of War or any other consideration.

6. My sense of applied law and justice, with which others, of course, may differ, requires me to enunciate these views clearly and unmistakably and ask you to be governed by them until they may be superseded.

S. T. ANSELL,
Acting Judge Advocate General.

Mr. ANSELL. I say that the strange thing is now that the gentlemen who are engaged in defending this system find their chief and almost only support in the fact that this organization of the office was made by me. In justice, look at the Wigmore publication, look at the statements of the Secretary of War, the statements of the Judge Advocate General. Why, they say we have the finest reviewing machinery in the world; that there is no appellate court in the world that goes over a record with such thoroughness.

Senator CHAMBERLAIN. And those were on your recommendation down there and adopted over the protests of the Assistant Chief of Staff?

Mr. ANSELL. That is true; adopted in spite of the contrary desire of military authority. If there was not protest or criticism, there was coolness to it all.

Senator LENROOT. Did you have a formal approval by the Secretary of War?

Mr. ANSELL. No; I just—Mr. Chairman, this is rather difficult to believe at the present time, because it is not in accordance with the usual administration, but in those times in the War Department if you got anything done, you did it, and took the responsibility; and I say that these very agencies, every one of which was organized by me and without help and largely with the hindrance of the War Department, every one of those agencies is now instanced by the War Department as showing the great virtues of this system. Of course, this reviewing machinery is simply standing the pyramid on its pinnacle. They say, "We do not want any lawyers in the courts below. We want the courts to do as they please. We do not want to be governed by legal principles, but when the mass of error finally becomes the scum at the top, we will take it off, there, by our boards of review;" a board that, of course, has no authority. It is nothing in the world but a lot of sophistry and shrewd argument. I say that the cases were not properly reviewed. I say that they were not all reviewed; that there were only a few of them that were reviewed, and that such reviews as were made were frequently ineffectual.

Senator CHAMBERLAIN. You were asked if your course had the approval in this matter of the Secretary of War. Is it not a fact that the Secretary of War—I do not mean this one, particularly, but the Secretary of War—was not accustomed to listen to those in inferior stations, in the Judge Advocate General's office, or in any of the other departments?

Mr. ANSELL. No.

Senator CHAMBERLAIN. So that if you reached him at all, no matter what your recommendation might be, you generally had to go through the Judge Advocate General?

Mr. ANSELL. Yes; you not only would have to go through the Judge Advocate General, Senator, but you would have to go through the Chief of Staff.

Senator CHAMBERLAIN. So that if they desired to withhold any recommendation you made or anything you said, they could do it?

Mr. ANSELL. Yes. It seems to me to be impossible under a scheme of military organization such as we have, for the administrative head to get real facts and real advice. You have got a bureaucracy there: it has been there and is going to be there apparently forever. Along comes the Secretary of War, who of course knows nothing about it, and he is gotten by the bureaucracy just like that [indicating], and just swims along with it.

I remember Secretary Garrison coming there, and with his very large and generous way of doing things he said, "I am the Secretary of War, and anybody who has a complaint or a suggestion to make, even though it be a corporal or a private, can get to me. I will hear him, with such time as I have. That is, the channel to me is free." I remember how everybody laughed at the new Secretary. Well, he may have thought that he was in touch with the Army—the privates and corporals, etc.—But Secretary Garrison could not reverse a machine like that in a moment. Just see what a private or a corporal would have to do in order to get to the Secretary of War—probably an impracticable scheme of administration anyway. He has got to get the consent of his company commander, he has got to get the consent of his battalion commander, he has got to get the consent of his regimental commander, he has got to get the consent of his post commander, he has got to get the consent of his department commander, and then he has got to get the consent of the Chief of Staff.

Senator CHAMBERLAIN. He could not even get past the first sergeant, to begin with.

Mr. ANSELL. Of course not; he could not get past the first sergeant. You have got the first sergeant to pass before you get to any of these others. It is absurd. You can not get to the Secretary of War. I did not get to the Secretary of War; and I did not when I was a brigadier general. They were always pleasant and always glad to see you when you did see them; but you did not get into the Secretary's room except through the Chief of Staff. Probably it will always be so. I think it is unfortunate.

This military system is so hidebound, it is so crystallized, and its channels are so fixed and so easily obstructed, that you do not get very far. The strange thing about our Military Establishment is this: I frequently think of it in my own case. I was not militarily ambitious, and it did not make any difference to me, except that there was a great lesson there.

The Congress of the United States called on a brigadier general, a man who had been acting Judge Advocate General during the war, to come down and testify on a pending bill. He comes down, and it is his disposition to call a spade a spade and speak frankly, which he did. Just before that I had received the distinguished-service medal, the highest honor that can come to a man off the field of battle, and, to drop to the language of the street, I was "the

white-haired willie-boy of the War Department." But when I did my duty before this committee over which you presided, Senator Chamberlain, I was promptly disciplined. But was it because I did not tell the truth? No; nobody said anything about that. It was because I did what I did; it was because I came down here and talked just as I am talking now, as I always talk. Let gentlemen on the other side say what they want to, this was their attitude: "It is because you are divulging the secrets of the system, giving away the system, giving away state secrets, things that we want to keep away from Congress and the public." There is not an institution on earth that so repels public inquiry and public knowledge as the Army of the United States. They come to Congress only when they want something.

Senator CHAMBERLAIN. May I ask something in that connection? Your answer suggests something to me. You indicated having been disciplined yourself. What became of the men in the department who stood by the system and who held lesser rank?

Mr. ANSELL. They have all gone. The last one got his moving orders Saturday morning.

Senator CHAMBERLAIN. No; I mean those who stood in with the system?

Mr. ANSELL. Stood in with the system?

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. Pardon me. They have gone, too. They have gone higher up.

Senator CHAMBERLAIN. They have received promotion?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And the man who did not stand with the system?

Mr. ANSELL. He has gone, too; down and out.

Senator LENROOT. Do I understand that those who concurred with the views of the department have been promoted, not in the usual order, but outside of the usual method of promotion?

Mr. ANSELL. Yes; I will make this statement, that men who criticized this system, or who sympathized with those who did criticize it, have been subject to the department's gravest displeasure. They have been menaced and threatened and disciplined. And those who take the opposite view and support the system have prospered exceedingly; they have gone up and on. And unless we soon disrupt the system, I do not know how high they will go.

Senator LENROOT. I suppose the testimony of witnesses at the end of the record shows what disposition has been made of them?

Mr. ANSELL. Yes; but, of course, there has not been much testimony on my side of the case, because you must have observed, when I was before you before, I never gave you the name of any man in uniform, because he was not free to testify, and if he had testified he would have been punished. I recall one of the most brilliant lawyers in this country, excepting none whom I know, Col. Morgan, now professor of law at Yale. I embarrassed him very much. I was making a little address before the Commercial Club in this city, and when I got through with it people began to talk about the court-martial system, because the country was interested then, and I hap-

pened to say, "Why do you not ask Col. Morgan about that," a friend of mine sitting over at another table. Morgan got up, and in about one minute stated his views about the court-martial system, not flattering the system, of course.

He was haled before the Judge Advocate General; he was accused of disloyalty to the Army and to the department and to the Judge Advocate General; he was charged with creating general embarrassment, with being a destructive agency, and a letter was read or shown to him requesting an investigation of his conduct by the Inspector General of the Army, preliminary to disciplinary action. They did not take the disciplinary action, but it was obvious that this excellent man was from then on persona non grata in the department. He was a lieutenant colonel, and other men were promoted over him when he was standing at the top by reason of ability and length of service. He was unquestionably at the top in point of ability.

He left here without having been promoted. Others who had no claims were promoted and are still being promoted.

I say those who criticize the system have all gone. They were not rewarded. The last one went yesterday or the day before. He got his orders to walk the plank.

If there was ever one institution in the world that really ought to be thoroughly investigated, in my judgment, it is the office of the Judge Advocate General of the Army. If I can speak impersonally, I think it is safe for me to say this, because I have given evidence of the fact that I am interested in this not personally. I can never profit, whatever you think of this system. I am a civilian, and so I always intend to be. But there are deep things at stake here. You have got to have justice in this Army or you will have no Army. You would have some difficulty in raising an Army now, by reason of the general dissatisfaction of the men with their treatment in the service, more difficulty than you did have when you raised this Army. Injustice reigns supreme in the bureau of military justice itself.

The man who has been the executive officer largely throughout this war was Col. Weeks, a distinguished officer, a colonel, a young man, a lawyer, a graduate of West Point, made executive officer because of his great organizing ability. That office was beautifully organized, not by me but by him. He is a most efficient man. It would have been difficult to run the establishment without him. He fitted into a niche where his absence could not have been well supplied. But he does not believe in the existing system. He disbelieves in it very much; and notwithstanding the fact that that man has had service in the field, as a judge advocate in China, and at the port of embarkation at Hoboken, a very difficult place and very difficult work, and organized this office and was running it smoothly, so smoothly that the papers got out of that office, although it was a law office, more quickly than they get out of any other office in the War Department, due to him and his service, he is now ordered to Charleston, an insignificant place, which, of course, will carry immediate reduction, because the rule is that you can have only the rank that is compatible with the place. He was not ordered in the usual way, as when the head of the office calls in an officer and says,

"Jones, we need an officer some other place, and I give you notice in order that you may arrange your own affairs here and get your family fixed and make the usual personal arrangements"; not that way; not the way of comity and courtesy that should characterize all such actions in such circumstances. No; they wrote out a memorandum for the Acting Judge Advocate General's signature, and they took it personally to the Chief of Staff, all unknown to this officer, and got the "O. K." of the Chief of Staff, and then took it to The Adjutant General and asked him to get out the order immediately, of which this man is all unaware until he gets the telegraphic order.

Now, when he goes to the Judge Advocate General and the Acting Judge Advocate General, they at first undertake to assert that the order is in due course, which, of course, was not true. He was not due for service outside of Washington. He has been here but briefly. He had just come from field service. There was no reason for his removal. They first said, "We are sending you there so that you can get experience on the outside," of which, as I say, he has just had far more than any other man in the department. Then they finally, probably inadvertently, gave the whole thing away. They said, "Well, Colonel, there have been two leaks in this office within the last 10 days, not 4 days apart, and you are too close to the newspaper man who put those leaks in the paper."

Now, what kind of treatment is that? The man said, "I have given out nothing"—as he had not, and as I know that he had not. He knew absolutely nothing about the two things. And yet, because of this arbitrary power and this man's independence and views—he is an officer whose heart is right and whose head is right, and who believes in making this establishment progressive and just—he is to be exiled. He wanted to go to West Point as professor of law, for which he is eminently qualified. No, his views are not right. A man can not be made professor of law at the United States Military Academy now unless he agrees with this system as it is.

Senator CHAMBERLAIN. You speak of your being disciplined. How? Do you mind telling how you were disciplined?

Mr. ANSELL. Personally, I care nothing about that; but it is illustrative of the depths to which our appreciations of justice have gone. I do not think of it as of any personal moment.

Senator CHAMBERLAIN. You are talking now just as you did before, when discipline was used.

Mr. ANSELL. Let us see what happened in that case. You may assume, because it is a fact, there was no officer in the Army more highly respected than I. I was young, vigorous, and active, and was thought very highly of by my fellow officers and by the department—by the present department including the Secretary. On the last day of January they paraded me along with several others.

Senator CHAMBERLAIN. This year?

Mr. ANSELL. Yes; this year; to give me this congressional badge of most distinguished service, reciting in the order my services in a very flattering way, and indicating that I have a far greater capacity than I have. But, nevertheless, this highest distinction in our service was pleasant, and a very beautiful tribute, and received as such on the last day of January.

On the 12th and 14th days of February I testified before your committee on that bill.

Senator CHAMBERLAIN. May I ask you, just right there: You had never talked with the chairman of the committee or to any member of the committee, so far as I knew; and you were subpœnaed before the committee?

Mr. ANSELL. No, Senator; I had never talked to a member of Congress about this system. I must say that I had wanted to, but I did not; neither to Senator Chamberlain nor to anybody else. I was opposed to it; did not like it; would not have minded seeing an investigation; was really glad when Congress did start. But, nevertheless, I did not start it and had nothing to do with it.

Senator CHAMBERLAIN. And at that time you had not discussed it in any way outside of the department?

Mr. ANSELL. Outside of the department?

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. I think not, sir. Sometimes expressions may be dropped at a dinner or socially.

Senator CHAMBERLAIN. I mean in the newspapers?

Mr. ANSELL. No. The department knew where I stood, though.

On the 12th and 14th of February, two weeks after I received the distinguished-service medal, I testified before this committee. The orders were at that time that a man would not be reduced to his Regular Army grade from the National Army grade unless the position that he occupied was abolished or unless he proved incompetent for his place.

On the Saturday morning before the Congress adjourned on March 4 an order was issued demoting me, which was not published until the day after Congress adjourned—demoting me from the grade of brigadier general to the grade of lieutenant colonel, my Regular Army rank; and the newspapers are authority for the statement, and doubtless it is correct, made by the Secretary of War. that my demotion had absolutely nothing to do with my connection with the criticism of the existing system. He did say that.

I was demoted. I was given this distinguished-service medal only two weeks before I testified. I was demoted two weeks after I testified, and in violation of the order of the department that governed demotion. Surely, if I had been found incompetent, the only thing that I had done since I received this highest evidence of competency was to testify. My place was not abolished, because they sent clear to France and got another brigadier general to put in my place. Now, I would not have minded if the Secretary of War had said to the people of the country, "I do not like this man Ansell's attitude; I do not like his views, and he is embarrassing me, and he is embarrassing the administration. I wish he had done otherwise. I do not like his policies." If he had done that, of course, I would have had the utmost respect for that; but to say that I was demoted in due course without connection with this controversy, of course that is not acceptable. That is a statement of official fact that carries no conviction; nobody respects such.

But he said on another occasion that it was in line with the general demobilization of the Judge Advocate General's department; that there were to be no more promotions in that department. There have been more colonels made in that department since I was demoted than before.

Senator CHAMBERLAIN. Who had not been in the service over two years?

Mr. ANSELL. Oh, of course not. Lawyers who had been in the service but a year were promoted above me and put on the clemency board as my seniors, voicing the views of the Judge Advocate General and the Secretary of War, who held me out, however, over my protest, as the president of the clemency board in order that the public might get such assurance as it could out of the fact that I was there.

Senator LENROOT. Was the brigadier general who took your place a temporary one?

Mr. ANSELL. Yes. Of course, it took him away from his office that he understood and brought him to an office that he did not understand and does not understand yet. He knew nothing about it.

Now, aside from the personalities involved in this——

Senator CHAMBERLAIN. I want to get it. I think the country ought to know it.

Senator LENROOT. I think so.

Senator CHAMBERLAIN. Not as affecting you, but as showing the methods of the War Department in this branch of the service; because it may develop later that there are other branches where the same treatment is accorded to efficient men.

Was there not, as a matter of fact, a further effort to discipline you, in the nature of investigation, or otherwise?

Mr. ANSELL. Yes. It is rather difficult to speak patiently about such pettiness.

Senator CHAMBERLAIN. I think the chairman would like to know about it, too.

Senator LENROOT. I would be very glad to have you state frankly the whole situation.

Mr. ANSELL. If such tyrannous conduct can never occur again, this information will not have been in vain. See what happened. They demoted me, took me from the head of the office to the very bottom, because that is where they placed me. The other chiefs and assistant chiefs of the division of course had temporary rank, although they were not regular officers. They were new men. They put me at the bottom. And yet, Mr. Chairman, I sat there and did exactly the duty which I had ever done, except signing my name, which was signed by another man; and yet, in spite of that, the Secretary of War and the Judge Advocate General of the Army and Prof. John H. Wigmore, after brief service made a colonel in the department, met. Did they take this attack, as they call it, as they ought to have taken it? The attitude of the Secretary of War, the guardian of the rights of every man in the Army, should have been one of inquiry into this thing. "What does it mean that this brigadier general, an officer of good standing, should go down there and testify before that committee as he has? What does it mean when Members of Congress and Senators, speaking from their positions in the Congress, make these statements here? What does it mean when there is this uncertainty in the country about the administration of military justice? What is my duty as the public official at the head of this great department?" Why, it naturally would occur to a faithful official to investigate. He should be alert to do

so. Even if the complaint should be found to be not justified, it was his duty, so long as it carried the prima facies with it, to investigate.

No. They met, these three men, and they decided upon a plan of campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants.

Senator CHAMBERLAIN. Who were the men? You mentioned them a while ago.

Mr. ANSELL. They were Mr. Baker, Gen. Crowder, and Prof. Wigmore.

The first thing done publicly was a statement for the press, devoted largely to discrediting me. They did not deny what I said before your committee, except in certain personal respects, such as that I had not been relieved from supervision of military justice because of my views, though it was admitted that I had been relieved without assigned reasons. It was stated that I had been treated—my views—with every consideration. The statement went on. It suggested that I wanted to be Judge Advocate General of the Army, a thing which every friend of mine in the world knows that I have never wanted to be, although it would have been a legitimate ambition. It is generally known that I should have been out of the Army before this if it had not been for the war.

Senator CHAMBERLAIN. I will say in your behalf in that regard that you have expressed the desire that Gen. Crowder might be heard first; but you wanted to be heard and to say what you had to say before the committee.

Mr. ANSELL. Yes; I think I have been fair. But they said that by surreptitious methods I tried to get myself appointed Acting Judge Advocate General, the emphasis being on the surreptitiousness. The facts are that my regular assistant, a Regular Army officer, Col. White, came to me and said, "Ansell, you are exercising a lot of authority here and signing your name as 'Acting Judge Advocate General,' and you have no authority to do it." He pointed out section 1139 of the Revised Statutes, and I examined it, and I said, "I think you are right." On that very afternoon I called up Gen. Crowder over the telephone, but could not get him, and, inasmuch as I was leaving the office, I dropped him a note, not formal, and told him that this had been brought to my attention and that I could not be Acting Judge Advocate General in charge of the powers and policies of that office unless I was designated under the statute; that merely succeeding as the senior could not authorize me to do those things. When the next senior comes into a place temporarily, briefly, for a day or two while the senior is temporarily absent, he has nothing to do with policies. When you are going to hold on day in and day out and month in and month out you can not do it by virtue merely of seniority. Gen. Crowder, when he left the office, had told me that he did not want to come back to take charge. He was then Provost Marshal General, and he was liaison officer between the department and Congress, and he was war councillor—three fields, either one of which was probably a full-sized man's job. But when this was called to my attention I dropped him this note and said, "What do you think about it?" He wrote back saying, "I fully agree with you, and you present the case directly to the Secretary of War." He now puts

the emphasis on the word "directly," and says because I did not present this case directly to the Secretary of War I am guilty of surreptitious conduct. Now, what was done, and all that was done, was for me to address a brief and simple memorandum to the Chief of Staff of the Army, who, under orders, is the channel for communication, just as I addressed everything except where the Secretary of War had personally taken up the matter with me or had personally directed otherwise because of his personal interest in it. The Chief of Staff is legally and de facto the alter ego of the Secretary of War, and to him we address all these communications.

Senator CHAMBERLAIN. If you had done otherwise you would have violated the rule?

Mr. ANSELL. I would. I simply sought the views of the Judge Advocate General, and his response seemed to me to be reasonable and in line with what he had already said and done.

So I made this brief memorandum to the Secretary of War through the Chief of Staff, saying that I seemed to be charged with the policy and output of the office, and it seemed to me under the statute I should be designated as acting chief of the bureau by the President, in order that I might have this authority under the statute, as my senior assistant had suggested; and my final sentence was: "I am authorized to say that the Judge Advocate General of the Army concurs."

He comes back with what I think must be designated as a mere quibble. He says that he did not want me to be designated as Acting Judge Advocate General. He did not want to be dispossessed. He wanted to be Judge Advocate General and Provost Marshal General and war councillor and all of the other things; which I did not know. And I judged what he wanted by his language, and it was a full concurrence with my suggestion. I say that I never spoke to the Chief of Staff or any other human being, except in this communication, to have me designated as Acting Judge Advocate General; and yet he calls that surreptitious.

Now, they got together and published this document accusing me of wanting to succeed, and wanting to succeed by surreptitious methods, and gave it to the papers—the Associated Press and all of them—all timed for the usual Monday morning fulmination. It had been held there two or three days and sent out everywhere, with great headlines, about me. All of this was done by the Secretary of War, who invited it by writing a letter to Gen. Crowder as a vehicle upon which this letter of Gen. Crowder's could travel. The Secretary did not say, "Let us investigate what Ansell and Senator Chamberlain and members of the House and people over the country are saying." He did not say that. He said, "General, I know that the system is a good system. I am absolutely assured that it has not done injustice during the war, but my own personal assurance is not sufficient. I want you to make such a statement as you can make that will assure the people of the United States, who are anxious about their sons in the service, that no injustice has been done. We must repel this attack that has been made upon us and give the people assurance."

Senator CHAMBERLAIN. That was his letter to Gen. Crowder?

Mr. ANSELL. Yes; and he said, "Please make the statement immediately." And the statement was made immediately that the system was splendid; that it had virtues that few human institutions have; and then it devoted itself largely to destroying me for bringing to the public, as I have had to do, the situation. And then, not content with what they gave to the press, but in accordance with the plan, they published this 70-page document here, which was an elaboration of the statement that was given to the press, in itself a long one, written by Prof. Wigmore.

This conference between the Secretary, Gen. Crowder, and Col. Wigmore that I told you about established a propaganda bureau, in which Prof. Wigmore was the chief. There were several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries.

The bureau got out this very elaborate statement, which is devoted to encomiums upon the system, and then concludes, as the other did, by calling the attention of the public to my surreptitious conduct, adding here another gross example of "surreptition," which is this: that in the fall of 1918, after I had returned from France, I recommended that the revisory power that was being exercised by General Kreger, representing our office in France, should be increased and made more effective. I did, and there in that order, the draft of the order prepared by me, I made the ruling of the Acting Judge Advocate General for that force in France final over any commanding general unless the commanding general appealed to the Secretary of War, when of course the Secretary's decision upon a matter of law would be final; and they say that I was disloyal to the Secretary of War therein, because I knew that he had decided that the commanding general himself would be final. The Secretary of War had decided, apparently after much wobbling, that the commanding general himself would be final, but from time to time, in hard cases and as a result of my insistance, that had been broken down, and I thought the time was ripe to break it down entirely—I speak frankly—over there, a place far removed from the seat of Government in Washington, and where men could be hanged for rape, for instance, upon the testimony of the women of a race whose language we did not understand and whose customs we did not know; at any rate, far removed from the seat of government here, where the President and the Secretary of War might act. I said that the ruling of the Judge Advocate General upon questions of law would be final unless the commanding general besought the Secretary of War for reversal. They say that that was disloyal, and that it was gained by surreptition. There, again, I did no more than frankly and in so many words put in the draft of an order, and wrote a memorandum to support it and sent all to the Chief of Staff, openly and above board, as the regulations require, and heard no more of it until the order was published. If that is surreptition, it is surreptitious to do business in the War Department through its prescribed channels, and in the prescribed way, and that is all there is to it.

That lengthy pamphlet was gotten out. There were 90,000 copies of this pamphlet published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this

system and to discredit those who would attack it. I wish to say to you, Mr. Chairman, that the records of the cases cited will prove that the Secretary of War and the Judge Advocate General of the Army have resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation. The truth is not in that document, and the records will prove that the truth is not in that document. The cases that they cite here are not only not fairly handled, they are falsely and untruthfully presented here, all with the purpose that the Congress of the United States and the lawyers of the United States might be misled and deceived. It is a sordid story, in my judgment, doing this department of the Government little credit.

Senator LENROOT. What is the title of that pamphlet?

Mr. ANSELL. It is entitled "Military Justice During the War."

(At 1.30 o'clock p. m. the subcommittee adjourned until to-morrow, Wednesday, August 27, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, AUGUST 27, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Senator LENROOT. I think, Gen. Ansell, you were narrating your own discipline, or had you finished?

Mr. ANSELL. I was induced yesterday, if the committee please, to depart from what little plan I had and to go into the administration of this system, which, to tell you the truth, I had hardly intended to do at the beginning, although, in view of the attitude that the War Department has taken, namely, that the system is all right and that just the human agencies by which it is administered are largely responsible for any difficulty that there may be, it may be that the administration of the system is rather more important than I thought it was.

The system itself is a system that can not be administered properly. It permits, tolerates, invites maladministration. So I thought I would continue upon the actual administration of this system in the War Department until I got to the organization of the present clemency board, get through that as quickly as I can, and then assure the committee I would go back and discuss the substantive law and its deficiencies and the remedies proposed.

I say that yesterday I was induced to enter into a field of discussion which was really entirely too personal to myself to be agreeable, but which, nevertheless, I believe has its usefulness to the committee and to Congress, and will serve to reveal how a Secretary of War can be induced by an organized military bureaucracy to use the great power of his office to oppress, to destroy, any who would dare differ with that bureaucracy. That is the truth. That, to my mind, will show that justice itself has been outraged in her own temple, the Bureau of Justice, which is a part of the Department of the Judge Advocate General.

The appreciations of justice in the Army truly have never been lower than they are to-day. Most regrettably, they can hardly ex-

pect to improve and become higher as long as the bureau which is charged with the chief administration of justice takes the attitude and indulges in the practices that it does take and indulge in and has taken and indulged in during this war.

The Judge Advocate General's Department is no longer a place of certain and assured justice. All too frequently it is a department given over to base wrong and tyranny, and the oppression of the men and officers who serve in it, and of the Army at large.

I am going far enough into this question of administration to show, I think, that justice is jockeyed around in that department, and it has been degraded to serve the personal purposes of an imperious master, the Judge Advocate General himself. The Army may be small hereafter, and it may be the old type of Regular Establishment or it may be an Army drawn from the people, but justice is certainly a subject that does not grow smaller or less important merely because of the number of men who are affected by it. If justice in a general sense can be said to be the largest interest of man on earth, then I say that justice is the largest interest of the Army.

The gentlemen from the Army and the War Department will be here engaging, and properly engaging, the attention of this committee and of the Congress with plans and programs of reorganization, and of raising and supporting an Army; and yet it seems to me, antecedent to all of those, is this question of military justice, more important than the size of the Army and the kind of Army and the organization of the Army. It may be that I overestimate it; having seen it at too close a range, I may have lost something of perspective; but the assurances of an officialdom, though they mount to the skies, will be of no avail unless justice exists in the Army. Officialdom is the last to hear of or to appreciate or to take steps to remedy injustice. It is a system of which it is a part. Discovery of and reform of injustice usually must come from the outside, from those who are the subjects of the injustice, from their efforts, their relatives, and the interested public generally.

I believe I have talked to more enlisted men than any other man in the Army during and after this war, personally, and it is a matter of the greatest regret to me that I fail to observe any of the enthusiasm among our soldiery that you would naturally expect to possess them, returning, as they have returned, victoriously; and I have talked to men who have not suffered this injustice; I have talked to men who have not been up against it but who have only seen it or sensed it.

The enlisted men of the Army know the Army, are conscious of this subjective effect to orders, laws, and discipline better than anybody else. They always know, and the people will know through them, and they will sense it. And let such injustice go far enough, and we shall be permitted only to hope that hereafter the patriotism of our people will be sufficient to assure willing hands to take up our arms and not hold them listless. It is a subject worthy of the very deepest concern, no matter what personalties are involved or what political aspects it can have. I can not conceive that it has any. It ought not to have any.

It makes no difference about any personal controversies, so far as this system is concerned; but obviously, if one set of men are as

insistent as I am that the system is wrong, and another set of men are equally insistent that it is very nearly perfect, there is bound to be some controversy.

In my communication addressed to the Secretary of War in reply to his and the Judge Advocate General's first defense of military justice [see Exhibit P], a reply which he declined to receive or permit to be published, though he published broadcast their own defense of the system, I said that the subject would never be composed until it was fairly composed, and I said to the Secretary of War what I say now, a fact which he does not seem to appreciate, that it is absolutely impossible for an official, however high, who has committed himself at once and immediately to a strong and strenuous defense of this system without investigation, who has arrayed himself with the solid phalanx of the Army—principally of the Regular Army—in support of this system, to initiate or conduct an investigation that can be fair, and that people will regard as fair.

I said to him, with such respect as the statement could carry in addressing the Secretary of War, that there ought to be an investigation of this subject and of his own part in it. He had appointed the Inspector General, the most reactionary of men—the ultra-militaristic type by virtue of his position, if nothing else, but he is so personally—to investigate the subject of military justice and my connection with it, and my testimony before the Senate committee, of which Senator Chamberlain was then the chairman, and I was called upon to come before the very man whom, in the brief the points of which I read to this subcommittee yesterday, I labeled as prejudiced and reactionary. I showed what his influence had been to maintain this system. I had to handle him as he ought to have been handled, having taken the stand that he had taken. That officer was the officer designated by the Secretary of War to conduct an investigation into the administration of military justice, my part in it and my testimony before the Senate Military Committee. The Secretary does not seem to perceive that, having committed himself, he has committed the entire department. Surely he would not sit in judgment upon a matter in which he had taken such a strong stand.

See how that investigation came along. First, after I had filed my opinion insisting upon subjecting courts-martial to legal regulation, in November, 1917, the Judge Advocate of the Army came back, took charge, relieved me from all connection with military justice, except, of course, when he was away for any period somebody had to act, and I acted; but I mean to say that I was relieved of all authority over that while he was there. While he was there I had nothing to do with it, though all the rest of the department I did have to do with, notwithstanding my great interest in this very subject. All this matter was handled by the Judge Advocate General, a senior assistant of his, a man without experience in the Judge Advocate General's department, in the administration of military justice, and the Secretary of War. At no time was I consulted except as, out of a sense of duty, I went to the authorities.

Then, in the springtime, when it was perfectly obvious that our department was not familiar with the emergency legislation of the nations with which we were associated, and especially not familiar with whatever those nations had done in the improvement of mili-

tary justice and its administration, I asked to be sent to Europe and to be equipped in such a way that I could make this investigation. I was sent to Europe. A single officer to assist me was denied me. I was given a clerk. And after the greatest exertion for between three and four months I returned to this country with a report, not only on the emergency legislation and its administration, but on military justice in those nations with which we were associated; which report never got beyond the Judge Advocate General of the Army.

Recently, however, in January, after this all came to the public, the War Department designates a perfectly inexperienced man who six months before had come from civil life and had manifested no particular quality for the place, unless it be his staunch adherence to the Judge Advocate General and his views, and sent him to Europe with a large staff and much money to make this second somewhat belated investigation; and I understand he is about to return or has returned.

Senator CHAMBERLAIN. Do you object to giving the name of that officer?

Mr. ANSELL. Maj. Rigby.

Senator LENROOT. With reference to this report, which you say never got beyond the Judge Advocate General, it has never been made public?

Mr. ANSELL. It has, now. I have read it into the record; and I will insert that report, with the permission of the committee, right here. The department has to be compelled to do what it does.

ANSELL EXHIBIT "Q."

EXTRACTS FROM GEN. ANSELL'S REPORT UPON MILITARY ADMINISTRATION IN EUROPE.

FRANCE.

The under secretary of state for military justice.

(*a*) *Corresponds to but has broader functions than our own bureau.*—This under secretariat in the French ministry of war, while corresponding to our own bureau, is given a far more prominent place in the establishment than is our department. Shortly after the beginning of war it was raised from the rank of direction to its present status, where it has contact with Parliament concerning its own affairs and an independence of administration unknown to us. While corresponding absolutely to our own department, as far as our department goes, it performs very much broader duties in three respects.

(1) It makes all inspections necessary to acquaint itself with the condition of the administration of military justice in the army and all inspections preparatory to the most important courts-martial and civil litigation.

(2) It conducts before all the tribunals all litigation in which the ministry and the military establishment may be interested.

(3) It is charged with the general inspection and direction of prisoners of war.

It is abundantly equipped for all these functions.

(*b*) *Methods of maintaining discipline in French Army sharply distinguishable from our own in several respects:*

(1) *There is but one kind of court-martial.*—It corresponds to our general court. There seems to be no need of any of the inferior courts because of the established system of disciplinary punishments for all minor offenses. The French tried an inferior court, only to abandon it. Special courts of inferior jurisdiction were provided for by the decree of September 6, 1914, but they were found unsatisfactory, were abandoned in practice, and finally actually

prohibited by the law of April 27, 1918. I was advised that they were opposed principally because it was thought they were the alternate whereby commanders would neglect their duty to impose summary disciplinary punishments, and also because courts-martial might become too frequent.

(2) *The system of summary disciplinary punishment (mentioned above).*—This system is an established, tried, and tested agency of French Discipline. No French officer can be found who disputes its efficacy. It is contended that, properly supervised as it is, (1) it results in effective discipline without the least injustice; (2) develops the proper sense of responsibility of command in all officers and corresponding respect for them upon the part of those commanded; and (3) obviates the great loss of time and energy consumed in courts-martial, leaving officers and members of the command free for their purely military duties. This system of discipline is regulated elaborately and in detail by the decree of May 25, 1910. There is no appeal to the courts. It applies to officers as well as to enlisted men.

There is one feature of the punishments authorized worthy of remark. Corporeal punishment, bodily indignity, or public disgrace is not permitted. The appeal seems to be to the pride and dignity, rather than to the sense of shame. The system carries with it a very wise concurrence of authority and responsibility. Every man must judge as he would be judged. The kind of field punishments habitually indulged in in the British Army have no place with the French. Considering the moral quality of our soldiery, as I have seen it evidenced here, it is my view that we could safely apply the basic principles of the French rather than English discipline.

(3) *There is a far more thorough investigation prior to courts-martial than there is with us.*—This is made by competent lawyers. Complaint of conduct that would subject the offender to court-martial having been made to the convening authority, or charges having been preferred to him, the whole matter, including all the papers, is turned over to a "rapporteur," who is an officer of the bureau of military justice assigned to duty with the command. He makes a thorough investigation and performs all the duties of the juge d'instruccion in the civil system, except that he himself does not finally decide whether the accused shall be subjected to court-martial or not. Upon that question he makes a report, with recommendations, to the convening authority. The convening authority may disagree with the "rapporteur," but in practice he seldom does. If it is decided to proceed to trial, the record of the case as it is made up is submitted to a "commissaire du government," who is also a lawyer appointed by the minister of war, who sits at the trial and represents both the Government and the accused in a sense unknown to us; that is, while he endeavors to see that the Government's case is presented, he is no more a prosecutor for the Government than he is counsel for the accused. He is there to see that justice is done between the State and the accused. This official is described as "a public minister representing justice." He should be at least of the grade of the accused. He is always a lawyer and is usually a man of considerable or even great distinction at the bar. He takes no part in the deliberations of the court. However, the court relies upon him for advice during the trial and may, and frequently does, consult with him during its deliberations, but this must be done in the presence of all parties.

If the papers upon coming to the hands of the "commissaire du government" are defective in stating a legel case, he amends them; if, for any reason they are fatally defective, he quashes them; and if during the trial he should become convinced of the deficiency of the proceeding as a matter of law, he so signifies to the court; in such a case his view is controlling. Even upon the facts the formal expression of his view that the State ought not to prevail is sufficient to work an acquittal or dismissal.

In time of war the two legal functionaries described above are united in a single person—"le commissaire-rapporteur."

(c) *Judgments of courts-martial are subject to an independent revisory power*—

(1) The Court of Cassation has, or until recently had, jurisdiction in time of peace over the judgments of courts-martial only under exceptional circumstances in the case of persons generally subject to military law, but civilians tried by court-martial for State offenses may always in time of peace have their cases reviewed by that court.

(2) A Court of Revision sits in time of peace and war for the Army. The court originally consisted of two civilian magistrates of the court of appeals and three officers of the Army. I am advised at the department that not long

before war broke out there was a change in the situation by decree that permitted an appeal to the Court of Cassation in place of the Court of Revision, and I am advised that in time of peace the Court of Revision had been largely, if not entirely, superseded by that court. In time of war the Court of Revision consists of five officers of proper rank, sitting at the headquarters of the Army or at each Army, as may be necessary.

In time of war there is no appeal to the court of cassation by military persons, and the Government may also, by decree, control appeals in time of war to courts of revision. In August, 1914, all appeals to the court of revision were suppressed. June 8, 1914, revision was reestablished for all judgments of death. On June 8, revision was suppressed again for death sentences imposed for passing or inducing one to pass to the enemy or to rebel armies and for revolt; but, as to these offenses, it was reestablished by the decree of July 12, 1917. By the decree of February 28, 1918, revision was reestablished for judgments of condemnation to hard labor for life and for deportation. The present situation is, then, that there maybe revision of judgments in the following cases: (1) Death penalties, (2) hard labor for life, (3) deportation.

By telegram of April 20, 1917, it was ordered that no capital case, whether it had been revised and rejected, or not revised at all, should be executed until the record had been submitted to the decision of the President. In all these cases the under-secretary of state for military justice submits the record, with his review and recommendation, to the President of the Republic or to the minister of war directly, without the intervention of other authority. By decree of June 12, 1917, the above provision requiring submission of death sentences to the President was temporarily abrogated in certain cases, but by note of July 17, 1917, the rule prescribed by the telegram of the 20th of April, 1917, was reestablished in all respects. The present law, therefore, is that no capital sentence can be executed without the approving decision of the President of the Republic.

I am also advised that cases carrying military degradation of an officer or soldier, dismissal of an officer, or the dishonorable discharge of a soldier are, by reason of the fact that the President is the pardoning power, usually submitted to the department by the general in chief of the Army on his own motion.

Courts of revision do not retry the facts. They will annul the judgment of courts-martial, and in a proper case order a new trial, only in the following cases:

(1) When the court was not lawfully composed.

(2) When it has violated the rules of its jurisdiction.

(3) When the penalty pronounced by the law has not been applied to the facts found to exist, or when a penalty has been awarded not known to the law.

(4) When there has been a violation or omission of forms prescribed to be observed under pain of nullity.

(5) When the court has failed to comply with the request of the accused or the "commissaire du government" to make use of a faculty or fight provided him by law.

(*d*) *An elaborate system of suspension of sentences.*—Except in the most heinous cases, all sentences that would deprive the Army of a man's military service are suspended for the period of the war. There is also an elaborate system whereby an offender may be completely rehabilitated. Commendation in orders will work a complete rehabilitation. Men are not lost to the Army. They serve either in prison works or in the chasseurs d'Afrique in France. Military service thus rendered is penal but is not beyond the realm of rehabilitation. All military persons are amenable to courts-martial exclusively for all violations of law, including the common law of the land, except certain offenses against the fishery and forest laws, in which civil courts have jurisdiction.

ITALY.

Bureau of Military Justice.

The personnel of the Bureau of Military Justice, presided over by a lieutenant general, is purely military. The ranking officers of the department are all eminent lawyers. The system of court-martial procedure is in general respects very similar to the French.

(*a*) *Distinctive features; A court of revision of all judgments of courts-martial.*—The system embraces this distinguishing feature: In accordance with law, the King, by a decree dated the 20th of July, 1917, instituted a supreme

council of revision. Its rules of procedure were promulgated on the 12th of August following. The council was originally composed of one of the generals commanding a section of military justice, who is its president; of the military advocate general of the vice military advocate general; of the colonel attached to the section of justice, of a councilor of the court of appeals, designated by the Minister of Grace and Justice, and an official known as a chief reviewer, chosen by the supreme commander from among the officers of the army who are qualified lawyers. As first established, it had jurisdiction to revise all sentences involving a penalty greater than seven years' imprisonment in all cases where there was not already legal recourse to the supreme tribunal of war and marine. (This latter tribunal has jurisdiction only in exceptional cases.)

In April of the present year this court of revision was reconstructed and enlarged, with a larger number of councilors of the court of appeals, and with jurisdiction to revise all serious penalties. The decree constituting the council expressly provides that the examination in revision will not suspend the execution of sentence. I was advised, however, that upon application, either by the accused or the department of military justice, a stay of sentence could be obtained in a proper case. The jurisdiction of the supreme council of revision is final, except in certain special cases. The records are first presented to the bureau of military justice and by that bureau transmitted for revision. (Concerning this court, see appendix "D" and rough translation.)

ENGLAND.

THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

(1) *History and place in the Government.*—Originally, before the appointment of the commander in chief in 1798, the Judge Advocate General acted as secretary and legal adviser to a board of general officers by the aid of which the government of the army was carried out by the Crown; and it was apparently to discharge the duty of defending the board and the action of the military authorities taken under his advice to this board that the presence of the Judge Advocate General in the House of Commons was needed. When the board was abolished, on the appointment of the commander in chief, the Judge Advocate General continued to be the legal adviser to that official, and though at times, up until 1805, he was not a member of Parliament nor a privy councilor, yet, nevertheless, in the absence of a responsible minister he acted as such and remitted capital punishment and dismissed officers in the name of His Majesty. In order to bring this Crown functionary under parliamentary control, the office of the Judge Advocate General was in 1806 made a political one, the holder became a privy councilor, a minister of the Crown. He had the duty of advising the Sovereign upon all matters coming within the scope of his office and was liable like any other minister to be called to account in Parliament for any act done in the exercise of his official function. From this time until 1851 the Judge Advocate General assumed to act judicially and his decisions were expressed as pointing out the nature of the defects in such language as, "I have the honor to inform you that the conviction can not be legally sustained or enforced," or that the "proceedings are invalid" and recommending or suggesting that "the prisoner be released and the entry of the conviction erased;" or, "that the commanding officer be informed that the finding amounted to an acquittal and should be so recorded in the usual form of 'not guilty.'" In a brief memorandum filed with me by the present Judge Advocate General (Judge Cassel[1]) it is said:

"In the late sixties, however, the form used more frequently took the shape of a direction such as 'Under the circumstances the proceedings are quashed.' 'I have to request that you will cause the prisoner to be released and the record of the conviction erased.'"

(2) *His place as sole legal adviser to the political head of the Department.*—In 1875 a case was submitted to the law officers, Sir John Coleridge and Sir John Jessel, who in effect gave it as their opinion that it was the function of the Judge Advocate General to give advice and not to pronounce judgment, and

[1] Judge Cassel was rather recently appointed. He is an eminent barrister and at the outbreak of war held a prominent place at the English bar as an equity lawyer. He was serving as an officer of the line in France when appointed.

that in constitutional theory "his opinion is not binding, although, no doubt, in practice it is not usual to disregard it." However, this was not followed by the succeeding Judge Advocates General. Judge Osborne Morgan in a minute to the secretary of state in 1880, when he was Judge Advocate General, while accepting in a sense the opinion of the law officers as a theoretical legal definition, nevertheless adopted as the constitutional basis of his office the definition set forth in a minute of his predecessor, Judge Ayrton, under date of the 17th of February, 1874, and held that the Judge Advocate General "was constitutionally as well as morally responsible for the legality of sentences of courts-martial." During all this time the office was a political office of a ministerial character, its holder having a seat in and responsible to Parliament. So it remained until 1873, from which date until 1905 there was an interim in which the office was held by the president of the Probate Divorce and Admiralty Division. In 1906 a further change was made and the present system initiated. The Judge Advocate General became a permanent official, debarred like other civil servants from sitting in Parliament, and with direct responsibility to the Secretary of State for War. To quote from the present Judge Advocate General—

"The result is that the responsibility of advising the Crown as to the exercise of the prerogative as respects the sentence of courts-martial is transferred to the secretary of state, and the functions of the Judge Advocate General are to advise the secretary of state as to the advice he shall tender to His Majesy. The secretary of state is at liberty to disregard the advice tendered to him by the Judge Advocate General, but he will rarely, if ever, take the responsibility of disregarding the advice of that official on legal matters."

The law officers of the Government are all agreed that while the office of the Judge Advocate General is theoretically advisory to the secretary of state the disregard of that advice would be so unusual and would be considered so serious a matter that it could not go far without challenging parliamentary correction. It is understood that in a case of exceptional importance the Secretary of State for War may refer the opinion of the Judge Advocate General to the attorney general and the solicitor general and may have their advice upon the question in dispute. This course has rarely been adopted, and I am advised there has been put one reference to those law officers within the last three decades. The reorganization of the office that has taken place within the last 150 years has resulted in placing a responsible minister at the head of the War Department, who stands between the Sovereign and Parliament, and to whom, rather than to the Sovereign, the Judge Advocate General of England reports directly. His opinions are subject to no military supervision or to any other kind, except in the rare instance when his decision may be submitted for the review of the attorney general.

(3) *He is independent of all military supervision and control.*—His sole superior is the political head of the department, namely, the Secretary of State for War, who is responsible immediately to Parliament. The office was originated in necessity as an independent check on military authority. It was established more than 200 years ago, primarily to correct abuses of courts-martial and the exercise of military authority. Court-martial sentences at that time were notorious for their disregard of the fundamental principles of justice of the law of the land. It is fundamentally inherent, therefore, in the establishment of this office that this official shall be amenable to no military authority whatever, but solely to the political departments of government. His appointment by the Sovereign, his authority as defined in the patent of office, his civilian status, he being no part of the military establishment, with life tenure and retirement, all establish his independence of military authority in the performance of the functions of his office. All this nobody in or out of the army disputes and none can be found to question its wisdom. His opinion in matters pertaining to his official function being subject to no military scrutiny or control, he is the final legal authority on the administration of military justice.

(4) *The several deputies judge advocate general.*—The judge advocate general has a deputy judge advocate general in each of the overseas forces; that is, in France, India, Mesopotamia, Macedonia, Egypt, Cyprus, and with the various other expeditionary forces of England. This official, while representing the authority of the judge advocate general is also upon the staff of the commander in chief of the force. There, as at the war office, rarely or never are the opinions of the deputy judge advocate general disregarded. If the commander in chief feels that he must differ with the deputy judge advocate gen-

eral, the question is submitted directly to the judge advocate general himself. The opinion of the responsible law officer is accepted without question by the army. The attitude of the army is one of respect for his authority. This administrative principle has a profound influence upon administrative action. A convening or confirming authority, or any other military authority charged with an independent responsibility, may, and with the utmost freedom in practice does, submit to the judge advocate general or his deputy any question arising in due course of administration, and his opinion is regarded as authoritative by the army and by the department, and will serve as a military justification for the action by that official.

Under the secretary of state for war, alone, the judge advocate general of England is the head of the administration of military justice.

(e) The administration of military justice.

(1) *Thorough preliminary investigation prior to resort to court-martial.*—What is universally pronounced as one great element of strength in the British system is to be found in the thorough preliminary investigation required to be made to determine whether the accused shall be subject to court-martial. After the officer prefers a complaint the commanding officer (usually the regimental commander) conducts a preliminary hearing, at which the accused is present. The witnesses against him are called and examined under oath and cross-examined by the accused. The accused then presents his own witnesses. Upon the evidence thus taken the commanding officer decides whether to dismiss the charge altogether, or whether to resort to his power of summary punishment, or whether to forward the charges to the convening authority for trial. In case he decides to resort to summary punishment, if the offense involves one of the larger summary punishments authorized by the statute, the man must be asked if he submits to the commanding officer's jurisdiction or whether he would prefer court-martial. A well-advised man usually submits to the summary discipline. If he takes a court-martial, or if the commanding officer decides to forward the charges to the convening authority, the substance of what each witness testified to is settled in a conference between the commanding officer or his adjutant and the accused, and upon disagreement the witnesses must be recalled. All this testimony is forwarded to the convening authority, where the judge advocate looks over both the charges and the substance of the testimony and decides whether there shall be a trial or not. If he finds incompetent testimony he indicates his ruling to that effect upon the testimony sheet, or if it appears that an offense has been committed for the proof of which evidence exists but has not been included in the evidence sheet, then the file is returned to the commanding officer for further investigation and again the man has the right to be present and examine the witnesses. At any time before final disposition by the commanding officer he has the right to administer his own punishment or dismiss the charges. All papers, including the evidence sheet, are sent to the president of the court, who must be guided by the rulings of the law officer as to what is relevant and what is not. This testimony sheet also serves as a check upon the testimony of witnesses.

(2) *The punishing power of commanding officer (usually regimental commander).*—Another great element of strength in the British system is found in the punishing power of the commanding officer, which is authorized by section 46 of the army act. The exercise of this power has caused nearly all inferior courts to be superseded and has made the regimental court obsolete. Together with the required preliminary investigation, it is believed to have reduced the resort to general court-martial by about 50 per cent. "The whole trend of army opinion and military jurisprudence," says the judge advocate general, "is toward increasing the power of a commander to administer in a proper case summary discipline."

(3) *The different kinds of courts-martial in practice.*—Courts-martial authorized in the British system are (1) the ordinary general court-martial, (2) the field general, (3) the district court, and (4) the regimental court. Where it is impracticable to maintain the ordinary general court-martial, the field general may be resorted to; and it has been held impracticable to maintain the ordinary general court-martial in France and other fields of service for enlisted men. Officers, however, are almost invariably tried by ordinary general court-martial. The distinguishing theory is that trials of officers are so few as to be within the range of practicability. So, in France and all active fields of service there are (1) the ordinary general court for officers and (2) the field general for enlisted men. At home there are (1) the ordinary general court for

everybody and (2) the district court for enlisted men and the regimental court. The last-named court is obsolete by reason of the summary punishing power, and the district court is infrequently resorted to.

(4) *General and field general courts-martial are provided with law officers, who control the court upon questions of law.*—The ordinary general courts-martial are provided with a judge advocate warranted by the judge advocate general or deputy judge advocate general. The English judge advocate is not, as with us, a prosecutor, but a law officer whose opinion may be taken by the prosecutor (counsel for the government) by counsel for the accused and by the court. He may, and frequently does, give his opinion to the court without their request, and would do so if he believed the court needed it or was about to err. When the evidence is all in he sums up and instructs the court upon the law in very much the same manner as a judge instructs a jury. The judge advocate is usually an eminent barrister who has had experience on the criminal bench.

The field general court is not provided with a judge advocate by law, but it is now the established practice to detail with each field general a member who is especially qualified in the law and who has all the qualifications of the judge advocate just mentioned. Out of deference to the line he is seldom or never made the president of the court, but, on the other hand, neither is he the junior member. While theoretically he has no more power than any other member of the court, under the British system he may spread his own views upon the record and may, indeed, report specially to the deputy judge advocate general any errors committed by the court on the trial.

(5) *Some weaknesses of present system.*—The present British system is weak. the law authorities find, in the following respects:

(*a*) The law does not provide for having a judge advocate on every field general. This difficulty has been obviated largely, as just said, by detailing as "law member" an officer who is an eminent barrister and of experience in the administration of criminal law, specially selected for the purpose of controlling the court in matters of law. The present judge advocate general strongly recommends the supplying of every court-martial, except the summary court, with a legal member, and would recommmend it immediately to Parliament were it opportune to do so.

(*b*) This law member should have a controlling power in matters of law. As just explained, he does have that power in fact, but only at the expense of transcending legal theory.

(*c*) In cases of death sentences the law does not, as it should, provide for a stay of execution until review by the judge advocate general. Inasmuch, however, as death sentences can in no case be confirmed by any authority below the commander in chief, the confirming authority always has the approving view of the deputy judge advocate general. Then, too, as a matter of fact, the deputy judge advocate general will take no risk of future disagreement with his chief post executionem, and, except in the plainest case of a death sentence, he would ask for the judge advocate general's review before sentence is executed.

(*d*) There should be a legal stay of execution for another reason: In order that the accused may request pardon. While every convening and confirming authority has the authority at any stage in the proceedings to ask for the opinion of the judge advocate general, an authority which is very frequently availed of, there is no express authority for staying the sentence or establishing an interval between the awarding of the sentence and its execution in order that the pardoning power may be sought. The recent Army act, however, with this in view, requires the president in all sentences of death to announce the verdict upon conviction, in order that the accused man may pursue his usual remedies or ask pardon.

(*e*) In the matter of settling charges there is an inconsistent relation in that charges are both settled before trial and ultimately passed upon in review after trial by the same legal authority. The present judge advocate general has so organized his office into divisions that the division that settles the charges never reviews the proceedings. In fact, so independent will he keep them that he himself, since he may be called upon to review a case, never personally settles the charges. All such matters, indeed all preliminary matters of this character touching prima facie legality, are attended to by a division which acts independently of the judge advocate general and takes action in the name of its own chief. If it were convenient at the present time to do so, the present judge advocate general would propose the statutory establishment of this independence.

(*f*) No reason is known for the illogical position that inasmuch as an acquittal is required to be announced in the British system immediately to the accused, all convictions should not be announced also.

(6) *Judge Advocate General as reviewing authority.*—The judge advocate general reviews all cases, even those that have been reviewed by the several deputy judge advocates general in the various Expeditionary Forces, though those passed by a deputy are not scanned with such great care. The number of cases now being reviewed are about 1,100 per week, and he tries to keep the work up to date. A case received to-day should be taken up by an examiner to-morrow and passd without delay. He is guided in his power of review by the rules, vague as they are, established by the criminal appeals act as grounds of reversal or quashal. The scintilla of evidence theory has long been abandoned in England, and because of the vagueness of the rules established in the criminal appeals act, the appellate courts have very properly reserved to themselves the right to say what shall constitute grounds of reversal and quashal, keeping in view, of course, so far as sufficiency of proof is concerned, the established common-sense rule in deference to those who have heard the witnesses testify. He not infrequently reverses, however, for insufficiency of proof, and uses the formula found in the criminal appeals act, that is, "There is not a reasonable sufficiency of evidence" or when "a substantial injustice has on the whole case been done the accused."

a. The Judge Advocate General of England has never limited himself to jurisdictional deficiencies in quashing proceedings; he will quash for other reversible error.

b. Practical steps in quashing.—When he decides to quash proceedings he makes what he calls a "minute" of the deficiencies without going so much into detail as we do. In several of the cases I noted he simply said, in a nut-shell statement of the reason for his conclusion, "I find that the charge alleges no offense known to the law;" or "that the only evidence adduced for the Government was incompetent;" or that "the evidence is not reasonably sufficient;" or "the accused was denied the substantial right of counsel and witnesses for his defense;" and that "for this reason the sentence should be quashed," or sometimes, "must be quashed." With but little more, this minute is addressed to the "S. of S." (that is, the Secretary of State for War) who returns the minute initialed. The minute is transmitted by the Army Council to the proper commander with a direction from the Army Council to see that the necessary notation is entered on the record of the accused and that all steps be taken to restore him to his former status.

Even in cases of quashing for defect of jurisdiction he seldom recommends another trial, as he leans decidedly against a second trial in such cases, though in particularly aggravated cases, where obviously the accused should not go unpunished, he does, of course, recommend trial.

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S. T. ANSELL.

Returning from Europe, I found Gen. Crowder away more and more, the control that he exercised when he came back to relieve me from administration of military justice in the fall before became very much relaxed, and I assumed more and more of it. I found that during my absence what I had told Gen. Crowder would happen had happened in regard to General Order No. 7, which I have referred to before as an administrative palliative enabling the department to make a study of these death sentences before they were executed. I found that the officer who had been engaged in this during my absence, a very able officer, indeed—I do not know whether he agrees with me on this subject or not, but an able lawyer and officer—had held, as I say, what I had pointed out to Gen. Crowder as a matter of law would have to be held with reference to General Order No. 7, that we were expressly limited by General Order No. 7—I mean the Office of the Judge Advocate General was limited—to the study or the review of pure questions of law; not passing on them—do not get that idea—but studying on them in

order that we might advise with the commanding general below, and thus endeavor to keep him straight, if he saw fit to accept our advice. But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this order acted as a limitation to that effect, and there had been no recommendation for clemency consequent upon these reviews and studies we made since the time of the publication of General Order No. 7 until after I got back.

Senator LENROOT. What had been done with respect to them?

Mr. ANSELL. They just made the review upon the technical questions of law, and sent the study or review to the commanding general.

But you see, regardless of what he might do, Senators, the man who studies this case and this record is in an excellent position to advise the President as to whether clemency ought to be granted or not, regardless of what the legal solution may be.

When I got back I took the bull by the horns, because it was nothing less than that, and I reversed what the acting Judge Advocate General had in my absence very properly, as a matter of law, held to be the limitations placed upon our office to recommend clemency, and instructed the boards to review and recommend clemency in proper cases.

Senator CHAMBERLAIN. To recommend to the President?

Mr. ANSELL. To the President, or to a subordinate commander. I wish to say here that when we began to recommend this clemency to these commanding generals below, it had to be done with a delicacy that does not speak well for justice. They are men of power, supported by the War Department, and they wanted no interference from a mere lawyer, and frequently we got very sharp retorts from them to the effect, "You had better mind your own business; we know what this requires."

Senator CHAMBERLAIN. They were superior in rank to the men who made the recommendations.

Mr. ANSELL. Yes. They are major generals, and at best the head of my office was only a brigadier. But I mention this to show you that by reason of this palliative, notwithstanding the fact that it would be thus interpreted, and the drafter of the order, the Judge Advocate General, had been advised that the order would be thus interpreted as a limitation upon our power inhibiting us to make this recommendation to clemency, it was not changed. It stayed there and operated as an limitation, and it was not changed until I got back here, and as I say, in violation of the proper rules in the construction of an order or a statute, I deliberately changed it, in the interest of justice. The departmental line-up was against the granting of clemency even then, and it has been worse since, notwithstanding that it has been published to the community at large that the special clemency board has been given a free hand to recommend and carry through clemency, a matter which I will take up in a moment.

Senator LENROOT. How did this board come to be designated as a clemency board, if they had no power to make recommendations?

Mr. ANSELL. This clemency board, if the Senator please, was not organized at this time. This board of review was a board of review created by me for the purpose of reviewing, for matters of law, the proceedings of courts-martial, limiting themselves to questions of law; and then when I got back I issued an office order enlarging their jurisdiction so that they could include a recommendation for clemency. That is, they would send one of those studies back to the commanding general, and they might say, "As a matter of pure law, the proceedings are regular, valid. Nevertheless, for these reasons, we think you ought to grant clemency." That was not by the clemency board, you see, Senators. The clemency board came into existence later.

Now, it is true there had always been in the office of the Judge Advocate General an officer who, among other things, passed upon applications for clemency, for remission of penalties, made by our prisoners in the old Regular Army, itself. Prisoners could make these applications every six months. Applications were treated, as a rule, rather perfunctorily. The regulations of the War Department were such as to repress these applications. The entire office had only four or five officers in it, and was not well organized; but in former times there was one officer there whose duty it was to look over the men's applications for clemency; the regular routine performance. There was no officer there and no organization in the Judge Advocate General's Department designed to recommend clemency at the very moment of reviewing the case in the first instance, you see, Senators. So I enlarged this jurisdiction of the board of review for that purpose, notwithstanding the fact that, as I say, General Order No. 7 prohibited it.

Now, we worked along. We were imposed upon by the power of military command, and I assure you nobody in the world knows it better than I. I was at the point of contact between the power of military command and the law; not the gentlemen in my office, but I. I was the official who was answerable to the Chief of Staff and other officers exercising military command. They had it out with me. The Army did not know about it; of course not. I have some very vivid recollections of what took place, and I will assure you that a lawyer's case, or a soldier's, if he wants to call my place a soldier's place, was a very uncomfortable one, if you were actuated by an ordinary sense of your duty and a desire to do justice when up against this all-powerful power of military command.

But after the armistice the Judge Advocate General returned again to the office and more largely assumed the reins, and the first thing that the Judge Advocate General of the Army did again was to relieve me from all contact with and supervision of military justice. The truth of the matter is, of course, that he and the department did not like my liberal views. They will not say it, but their conduct speaks far louder than any words.

I was relieved when he came back the first time, of course, with the knowledge of the Secretary of War, if not at his suggestion. I was relieved again, the first thing, when he came back the second time. I was kept in charge of contracts and all other legal matters of the War Department except the one in which I was most interested—military justice. I do not say I was the most competent; I say that I

was the most interested in this human thing that I started out very interested in, and that I am interested in it yet.

After the armistice the punishments got worse than before the armistice.

Senator CHAMBERLAIN. You mean the sentences or the punishments?

Mr. ANSELL. The punishments and the sentences. Why, there seemed to be a contagion all over the Army of these terrible punishments, stimulated perhaps by the fact that after the fighting there was a let down, I suppose. Men go away without leave more frequently then. I do not mean to say that there is any great increase of vicious conduct; that is not so; but there is less observance of these thousand and one military exactions after an armistice, as we may appreciate.

Senator LENROOT. You mean the morale is lowered?

Mr. ANSELL. The morale of that particular type; not morale of any substantial type, I think, Senator. That is, there was no more felonious conduct then. There were no more gross breaches of the military obligation then. There was more absence without leave, more going without pass, and probably there may have been some let down in dress—I have seen that—and to that extent a lowering of morale.

Observing this increasing harshness, from the cases that passed over my desk, I began to send to the chiefs of division and have them present to me the cases from the various camps here in the United States. I observed that the curve went away up on arbitrary punishment; and on a certain day, which was the Thursday before the 11th day of January, I got the cases from Camp Dix, commanded by a major general of the Regular Army who had been Chief of Staff who had been honored by the commander in chief with every gift that can come to an officer of the Army; an old officer with great experience; and those punishments, those proceedings, approved by him, were so shocking not only to me but to gentlemen of the office, one particularly, the Chief of the Division of Military Justice, an old-time Regular Army officer, who believes in the rough-and-ready type of justice, and who disagrees, therefore, with me—that I knew something had to be done, and I had to start in again; an unpleasant task.

I went to the Judge Advocate General of the Army. I told him about this, and in the earlier conversation I got the impression that he concurred with me; but later in the afternoon of the same day he sent for me and told me that my views apparently were looking to general clemency, and I said that was true; I was convinced that something had to be done, first to restrain the aggravated tendency to severer punishments and also to investigate all of our punishments during the war. He said that he was at first impressed with my suggestion, but it would be, he feared, an impeachment of the military judicial machinery, and that he was reluctant to take action.

Finding myself, three days after that, in charge of the office——

Senator CHAMBERLAIN. When was this?

Mr. ANSELL. This was on the 11th of January last. Finding myself in charge of the office and observing that very morning further and impelling evidence of what was happening in the field, and being in charge of that office by reason of the fact that the general was away,

I addressed a memorandum to the Secretary of War calling his attention to the situation, and I put a copy of it, of course, on the Judge Advocate General's desk. Of course, I shall be accused of having taken advantage of the absence of the Judge Advocate General in doing this, but I am not concerned with the accusation. I did, in a sense, take advantage of it, because the thing had to be brought to somebody's attention, and I had not succeeded. But exigent action was needed, because there was evidence that very morning of orders that had been published by two commanding generals in this country to the effect that all absences without leave of four days' duration would be punished by general court-martial, and conveying instructions that where a case of absence without leave was referred to a general court-martial, as all of them by this order were, it was for the purpose of seeing that the delinquents got proper punishment. That means to say that absences, however trivial, could not be referred to a special court, because the limit of the punishing power of a special court was six months' confinement and forfeiture of six months' pay; so that, of course, under the commands of these two generals, courts were instructed to punish all absences without leave, however trivial, with greater punishment than six months' confinement and forfeiture of six months' pay.

Senator LENROOT. I would like to ask you, there, General, is that in your view, as an example to the Army or as to its deterrent effect upon the men as a whole, a more severe punishment than six months' confinement?

Mr. ANSELL. Senator, it is I know contended by the War Department now that these large punishments, harsh in terms at least, were imposed by the Army in terrorem. That is no defense of the punishment. That is what this War Department defense, published under date of March 10, says about it. That is what the Kernan board says. The Kernan board says it is a wonderful method of maintaining discipline in the Army. That is, they say that at the time these sentences were imposed, no human being ever intended that they should be served. They say that you had these green men; that you had to make soldiers out of them in a very short time, and it was necessary to—they do not use the word "terrorize," but it is aptly descriptive of the method and of their meaning—absolutely necessary to terrorize these men who had just come from the farms and factories by making them believe for the time being that if they batted their eyes, or did this, that, or the other thing, they were up against it. Now, surely it is a perversion of the sacred functions of courts and justice to bluff like that.

But, secondly, is it not bound to be destructive of its own silly purpose? I use the adjective "silly." Will we be permitted to do it in the next war? Will we be permitted to do it now? When will we come to lop off these sentences? Because then the men will know. Is it not like hanging up a scarecrow in a field to scare the birds? If you can not successfully disguise it the birds are soon going to use it as a perch.

Do you believe, can anybody believe, that the whole commissioned personnel of the Army of the United States could have adopted as a policy the imposing of long sentences as a bluff, without the enlisted men at the same time knowing that it was a bluff? But assuredly the sentence will have to be served in such a case, whether it is one year

or 99 years—and there have been 99-year sentences—unless somebody with interest enough and power enough and personality enough comes along and sees that they are curtailed.

Senator CHAMBERLAIN. But there is the stigma of conviction of crime.

Mr. ANSELL. Oh, yes, We are just talking about clemency; because I thought that suggestion was in the Senator's question, that the man was properly convicted.

How about these long sentences that are shocking to our conscience and sense of justice, if they are intended to be served? The War Department says they were never intended to be served; that they were imposed just simply to terrorize these men; that you got discipline and obedience by instilling this great fear.

But if the Army was intent upon handing out these long sentences, for such a purpose, ought not the Acting Judge Advocate General of the Army, I, to have known about it? I never heard that this was the policy, and I would have advised against it if I had so heard. Was it not incumbent upon the general who organized the service with that intent, to see that those sentences should never be served? Was it not his duty after flagrant warfare ceased to institute some sort of procedure whereby these punishments would be curtailed? The man who did institute the procedure was myself, a man who was not aware of any such policy or purpose, if such existed, and a man who had had to fight to get such clemency as we had already.

Senator LENROOT. What I had in mind, General, was this, in my question: It will be admitted. I take it, that punishment is necessary.

Mr. ANSELL. Yes.

Senator LENROOT. To enforce discipline.

Mr. ANSELL. Yes.

Senator LENROOT. Now, what I would like your opinion upon is, in a case of absence without leave, in the general class of cases where there is no question of guilt, whether trial by special court with a maximum sentence of six months would be sufficient for disciplinary purposes?

Mr. ANSELL. Oh, pardon me, sir. My opinion is that ordinarily it would be ample; absence without leave being distinguished, of course, legally and in substance from desertion.

Senator LENROOT. Oh, I understand; yes.

Mr. ANSELL. The absence without leave would have to become very flagrant, and more general than I think could be humanly anticipated, to make that penalty insufficient; there would have to be a disintegration of the Army before that punishment would be insufficient for a man who was gone, under circumstances that would indicate that he was not a deserter, less than 10 days, which is the presumptive period changing absence without leave into desertion. A man under ordinary circumstances goes absent without leave a maximum, say, of 10 days. It seems that our ordinary sense of justice would say that if you took that man and put him in imprisonment, in close confinement at hard labor, for six months, and made him forfeit all his pay for six months, he would pay pretty dearly for his absence.

Senator LENROOT. That might be, so far as the individual was concerned; but a man purposing to absent himself without leave,

would a knowledge on his part that the maximum punishment was imprisonment for six months and forfeiture of pay for six months be sufficient to deter him?

Mr. ANSELL. In my judgment, Senator. One man's judgment would be as good as another's; but if I may speak out of what little experience I have had in the Army, I would say ordinarily that an absence without leave of the maximum of 10 days should not bring more than one month's confinement; and I would say that my experience in the Army was probably the result of observing a sensible application of punishment. Nobody has ever heard of adopting anything like six months' imprisonment and forfeiture of six months' pay for an ordinary absence without leave.

Senator CHAMBERLAIN. They do not ordinarily give that much?

Mr. ANSELL. Oh, no. Absences without leave are treated very lightly. I do not know what the maximum limit of punishment in time of peace is, but I know that it is very light. I know that I have on some occasions had just some little reason to wonder if a man who wanted to take a little fling would not take it and say, "I am not going to get very much out of it," under the old peace-time maximum limit. We do not have very much absence without leave.

Senator LENROOT. Then is it your opinion—I am not speaking now of excessive punishment, but is it your opinion—that the order sending all these cases before a general court-martial where the punishment would be more than six months had no beneficial effect upon discipline?

Mr. ANSELL. I think it had a very injurious effect.

Senator LENROOT. That would be the extreme sentence, of course. What would have been the result of the fact that six months was the maximum punishment instead of 20, 30, or 40 years?

Mr. ANSELL. It would have been not only the subject of comment, but comment indicative of the general view that it was arbitrary, though not necessarily harmful.

Senator LENROOT. Even though the maximum punishment of a general court-martial for absence without leave had been one year?

Mr. ANSELL. Oh, yes; I will go so far as to say six months, Senator. That is to say, the general sense of the necessity of maintaining discipline in the Army through punishment. determinative of the length of punishment, would have been shocked by saying that they should all have been punished by sentences of six months, or generally punished by a sentence of six months. When you come to consider the span of man's life and the part of it that he usually spends in war—the arms-bearing man—taking three-year enlistments for instance, six months takes a pretty big gouge out of that, and six months is a pretty long time to put a man in confinement and work him at hard labor, and then take away every cent of his pay. The punishment is pretty heavy. If we had that in civil life. it would be considered a pretty heavy punishment. But I have no hesitancy in saying to you, Senator, that I have seen no evidence of such a contagion of absence without leave, or any such reasonably contemplated injurious effect of absence without leave, as would justify any military commander in saying to his court-martial agencies, assuming that he ought to have that power, that all these people now should be punished with more than six months.

I submitted this memorandum to the Secretary of War on January 11, and I would like to read that memorandum into the record. I will put all these memoranda, if I may, in the record, that evidence these administrative phases, as I go along.

Senator LENROOT. Yes.

Mr. ANSELL. (Reading):

ANSELL EXHIBIT R.

JANUARY 11, 1918.

Memorandum for the Secretary of War:

1. I have just finished reviewing the general court-martial cases from Camp Dix, under General Orders, No. 7, which has been presented to me to-day by the Chief of the Military Justice Division of this office. Those cases relate, of course, to that command alone, but I fear and have reason to believe that they evidence a situation that is much more general. This condition is directly due to a failure upon the part of the court-martial—a failure which in this case appears to be absolute—to appreciate the high character of their judicial functions and a similar failure upon the part of the convening and reviewing authority. Under the limitations of law, regulations, and orders, as construed in the War Department, this office was limited to advising the reviewing authority as to whether the record of trial was "legally sufficient to sustain the findings and sentence of the court," and was not otherwise concerned with the quantum of punishment; this upon the view, of course, that the jurisdiction of the convening authority is final and beyond review. Nevertheless, impelled by the irresistable evidence found in the great number of unjust sentences passing through this office, I have presumed, with a hesitation which the delicacy of the situation demands, to invite the attention of convening authorities to the great severity of the punishment in those cases in which the punishmen has appeared to be so disproportionate to the offense as to shock the conscience. In the light of what is transpiring at Dix, and doubtless elsewhere, I do not regard that such an administrative course taken in specific instances is sufficient to achieve and establish military justice.

2. The cases to which I now invite your attention have all come to me to-day as a part of the day's work. The officers who have handled them in this office and I are of one mind as to what they reveal and as to the necessity for the application of curative measures. I will give you a brief summary of them:

(a) In the case of Pvt. Sanford B. Every, 40th Company, 13th Battalion, 153d Depot Brigade, the accused was convicted simply of having a pass in his possession unlawfully. He was sentenced to be dishonorably discharged with total forfeitures and to be confined at hard labor for 10 years. The reviewing authority reduced the confinement to 3. We consider this a trivial offense, and this office will doubtless go so far as to suggest to the convening authority that, inasmuch as this soldier has already been in confinement about 2 months, the entire sentence should be remitted.

(b) In the case of Pvt. Clayton H. Cooley, 13th Company, 4th Battalion, 153d Depot Brigade, the accused was found guilty of absence without leave from July 29 to August 28, 1918; failing to report for duty; escaping from confinement September 1, 1918. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor for 40 years. The reviewing authority reduced the confinement to 10 years. The man has evidently been in confinement since last July. Even as so reduced the sentence is altogether too severe, and this office, in returning the record to the convening authority, will so comment upon it.

(c) In the case of Pvt. Charles Cino, 71st Company, 153d Depot Brigade, the accused was tried for disobeying an order "to take his rifle and go out to drill" on November [illegible] and on escaping from confinement on November 4. He was sentenced to be dishonorably discharged the service and confined at hard labor for [illegible] period of confinement the reviewing authority reduced to 20. [illegible] accused claimed that he was sick, and doubtless he was suffer[illegible] from venereal trouble. It may be that he was a malingerer. [illegible] the sentence, even as reduced, was entirely too severe, and this office will [illegible] comment upon it to the convening authority.

(d) In the case of Pvt. [illegible] W. Harper, Company A, 413th Reserve Labor Battalion, the accused was charged with desertion and convicted of absence without leave from the [illegible] of August to the 13th day of November, 1918. He was sentenced to be dishonorably discharged, to forfeit all pay and allow-

ances, and to be confined at hard labor for 20 years, which period of confinement the reviewing authority reduced to 10. The period of confinement, even as reduced, is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company 36, 9th Training Battalion, 153d Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife with a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, 58th Company, 15th Battalion, 153d Depot Brigade, the accused was found guilty of disobeying the order of his lieutenant to "give me those cigarettes"; behaving in an insubordinate manner to one of his sergeants by telling him to "go to hell," and behaving himself with disrespect toward his lieutenant by saying to him that he, the accused, did not "give a God damn for anybody." Of course, there can be no question but that such conduct can not be tolerated, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was a company rumpus which, in my judgment, might have been otherwise dealt with, or, under the circumstances of its commission, merited no very long term of confinement. There was no evidence of previous misconduct. The court sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, 49th Company, 14th Battalion, 153d Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged, and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, base hospital, tried at Camp Grant for insubordinate conduct, which, at worst, could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages of his review to show that such punishment was well merited.

3. If these were isolated examples, they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

4. If the courts are blameworthy, the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this, found in a camp order which provides as follows:

"Absence without leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court.

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction, *the court must realize* (italics my own) that it

has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this, and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543), and Grafton *v.* United States (206 U. S., 333). There are numerous other decisions to this effect. (The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.)

This order contains, in effect, and was intended to convey, the following directions:

(*a*) All absences without leave will be tried by courts-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay (the limit of punishing power of a special court).

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believe I have observed, during this war.

S. T. ANSELL,
Acting Judge Advocate General.

The Secretary of War then asked Gen. Crowder, who had returned, what ought to be done, and they recommended the establishment of a special clemency board, which was, of course, clearly suggested in my memorandum.

Senator CHAMBERLAIN. But rather extra legal, while your proceeding might have been a legal one under your view of the law?

Mr. ANSELL. Yes, sir; still just talking of clemency.

Now, let us see how far clemency has gone to remedy the injustice; see if it has gone as far as it ought to have gone; whether the evidence of the War Department's attitude and their action indicate that the War Department has been in favor of the degree of clemency which I should think would appeal to us all as necessary, upon an examination of the records in these cases, and in view of our experience in the office. It must be remembered that Gen. Crowder had not had much experience in the office during the war; and it must be remembered, furthermore, that the Secretary of War had had none. He refers to the great number of cases that he had reviewed during the war, but obviously the Secretary of War never sees any records but these. The few dismissals of officers from the divisions, not from the department, and a small percentage of the death sentences; that is all. That is, he sees only those records, few in number, that come to the President of the United States as the Commander in Chief of the Army for confirmation. He does not see the rest of them. I should imagine the Secretary of War had probably seen less than 300 records since he has been Secretary of War, and I should say that the Secretary of War had seen less than 100 really important cases that were suggestive of an opinion upon the fate of military discipline, at all.

Senator CHAMBERLAIN. Will you at some point in your testimony put in the number of the various kinds of courts-martial?

Mr. ANSELL. I will do that now, sir—not accurate. Round numbers are usually inaccurate, but this will be close enough.

For the year immediately preceding the armistice, according to the reports that I have, there were 28,000 general courts-martial out of an Army that averaged perhaps 2,000,000. We know the size of the

Army the year before the armistice, and we know the size of the Army at the time of the armistice, and I roughly estimate it at 2,000,000 men.

In the inferior courts during the same period there were between 340,000 and 360,000 cases.

Senator CHAMBERLAIN. That is for the year preceding the armistice?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Do you know, as to those inferior courts, how they were divided as between special courts and summary courts?

Mr. ANSELL. No, I do not, Senator; and we have no way of telling that, as those records do not come to us except in unusual cases. Indeed, the safeguard was created with the view of straining down from the general courts cases that we thought could be properly tried by courts of lesser jurisdiction; but the military commanders have met us with the opposite practice. A commander who believes that a summary court can not hand his man out enough, of course, resorts to a special court; so that while the policy of administration has been to bring the cases within the jurisdiction of a lower and still lower court the practical tendency has ever been to take a case triable in the summary court and send it to the special court, and so this midway court has tried far more cases than any of us had expected it would try; cases that come up that more properly belong to the summary jurisdiction rather than the general jurisdiction.

Senator CHAMBERLAIN. You have not the number of cases that have been tried since we entered the war?

Mr. ANSELL. No, sir.

Senator CHAMBERLAIN. Your figures are only for the year preceding the armistice?

Mr. ANSELL. Yes; I took that because that became the basis of discussion; and that is all I know.

Mr. ANSELL. Accordingly, the clemency board was organized within two or three weeks—a special clemency board, we will call it—which was to go back and take up cases, however long they had been tried, during this war, for the special purpose of clemency, and I was made the president of that clemency board.

There were conferences between the Secretary of War and the Judge Advocate General and the prison officials, one of which I attended, and the question arose as to whether the prisoners abroad, the number of whom nobody in the War Department knew, were to be given this special consideration also. I could see no reason why they should not be given the same consideration as our men imprisoned here at home, but it was decided that their cases should not be taken up, the reason assigned being that they were over there, in and near the theater of operations where the offenses were committed, and that people would not be so interested in extending clemency to prisoners so circumstanced as here at home; with which I disagreed. So that from the beginning we were not to include in this special dispensation prisoners confined abroad.

I have already said that I was reduced to my Regular Army grade of lieutenant colonel, and there had been put on the board, in the beginning or shortly after it was organized, Col. Wigmore, a very stanch supporter of the view opposing mine, and a man who is not

zealous in according clemency. So that when I was reduced they kept him as the senior member of the board.

My relation to the Judge Advocate General had been personally affected. By virtue of this officer's rank he became the point of contact between the Judge Advocate General and the clemency board, and instructions governing the clemency board were issued to him and not to me. Indeed, except so far as whatever personality I could put back of my position, it could be said that he was largely the clemency board.

Now, clemency is not a matter that can be accurately measured. After all, it is a matter of the heart and of the conscience; and I was very anxious to have a board, of course, that shared what I conceived to be liberal views and the proper attitude toward clemency. That board, of course, I did not get when the senior officer on it was a man ardently supporting the Crowder view and bitterly opposed to mine.

Some time in early March I observed that the clemency examiners, the officers who made the records, evidently did not understand the considerations that would have governed me in examining the records for purposes of clemency. They were deferring too much to the record. They were approaching it as they would review a record for determining errors of law, and were not taking into account what the record reflected of the human situation; not governed by those aspects, but simply by the legal determinations of the record. We were not getting very far. So far the situation between my clemency board and me had been such that I had not been in position to instruct it. They sat in one room and I sat in another, and the channel of instruction from the Judge Advocate General's office to this superior officer was not through me.

Senator LENROOT. Do I understand by that, General, that the policy was that if they found what would have been in a civil court a reversible error, they would recommend clemency, but otherwise not?

Mr. ANSELL. It was largely that; and they were pretty strict about the reversible-error proposition also. Yes, Senator; that probably expresses it as accurately as it could be expressed.

Senator CHAMBERLAIN. Wigmore was a civilian. How long had he been in the service?

Mr. ANSELL. From near the beginning of the war; but he had been in the Provost Marshal General's office. Col. Wigmore had had absolutely no experience, which he confesses in the letter he got out to the American bar as its Nestor, advising them what to do on the subject. He confesses that he had never examined but two court-martial records, which had incidentally come to him; yet he assumed to speak with Nestorian authority.

Senator CHAMBERLAIN. He was your superior on this board?

Mr. ANSELL. Oh, yes, sir; after I was reduced; so that, seeing this situation, on March 21 I asked the Acting Judge Advocate General, Gen. Kreger, that I might be permitted to instruct the clemency board, and the examining officers who made the reports to the clemency board, or at least might be permitted to present to this clemency board my views of the general principles that should govern the granting of clemency. I was moved further to do this by the fact that recently the commandants of the prisoners had been brought on here, and they

were very potential factors in the granting of clemency, because they make a recommendation in each case; and the tendency of the War Department is, of course, to support the recommendation of the prison commandant rather than, perhaps, what might be described as the more humane view of the clemency officers.

These gentlemen had been brought here, Col. Rice and others, and they and the Acting Judge Advocate General all conferred with the Clemency Board and the examiner and agreed upon some principles governing the award of clemency. I was not there, although sitting right in my room, nor was I notified of the meeting.

I wish to submit at this point in the record a memorandum for the Acting Judge Advocate General which contains my views with respect to the principles that ought to govern clemency, views which I think nobody could disagree with unless they were apprehensive because of their conception that I was extremely liberal, or there was something in the views themselves that was hidden.

Senator LENROOT. That will be inserted.

(The memorandum referred to is here printed in the record, as follows:)

ANSELL EXHIBIT S.

MARCH 21, 1919.

Memorandum for Gen. Kreger:

Here are my views, briefly and roughly stated, respecting the considerations which I think should govern the Clemency Examiners and the Clemency Board itself:

1. Clemency is not a matter to be governed by technical rules of law. It is a matter of conscience rather than strict professional judgment. It is a matter which requires us to see the human being, his motives, circumstances, and condition, and our vision in this regard must not be limited by what the record, legally considered, strictly shows.

2. Too much legal deference must not be paid to any record for purposes of clemency, and this is especially true of courts-martial records. They frequently show, what is only too frequently true, that however closely the forms of trial may have been adhered to, the trial itself was not a fair, full, and impartial presentation of the case. Speaking more specifically, I think we must ask ourselves, among many others, the following questions:

(*a*) Were the facts, as revealed on the record and as they may be fairly inferred, such as to indicate a state of mind that is really criminal or immoral, or chronically perverted, or intolerably reckless of the military obligation? Or, especially in purely military offenses, was not the delinquency due to thoughtlessness, or ignorance, or a lack of understanding of the military environment, or was it not provoked, as is frequently the case, by an unsympathetic, if not an oppressive attitude upon the part of those in authority? Frequently the two serious charges, desertion and disobedience of orders, can be so resolved, in the light of the human facts, as to indicate that there was no intention to commit the offense at all. While every charge of disobedience of orders sounds bad upon paper, very frequently the order itself was one given in a light or improper manner, or was not a necessary one, or involved some inconsequential thing not sounding in those necessitous circumstances where disobedience of orders becomes a most serious, even a capital offense.

(*b*) Accused may have counsel, but too frequently counsel is so limited by reason of his lack of legal qualification or a lack of that rank which gives him standing before the court, or a general lack of those inclinations and appreciations which zealous and competent counsel must have in order to make a good defense, that it can be said, as a matter of fact if not a matter of law, that the accused did not have the substantial assistance of counsel which every accused should have. And frequently the court will permit a man to go to trial without counsel when any man of legal appreciations knows such a course to be unwise. What is true of counsel is frequently true of other incidents of the trial.

(*c*) There is nothing that courts-martial are more inclined to do than follow a natural inquisitiveness to admit masses of hearsay testimony, and at the same time so limit the counsel as to prevent proper cross-examination where, as is none too frequently the case, the counsel is inclined to indulge in one. Military counsel often hesitate to cross-examine superior officers, and courts-martial as a rule seem to think that it is improper to test a witness, especially if he is a superior officer, for bias, prejudice, or credibility.

(*d*) Special attention must be paid to improvident pleas of guilty. Frequently the entire case is given away by such a plea made by an accused without counsel, or advised by incompetent counsel; and very frequently, after such a plea, the accused makes statements in his own defense inconsistent with the plea, which courts as frequently disregard. Pleas of guilty of serious offenses should be most carefully scrutinized. Court-martial duty is uncongenial, and a plea of guilty is acceptable as a brief method of ending the trial.

(*e*) Of course, as a technical matter, every presumption should be made in favor of the action of the court, but frequently the action of the court, however it may appear in mere form, is not fair and its conclusion is prejudiced thereby.

(*f*) We should be on our guard against confessions or statements of any kind against interest, when made by a soldier to a military superior. The military relation is such as to induce confessions in such a way as to render them incompetent.

(*g*) I do not regard that the thirty-seventh article of war changes the rule with respect of the effect of prejudicial error, but simply redeclares it. Substantial error, in my judgment, must be presumed to affect the finding and sentence. As between evidence of the same degree of credibility, it may be that the effect of evidence erroneously admitted may be overcome by an overwhelming volume of evidence of such a nature as to compel the mind. But, for instance, take a confession which when worthy of belief is the most convincing of all evidence, if it should be improperly admitted, I should conclusively presume error.

(*h*) I observe that it is frequently said in the clemency memoranda that the evidence is sufficient to sustain the conviction. Evidence may be sufficient to sustain the conviction when tested by an appellate court for its purposes, and yet be so weak and unsatisfactory as to justify clemency. The tests and purposes of the tests of the evidence in two cases are entirely different.

3. I believe that the great principles fundamentally established in our civil jurisprudence, designed for the purpose of securing a fair trial, are equally applicable, except where clearly withheld, to trials before courts-martial. A military accused is entitled to the same full, fair, and impartial trial; to be informed of the nature and cause of the accusation; to have the facts against him determined by the usual rules of evidence; to have witnesses in his favor; to be confronted with witnesses against him, except in those cases where the rules of evidence reasonably prescribe otherwise; and, above all, he is entitled to the assistance of counsel for his defense, counsel that should represent him and his cause, and not simply appear in the trial to satisfy a form of law. And a military accused is fully entitled to protection against self-incrimination, as much so as an accused in a civil court.

4. The Articles of War and the military statutes are not the sole source to be sought in determining whether or not a man has had a full, fair, and impartial trial. The fundamental principles of law which are a part of the common law and now a part of our Constitution must be resorted to and applied, except where by their very nature they are inapplicable to military proceeding.

5. I think our tendency should be, wherever we can justify it, to get rid of that kind of punishment which is continuing and damns a man forever, such as a dishonorable discharge. Such a punishment as that should be given only in extreme cases. It has been given altogether too frequently and we should lean toward finding a way to reduce that kind of punishment. In the ordinary case we should try to restore a man to the colors or return him to civil life without marking him so he can never rehabilitate himself.

If you should approve of these views, I think you should instruct the examiners and the board accordingly, or authorize me to do so.

S. T. ANSELL.

Mr. ANSELL. I heard nothing from that, though I had really thought I would hear almost immediately. I knew there were conferences between the Acting Judge Advocate General and the new

senior officer of the board, Col. Easby-Smith. Col. Wigmore had been relieved and reassigned to duty at the Provost Marshal General's office. But an officer of equal rank and my superior, a new officer, incompatible with me and my views, was assigned, vice Wigmore, relieved. That officer was Col. Easby-Smith, who, if possible, is even more pronounced in opposition to my views, both in regard to the system of justice and the clemency that we were undertaking to award, so ardent a champion is he of the Judge Advocate General.

Senator CHAMBERLAIN. He was a civilian also?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. He was a lawyer here in the District of Columbia?

Mr. ANSELL. Yes. He had not been on duty in the Judge Advocate General's office and he knew nothing about this matter. So that I addressed on March 24 another memorandum to Col. Kreger, which I would like to read. It is brief, and I would like to have that inserted in the record [reading]:

ANSELL EXHIBIT T.

MARCH 24, 1919.

Confidential memorandum for Gen. Kreger:
Subject: Clemency.

1. I request that I be given full authority to direct the Clemency Board and the examiners in the matter of the proper methods to be used in examining the records—those matters of record or omissions from the record which may properly be considered as indicia of clemency, the general principles that should govern clemency, and, equally important, that I be consulted in the selection of the personnel engaged in clemency work. Otherwise I must advise you that I must disclaim all responsibility for results and you and others must assume it.

2. My name has gone to the public in such a way as to indicate that I am in charge of the examiners and the board and that my views in general govern. This is far from accurate. The administration of this office in respect of this most important matter has been laid down so as to hold me responsible and yet to deny me the necessary freedom and authority.

3. Because Col. Easby-Smith is my senior by one grade, which in itself is embarrassing, because his views as to clemency and his attitude to the subject generally so differ from mine as to result in obstruction, and because I lack for him the official regard which I should for the senior member of the board, I ask that he be relieved from duty with it.

4. I also believe that the special board of review exercises such a restraint upon a fair examination of the records as to be obstructive of proper clemency. I request that you direct the special board of review, the Clemency Board, and all clemency examiners to report to me for instruction, and that I be consulted hereafter in assignments of officers to duty in connection with clemency work.

5. I would have you know that nothing is farther from my desire than to embarrass you, but my own protection and a proper regard for my duty require me to say to you this much.

S. T. ANSELL.

I referred there to a special board of review over clemency. The system of examining records for clemency consisted in having an officer examine the record and then report to the clemency board, consisting usually of four or six officers, divided into two or three divisions, each division of two officers, of which I was nominally the president, and obviously, at least from my viewpoint, one great element making for clemency was the poor quality of the trials. A man may have had counsel, nominally, but when you look over the record, its poverty speaks louder than words. You may find that the counsel sat there, and everybody sat there, and saw the case poorly developed; so that the record, however technically dependable,

was as a human document unreliable. That was an indication for clemency, especially, when it would appear that the omissions or the particular slant given by the method of presentation was operating against the accused.

The War Department did not wish to impeach or impugn the integrity of these records; but I insisted that there should be printed on the clemency examiner's report certain questions: "What do you think of the trial in this case, and why? Who represented the accused? What kind of defense did he put up? What do you think of the case in general?" Now, these were young officers, militarily ambitious; properly so, doubtless. If they reported a case "poorly tried," that suggested clemency. Of course if the case were reported "well tried," there was lacking in the case the element of clemency; but quite the contrary, if it had been poorly tried. A case poorly tried, so far as the trial is concerned, does suggest clemency.

The Judge Advocate General organized this special board of clemency review consisting of three lawyers chosen, as I say, especially because they reflected absolutely the views of the department and the Judge Advocate General. Seldom or never could that board find a case poorly tried. They were all well tried. So that every case that the clemency examiner reported as poorly tried went to this clemency board, when they would report back to the Judge Advocate General, frequently in language characterized by brusqueness and unjudicial temper. They would say "It is absurd to say that this case was poorly tried. The examiner who made that statement evidently did not make a thorough examination of the record. No court in the land would say that that case was poorly tried. It should be sent back to this officer with instructions to look over his work again." Now, to a civilian that may not appear to be more than a mere difference of opinion as to the quality of a record; but to the military man, here are all these men in what we call the pit, working as hard as they could, getting out thousands of records. When a man put "poorly tried" on a record he knew that was going to be viséd by a set of men who did not want to see the "poorly tried" maintained. If he reported "well tried," of course that went through.

Now, I say that one of the principal obstacles to getting a fair estimate of the record was to be found in that fact that the Judge Advocate General organized this separate board of review, of high ranking officers, with special authority to supervise the work of the clemency examiners, whenever there was found an element in the records that made for clemency, but never to supervise when there was found a record not making for clemency.

Senator LENROOT. Was there ever a difference in the treatment of the records of trials of men and officers?

Mr. ANSELL. A world-wide difference, Senator. You let an officer be tried, and there is a straining of energy from the time the original investigation begins. You let a charge be made against an officer, and the whole system lines up really to see that there is an absolute necessity of trial or there will be none.

The Inspector General's Department goes to work and inspects, and inspects, and inspects; and reports, and reports; and then the judge advocate of the convening officer's staff investigates with the utmost care, and the commanding general really is only too glad to

find a way of letting the officer out; and when you come to the court every presumption in the world is in favor of this officer, if he has been an officer in good standing; and so it is throughout the entire procedure. And when it gets to our office there never has been a time, no matter what the personnel was, when there was not the most thoroughgoing, careful review of every officer's case, with a distinct, palpable disposition to find all fault possible, and to reduce as much as possible the importance of everything against him. I say here, with the keenest sense of my responsibility in making the statement, that an officer and an enlisted man in our establishment do not at all get the same kind of justice. I say that they stand at opposite poles. Every presumption is made in favor of the officer. There is a thoroughness of trial that we do not find elsewhere. Our treatment of the enlisted men is to run them through the mill.

Senator LENROOT. In the case of proven guilt of an officer and enlisted man for the same offense, is there a different degree of punishment?

Mr. ANSELL. Yes, Senator. Let us take the Army estimate of dismissal for an officer and dishonorable discharge for an enlisted man. There may be some difference in the two punishments, but they are so nearly analogous that I think we can discuss them and, by way of contrast, answer your question.

You are an enlisted man. You do not belong, as a rule, to the same class—if we are ever justified in talking of classes; and you talk it in the Army, the Lord knows! An officer is apt to be a better educated man, and better circumstanced, with more influence. We all know that the enlisted man is apt to be of the humbler type; not always, but apt to be. Both are found guilty. The trials differ as I have indicated. Let us suppose that the officer gets dismissal. The corresponding punishment in the case of the enlisted man is dishonorable discharge. I say to the committee that both of those punishments are ruinous; they are destructive of all capacity in a human being to rehabilitate himself. I have known of few men in this world who have left the Army with a dishonorable discharge or dismissal that they did not go down and out, and never come back. Few, if any of them, ever get back. One such officer was in my office in the last few days. That man was a fine officer. He made what I should conceive to be only a slight mistake, but the powers had lined up against that man to railroad him out of the Army. That man has striven and striven and striven until he has come back in civil life; but, though a young man, younger than I am, he shows what has happened to him. His hair is white as snow and his face is filled with the wrinkles that belong to 80 years of age. If this man had not had great stamina, he never would have come back.

Take an enlisted man in his situation. He is less apt, still, to come back. When the enlisted man is tried we in the Army try to make his punishment as severe as possible. We follow a man who has gotten a dishonorable discharge wherever we can, and we give him this yellow sheet, and then we try to prevent his employment anywhere in this world.

Senator LENROOT. Just elaborate on that, will you, a little?

Mr. ANSELL. One came to me the other day. He had gotten employment, I think, on a trolley line—something—in southern Cali-

fornia. An officer of the Army, hearing that this man was there, notwithstanding the fact that the man was doing well as a conductor or motorman, reported to the company, to the management of the company and said, "This man has been fired out of the Army as a bad egg. You do not want him. It is our policy in the Army to try to see that those men are known for what they are—unfit to serve their country in uniform." I do not believe the manager wanted to do this, but nevertheless we all know business management. That man was fired—dismissed.

These punishments, Mr. Chairman, are lifelong. They last, and the department intends to make them last as long as the victim draws the breath of life. He is tagged; he has the yellow sheet; he is followed, and wherever the Army is known he is apt to be known, and the influence of the Army will be used to prevent his successful efforts at rehabilitation.

Senator LENROOT. Do I understand that the action of the officer you refer to was in line of duty?

Mr. ANSELL. Common understanding; yes. Not in the line of official duty, in a strict sense, no; but common understanding, yes. I say that emphatically. Why, an officer of the Army dismissed, as I say, for a mighty slight offense—at some more convenient moment, if I can find the time, I am going to try to present that man's case to this Congress and show this Congress that the man was unjustly treated and he ought never to have been dismissed from the Army. Yet that man, when we got into the war, wanted to supply a post with some commodity, maybe fish or vegetables, which he was able to supply, and which he was supplying through a contractor. The commanding officer of that post, observing this poor fellow dragging a load of fish, or cabbage, or what not, into that post for the supply of the troops, recognized that he was this military pariah. The commanding officer made inquiry and found out that the victim was supplying this contractor with this provender, and the post commander called up the contractor and told him that he would have to fire this man. The man was brought up in the presence of the contractor, that the post commander might identify him with assurance; and the post commander, in that authoritative way that men with great power have, just simply said, "That is the man;" and then the contractor took the man outside and said, "I am sorry; you have been a good man; you have worked hard; you have done well for me; but I will lose my job if I do not fire you." Of course, you have got some suggestion of that in the Articles of War themselves. At least one article forbids any association with convicted men. But I am referring to a common understanding—a tradition, if you please; an element of esprit de corps. Obviously you would not expect officers and men of the Army to exist on terms of social and official equality with men convicted; but the point I am making is that there is an affirmative effort to do injury that is lifelong.

Now, dishonorable discharge, if you are an enlisted man, means just as much to you as dismissal from the Army means to me if I am an officer. But I want to assure you that the Army does not so regard it. The Army takes into consideration the social standing of the officer—what it means to be an officer with the badge of sov-

ereign authority on you. It is a wonderful thing, really, to be an officer of the Army. They say that if you destroy that man's tenure of office and throw him out into the world in disgrace in a material way you have destroyed a lifetime vocation and livelihood. You have thrown him from a place of honor than which none is higher, because, no matter what the attitude of our people may be to the Army as such, there is no people in the world who hold an Army officer in higher esteem as an individual than the American people.

"And see what the man has suffered," they say. "Here upon this very pinnacle of pride and popular appreciation, and cast out. Therefore, we are not going to give the punishment of dismissal except in the most flagrant case." And that is generally true. But dishonorable discharge—I do not want to criticize our Army unfairly, and I will not do it, but I must speak truthfully as I know the truth to be—dishonorable discharge is regarded as a sort of perfunctory thing. It is but part of a formula. The language runs, "dishonorable discharge from the service of the United States Government and confinement for four years with forfeiture of all pay and allowances." It goes right along. In fact, when you give a man more than six months' punishment you must give him dishonorable discharge. It is an easy thing. Now, they say that dishonorable discharges may be remitted. May I say to you, sir, that in all convictions in the year immediately preceding the armistice—or, I will give you some statistics. Statistics are devitalizing, as a rule, but they are interesting in this case.

Out of every 100 sets of charges drafted by an officer against an enlisted man between 96 and 97 were tried.

Of every 100 trials by general court-martial the year before the war, just a little less than 90 per cent were convicted; and in the old Regular Army before the war 96 were convicted year after year and year after year.

Get the full import of that! An officer here, under no special obligation, acting simply upon his responsibility as an officer, prefers a set of charges against a man, and 96 out of a hundred are tried, regardless of all this talk of investigation by the War Department; and of every 100 tried 96 are convicted; and out of every 100 convicted, 64 of them are given the sentence of dishonorable discharge.

Now, they say, "Oh, we suspend the sentence." But in the last statistics, the year before the armistice, those statistics showed that 48 out of every 100 men tried by general court-martial did get dishonorable discharge, notwithstanding all their talk.

Senator CHAMBERLAIN. They do not suspend them?

Mr. ANSELL. Yes; they do now.

Senator CHAMBERLAIN. Do they now?

Mr. ANSELL. Yes; under your act. Yes, they do; but many are not suspended. But I will tell you something else about the suspended dishonorable discharge that so much is made of. In connection with this power of review that we have under General Orders, No. 7, if a commanding general does not wish a sentence of dishonorable discharge to be reviewed, all he has got to do is to suspend the sentence for the time being, because under the terms of General Orders, No. 7, it is only an executed sentence of dishonorable discharge or a sentence of death that is reviewed; so he can suspend it

to-day and thereby obviate any review of the case, and then come along to-morrow and vacate the suspension, and that is the end.

Now, Mr. Chairman, these statistics, I hate them, but they are interesting; and they are interesting when you look at the old Regular Army. They are trying to say this is a new thing, all these terrible punishments. Why, Mr. Chairman, the condition of things in the Regular Army with respect to the injustice done through courts-martial was far worse than it has been in this Army; far worse. There were fewer charges and fewer convictions and fewer dishonorable discharges in the new Army. Why, do you know, if we had preferred as many charges in this new Army, per capita, as we preferred in the old Regular Army we would have had this appalling result: If we had applied the ratio of Regular Army trials to the new establishment we would have had 125,000 general courts-martial and 1,300,000 inferior courts-martial, surely a number that would have destroyed any army. Every year that I have been in the Army of the United States the number of men convicted by general courts-martial every year out of every 100 was not less than 5, and usually 6. Think of it! Six men out of every hundred every year are tried, and more than half of them discharged dishonorably from this Army. Three-year enlistments, 18 out of every 100. Four-year enlistments, 24 out of every 100.

Now, they have argued that these deficiencies have been demonstrated in the new Army, and that they have been due to the fact that the new officer is an inexperienced officer, and that he has been oppressive; clad with a little brief authority. How is that reconcilable with the fact that there has been such a smaller proportion of courts-martial in this war army; that there has been a preceptible smaller percentage of convictions?

Senator CHAMBERLAIN. How do you account for it?

Mr. ANSELL. From the fact, largely, that the new officer had not become completely divested of his civil sense of justice. He endeavored to put up with these men without resorting to the Regular Army method of preferring a charge every time a man did something. I speak out of my experience as Acting Judge Advocate General during this war and say to you, sir, that the harshest courts during this war in this Army were courts presided over or controlled by Regular Army officers.

Senator LENROOT. Do you not think that while we were at war there was a higher spirit among the men—a better morale?

Senator CHAMBERLAIN. And there was a better class of citizens in the Army.

Senator LENROOT. Yes; a better class of men.

Mr. ANSELL. That you had a better class of men, I think we must concede. After all, it was a segment of our citizenship, not all the best, but of very high character; the highest grade of personnel that I think any army in the world ever had, and I profess to be something of a student of military history. But let us not get the idea that the old-time regular was a sort of roustabout. He may have been once. But any man that has ever served with regular troops is conscious of the great loyalty of those men, of their great zeal in the performance of their duty, and their capacity to render blind obedience to the Regular Army.

We did have a better type of men in this army; but, on the other hand, you want to remember that there were immeasurably greater opportunities for violating the regulations. Take a boy brought up at home—take me, for instance. I think they have never regarded me down home as a general. I am still what I was to them. They do not understand these new shoulder straps. They have never seen me in my shoulder straps. If I had spoken to one of those men from my home a little sharply it would have been an extremely likely thing for him at first to hand it back to me as he got it. Take a boy taken right off the farm and put him into that army, without the regular preliminary course of training we give to an enlisted man in the Regular Army. We put the new men right into it. They were civilians yesterday. Take a man that came from my home, a rather rural, backwoods place, who never saw a rifle before and knew nothing about the Army; they took those "tar heels" and put them right into camp, absolutely green men. Then you have an officer come around among those men and begin to talk to them in this ultra-authoritative way; it is a wonder that there had not been more derelictions than there were. These new men needed not punishment at that stage of the game; they needed but instruction and sympathy. There was time in the days of peace to instruct the Regular Army men, but there was no time to instruct these men, and you should not hold them up to this high exaction.

I think, Mr. Chairman, it is an unworthy argument to place the blame on the new officers; first, because it is untrue. It is untrue, and I say this speaking from the record; and I have no reason to hold a brief for any new officer. The new officer is not responsible for the harsh punishments. And here is a clinching argument to show that that argument is not true. You can count up on the fingers of these hands every National Guard officer and every National Army officer who exercised general court-martial jurisdiction. You know that, sir. You know your army commanders and division commanders and department commanders were Regular Army officers, naturally. They were the professional soldiers and they went to the top. But nothing less than, nothing of lower rank than, a division commander can convene a court-martial, and pass upon its judgment, except in some special case where the President of the United States specifically endows a junior officer with authority for a special purpose.

Who, then, in the last analysis, was responsible for the great number of trials—there were too many—and the harsh punishments resulting from those trials, if it was not the man who took the charges and ordered them tried; and then who approved the punishment, and who at any moment of the proceeding could have cut it down? How do they escape that? How can anybody escape it?

The Regular Army is a wonderful institution. We all know its history. But, in heaven's name, let it appreciate one fact, that is, regular armies are not going to fight the battles of this country. We are going to fight the battles of this country with armies just exactly like the ones we have just had. We are always going to do it, unless it is some opera-bouffe affair.

Now, if it were true that the deficiencies of or evils of the administration were due entirely to these new officers, is it not up to us to

protect the institution and the men of the institution from a situation that is as inevitable as that? Must we not restrain the man clad with a little brief authority? Of course we must. We get nowhere by saying that it is due to the fault of these people, when we must inevitably have them. If it is due to the fault of those people, then by law we must restrain them.

(At 12.30 o'clock p. m. the subcommittee adjourned until Friday, August 29, 1919, at 10.30 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

FRIDAY, AUGUST 29, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Mr. ANSELL. If the committee please, in the first place this morning I wish to read into the record this self-explanatory correspondence, consisting of a letter from me to Gen. March, dated yesterday, and a letter from Gen. March to me, in reply thereto, also dated yesterday [reading]:

AUGUST 28, 1919.

MY DEAR GENERAL MARCH: The press reports me this morning as having stated to the Senate Military Committee yesterday that you were one of the officers who obstructed the administration of clemency, through the special clemency board, of which I was the president.

I did not say this for the simple reason that you were not one of the obstructing officers. Those officers were the Secretary of War, Gen. Crowder, Gen. Kreger, and some others who were subject to Gen. Crowder's and Gen. Kreger's direction.

At my appearance before the committee to-morrow, I shall take occasion to say that in no way, directly or indirectly, so far as I ever knew, did you interfere with the administration of the special clemency board.

Very truly, yours,

——— ———.

Gen. P. C. MARCH,
Chief of Staff, United States Army, Washington, D. C.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, August 28, 1919.

MY DEAR ANSELL: I have your letter of August 28, in which you inform me that you did not state to the Senate Military Committee what appeared in the newspapers this morning concerning my being one of the officers who were obstructing clemency.

I have noticed the statement in the paper and was amazed at your being quoted as saying what was accredited to you, as, of course, the statement was entirely false, and I am glad to find, as I expected, that you were misquoted.

The same statement appears in the New York papers which have Associated Press service, indicating that the false statement was sent out by the Associated Press. I would be very glad if you would inform the president of the Associated Press that the matter accredited to you was false, as it not only places me in an entirely false and objectionable light before the country at large, but it is not fair to you, as many of your old associates in the War Department know the facts of the case.

Very truly, yours,

P. C. MARCH,
General, Chief of Staff.

Gen. S. T. ANSELL,
Suite 710–712 Riggs Building,
Washington, D. C.

I received that reply from Gen. March only a few minutes ago.

Senator CHAMBERLAIN. I did not understand you to charge Gen. March with that.

Mr. ANSELL. No; but if it were possible for anybody to make that inference, I desire to disclaim it here.

I was discussing, when we took the adjournment day before yesterday, the administration of clemency, and I had reached the point where I had requested to read into the record the efforts that I had made to see that the special clemency board was given the instructions that I thought they ought to be given, and I had, I think, the permission of the committee to read the memorandum of instructions that I had addressed to the Acting Judge Advocate General. I wish to say that the instructions, though obviously correct—and I think the committee could not do otherwise than find them so—were held by the Acting Judge Advocate General for three or four weeks. In the meantime other instructions were given, which I did not hear, and with which, from what I have heard of them since, I did not disagree; and the results of those instructions were reflected in the work of the special clemency board.

On March 24 I asked the relief of certain members of the special clemency board, but this was ignored. (See Exhibit T.)

On May 17 I was advised by the Acting Judge Advocate General that the work of the special clemency board was nearing its completion, and that the board would be disbanded and that the officers would be distributed to other divisions of work. I protested to him that the board ought not to be disbanded. He said that we were about to finish the exigent cases of prisoners in the United States. I reminded him that we still had the prisoners in Europe. Their cases had never been touched. The War Department at that time did not know how many prisoners there were in Europe, but believed that there were but very few. I asked that the question of how many prisoners there were in Europe be taken up with the authorities there, as obviously, for every reason, the War Department ought to be cognizant of the number of prisoners we had in Europe, and I also filed a memorandum with the Acting Judge Advocate General which I wish to read. It is brief [reading:]

ANSELL EXHIBIT U.

MAY 17, 1919.

Memorandum for the Secretary of War.
(Through the Acting Judge Advocate General.)

I recommend:

1. That the special clemency work which is now limited in its considerations to prisoners confined in the United States be extended to prisoners in our Army serving sentence in Europe.

2. That a more thorough review now be made of all doubtful cases here of prisoners still having more than three months to serve; this in recognition of the fact that the work of special clemency examination has been done so hastily as to preclude assurance of satisfactory results.

3. That a thorough review now be made of all cases here and abroad in which the record of the proceedings would indicate the advisability of extending a full pardon.

4. That if I should be intrusted with this work as president of the special clemency board, I be permitted to select, as far as possible, the personnel of the board, in order that it may be in general sympathy with my views at to clemency.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate.

The purpose of this memorandum, of course, was to give us general consideration of all the prisoners in Europe, of whom I apprehended there were many, and also to go over again many of these cases; because the committee can understand that when you undertake to handle some 5,000 or 6,000 cases and examine that many records within a period of less than three months, you are necessarily acting very hastily and not thoroughly, and I thought that the matter was of such supreme importance that we ought again to go over all serious cases thoroughly. I also thought, and I still think, that the pardoning power ought not to be strained in its exercise, especially in cases of this sort, and that we ourselves ought to take the initiative in the extension of full pardon where we were convinced that justice required that course, not leaving it to some humble man to present his case here to the pardon power, through attorneys, and all that kind of thing. I was particularly anxious about this, for the reason that, as the committee may know, there are certain offenses—desertion, for instance—which carry with them incidental punishments in the way of civil disabilities. A man convicted of desertion is outlawed. He loses his right to citizenship and his right to hold office, etc.; and, obviously, no conviction of desertion or any conviction that carries such civil disabilities as that, ought to be had except upon most thorough trial and thorough consideration after trial. Whether pardon will restore the status ante culpam and remove the disabilities is questionable, nevertheless, if it would remove some disabilities, and a man not justly convicted ought to have his disabilities removed. At all events, we know as the result of the history of the Civil War that we have been correcting the records of that war, or endeavoring to correct them, by legislation, by the removal of charges of desertion and trials for desertion, in order that those men might have their rights restored.

On June 24, 1919, nothing having been done so far as I knew in this direction, I addressed another memorandum to the Acting Judge Advocate General, which I hope I may be permitted to read into the record.

Senator LENROOT. Proceed.

Mr. ANSELL. I will read it [reading]:

ANSELL EXHIBIT V.

JUNE 24, 1919.

Memorandum for the Acting Judge Advocate General:

1. On May 17 I addressed to the Secretary of War, through you, a memorandum in which I recommended in effect that (1) clemency consideration be given our prisoners in France, as well as those in this country, which has not heretofore been done; (2) that in view of the haste with which the first

review was necessarily made, a more thorough review be made of doubtful cases, looking to still further clemency; (3) that another and thorough review be made with a view to granting in proper cases full pardon; and (4) that if I should be intrusted with the work I be permitted to select as far as possible a personnel in sympathy with my views as to clemency.

Yesterday you indicated to me that you would approve my recommendation that the prisoners in France be given the same clemency consideration as the prisoners here, but that you were of a mind to disapprove the other recommendations.

2. With the greatest earnestness I urge you to reconsider, in the hope that you may be brought to that state of mind enabling you to view the situation as I do. The work has been hastily done. More than 5,000 records, each with its accompanying papers, have been examined. It is not humanly possible to give to that number of cases, their records and the facts and information dehors the record the consideration which justice to the enlisted man requires. The clemency examiner, upon whom so much depends, has been at times inexperienced in the work and at all times almost intolerably pressed. I have observed evidence and have been conscious of hasty action in all departments of the work, including my own. It has not been done with that accuracy, deliberation, and assurance which should characterize judicial action.

A second examination would not require the most thorough examination of every record, but only those in which there were some outstanding indicia of the necessity of reexamination. To indicate one class of cases, I myself believe that many of those in which clemency has been flatly denied ought now to be more thoroughly reexamined.

3. According to your view, the application for pardon should be initiated by the individuals who deem themselves so aggrieved as to justify that course. In view of all the circumstances surrounding the administration of military justice this, in my judgment, would be an unjust as well as an unwise course. As long as clemency was permitted to be given consideration only upon the application of the individual, little clemency was had. It is the right of the individual to seek clemency; it is the duty of authority to give it. That duty carries with it, when there has been so much injustice as there has recently been, the duty of taking the initiative, and not waiting upon individual application. We took the initiative in the granting of clemency, and why should we not for the same reason take the same initiative in granting pardons? Taking such initiative would, in my judgment, be to the great credit of the pardoning power. Pardon ordinarily is a matter of mercy and as such should not be strained out just to those who may be advised to seek it, and it never should be deferred for mere convenience's sake. In many of these cases in which we can say with fair assurance that the man ought not to have been tried, or was not lawfully tried, or that the record as it stands can not fairly sustain the conviction, pardon becomes a matter not of mercy but of partial justice. In such a case we should act, not as a matter of grace, but in recognition of a high sense of justice. In such cases our sense of justice and our sense of duty should compel us to act. Furthermore, the military relation is such and the condition of the prisoner is frequently such that he has not the ability, nor the liberty, to make out the case that ought to be made for him.

We ought frankly to acknowledge and act upon the fact that courts-martial ran riot during this war and now do all we can to correct their unjust results.

4. If you still adhere to your views of yesterday and report upon my previous memorandum accordingly, after you have considered this memorandum, permit me to request that you forward it with the other papers for the consideration of the Secretary of War.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate.

I have received no written reply to those memoranda. I have been told by the Acting Judge Advocate General, orally, that the Secretary of War disapproved of all of them except the one that extended the clemency consideration to the prisoners in Europe; and I observed that the Secretary made a statement to the press to the effect that consideration was not extended in the first instance to the prisoners in Europe for the reason that they were going to be brought home soon any way, and that we would wait until they got here.

I wish to call the attention of the committee to the fact that the reason assigned at the outset for not granting clemency consideration to the prisoners in Europe was that there was a different relation between those prisoners and their offenses because of the fact that the offenses were committed in the actual theater of war, or at least abroad, and that there was less popular interest in their cases than in those here at home. I was also advised orally, but with some uncertainty upon the part of my adviser, that the Acting Judge Advocate General at the time I made this memorandum thought that Gen. Pershing had instituted some sort of clemency over there that they relied upon, and that it would not require a second examination over here. I did not believe that Gen. Pershing had instituted the kind of machinery that would give proper clemency, or even the degree of clemency that we were giving here. I observe that the press reports state that now, six months afterwards, these European prisoners are having their cases considered.

Senator CHAMBERLAIN. Here?

Mr. ANSELL. Here.

Senator CHAMBERLAIN. I know there are a great many of them.

Mr. ANSELL. I advert again to the fact, however, that the president of the special clemency board who succeeded me and who shared my views as to clemency, after or about the time that he had entered upon the examination of these European cases, was relieved.

Senator CHAMBERLAIN. That is Col. Weeks?

Mr. ANSELL. Col. Weeks.

Senator CHAMBERLAIN. Who is acting now as president of that board?

Mr. ANSELL. I have not heard, sir. So much for the administration of justice through clemency. I had taken, along collaterally with the administration of clemency, the investigation that the War Department was carrying on with relation to the administration of military justice, and I think that the results of the War Department activities, as known to the public, must indicate to every fair-minded man that the War Department has at last, through a statement made to the press through the Secretary of War, declared its real state of mind and its adherence to the reactionary policies of the regular establishment, a thing that evidently it was apprehensive of doing in the early stages of the controversy. Though the Secretary at first stated there had been no injustice, he later stated that he agreed in large part with those principles which I enunciated, which were predicated upon the assumption that the system in and of itself inevitably led to injustice; and, second, its administration had not helped it out much. He said he agreed largely with my views and principles.

I was invited to draft a bill. The public generally thought that the War Department was going to take a more liberal attitude.

The Inspector General of the Army was then directed to investigate the subject of military justice in some of its aspects—doubtless, the relation that I had to it.

This Inspector General of the Army was the very same bureau chief whom I had called reactionary in the early days of the war, and who had joined strongly with the other bureaus of the War Department to protest and resist the establishment of any revisory power in the War Department. I was called on by him to state my

side of the case, and I declined to do it. I was not going to be put in the position of the gentleman who admits the jurisdiction and fairness of the court, and then has to console himself by adjourning to the nearest corner grocery store and cussing out the court. This officer, I said, was not competent to make an investigation, first, because he was the Secretary's minion; secondly, because he was not legally qualified; and thirdly, because he was a prejudiced party. He was deeply prejudiced. I stated that to the Secretary of War and I stated it to him in a memorandum of March 10, and I wish that that memorandum may be included in the record here. It is probably brief. I do not have it now, but I will get it later.

Senator LENROOT. It may be inserted.

The paper referred to is here printed in full, as follows:

ANSELL EXHIBIT W.

The Inspector General:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigation has to do with my statement before the Senate Committee on Military Affairs, that statement for which, of course, I am responsible speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it, are not, when fairly considered, particular incidents to which your special capacity of inquiry can be properly applied; they are extradepartmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides, whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War, whose subordinate you are. Even more; it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation and excepting, as I do and for the reason given, to your jurisdictional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it, voluntarily.

S. T. ANSELL.

Mr. ANSELL. There was a so-called investigation by Gen. Chamberlain. I have no hesitancy in saying to this committee that the methods pursued in that investigation were such as to show clearly that it could not have been fair, and it was not fair. This investigation is an instance illustrative of something besides the mere personality involved. It illustrates the basic theory with which the Inspector General's Department makes preliminary investigations of suspected dereliction of duty.

The Inspector General, whom I had long known, after I had in the beginning declined in writing to participate in any investigation—that is, voluntarily to participate in any investigation—conducted by him, and when he was about to close his investigation, called me officially to his office and put me under oath and began to question me. I declined to proceed, upon the grounds previously indicated. He then advised me in a fraternal, paternal sort of way, to take part in this investigation, but I still declined to do so, repeating to him the reasons that I had formerly expressed on paper. And then the Inspector General, in my judgment forgetting whatever quasi-judicial character belongs to his position—and there ought to be a great deal to it—said, "You know, I am making a report on this subject by order of the Secretary of War. This thing is in Congress, and my report will go to Congress; and, Ansell, when it goes to Congress it will be very detrimental to you;" and I said, "Well, General, I would rather meet you in Congress than deal with you here."

That statement was made with all the influence that office can put back of it. Now, that was of sinister significance; it is symptomatic of a general condition. When the Inspector General or the Inspector General's Department goes out to investigate a case, the evidence is that all too frequently a man less able than I, perhaps, to stand that test and protect himself, is imposed upon and induced to act in response to such a statement as that, which was a mild third degree; in my case it was a menace, a threat that unless I played the departmental rôle the report was going in against me, would be published broadcast to the world, and would be very detrimental to me, notwithstanding the fact that, as I said, the Secretary of War and the Chief of Staff, the very people whom I had opposed in this controversy from the very beginning and whom I was still opposing, were not in any position to make any investigation of me that could be fair or helpful.

A very interesting little thing came out during the investigation of the American Bar Association. Maj. Copp, a member of this special clemency board of review, put there by Gen. Crowder because he shared Gen. Crowder's views with respect to the administration of military justice and clemency, testified before the American Bar Association to the effect that the Inspector General's Department did habitually in the camp and division in which he served compel testimony out of the suspect or the accused, and then used it against him.

Maj. Copp, speaking out of what he described as his experience as a judge advocate in a division during this war, said that it was customary for the Inspector General's Department to compel, by virtue of the power of office, a man to incriminate himself. When the committee asked him time and time again, "Do you know this to be true?" he said, "Yes; because I not only observed it, but the representatives of the Inspector General's Department at the camp where I was stationed admitted that to be a fact."

That promptly brought a denial from the Inspector General, who appeared on the stand the next day and explained and denied; but any man who knows the Army, and any man who knows the great gulf between the officer and the enlisted man, and any man who knows the great power that an inspector has in conducting these investiga-

tions and what little legal appreciation he has, knows that there ought to be some law against permitting the Inspector General's Department of the Army to use these third-degree methods of menaces and threats, and taking advantage of the innocence or ignorance or the unhappy lot of the enlisted man.

Senator CHAMBERLAIN. These are the inspections which precede of the charge?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. And the charge is based on these investigations?

Mr. ANSELL. Yes; in certain cases. Of course, there is not an Inspector General's investigation made in every case. But, again, I get back to the theory that such an investigation should be quasi-judicial, and ought to be conducted by officials who know some law and who have some respect for what our civilization has prescribed for the protection of a man suspected of crime. And such is not so. The methods pursued by the War Department with respect to this bar examination, and the investigation made by the committee of the American Bar Association here, foreshadowed what is now seen to be the department's true and revealed attitude. They were going to support the existing system. They believed in it. That committee of the American Bar Association came here, got into touch with the War Department and the Judge Advocate General of the Army, got a list of witnesses from them, and called those witnesses and no other witnesses until just about four days before their hearings, which had extended over four or five weeks, were about to close. They then, condescendingly, gave me an opportunity to appear, and called one other officer voicing my views; and then they asked me if I had a list of names of gentlemen who might appear, presumably in advocacy of my side of the matter, and when I had handed in that list, they left the next day or the second day following—within 48 hours—before any but one of those gentlemen could get here, even at their own expense. They did hear one man who happened to be in New York. But that investigation had been proclaimed abroad as an investigation conducted by the American Bar Association committee. I think this committee ought to know the kind of investigation it conducted, because the report of that Bar Association committee is going to be used, of course, by the War Department to influence legislation. That investigation was never a fair investigation, and I appeared before the committee and charged them with that fact then and there.

Take first of all the witnesses. The witnesses who were called to appear before that investigating body were called by the War Department, denominated by the War Department; their expenses were paid, and it was called official duty necessary in the military service. These maj[illegible]erals, with the great title and power of office, who [illegible] told the committee that if you disturbed this system th[illegible] of the Army would be ruined, were on official business [illegible] War Department said at the time to one of these [illegible] "We are calling as witnesses before that committee [illegible] who can present the ultra-military view"; and so that Bar Association committee sat there and heard and drank in the ultra [illegible] and they heard nothing else except as I, single handed, and [illegible] other officer, could present.

Senator CHAMBERLAIN. Did you not, as a matter of fact, charge the committee itself with being a packed committee?

Mr. ANSELL. I did; and if this committee will permit me, I would like to put that in the record here, because I know you are going to have the report of that bar association committee here. I have not got my statement here, but I have got it. I presented it to the president of the American Bar Association, who is, by the way, president of the executive committeee; and I believe I have proved the case, too. With your permission, I will insert that letter.

The letter referred to is here printed in full, as follows:

ANSELL EXHIBIT X.

JULY 17, 1919.

Hon. GEORGE T. PAGE,
President American Bar Association.

SIR: In March last, pursuant to the resolution of the executive committee of the association, you appointed a special committee, consisting of Hon. S. S. Gregory, chairman, Chicago, Ill.; Judge W. P. Bynum, Greensboro, N. C.; Mr. Martin Conboy, New York City; Prof. Andrew A. Bruce, Minneapolis, Minn.; and Mr. John Hinckley, Baltimore, Md., to inquire into the status of our military law relating to courts martial, directing that they report the results of their investigations, together with their recommendations, to the executive committee.

This special inquiry was brought about by the many complaints made during the war against the existing system of military justice, and its purpose was, of course, to acquaint the association with the actual situation with respect to the administration of military justice and to put it in a position to make an effort and exert its influence toward a reform of the existing system of military justice if the investigation should reveal deficiencies calling for remedial legislation and if the association should see fit to take action. Such a purpose required that the personnel of the investigating committee should be generally well qualified to conduct an investigation and should be capable of appreciating the place that military justice should have in our institutions, the great interest our people have in it, and, above all, the necessity that not only must justice be done in our Army, but that our people and our soldiery should have the assurance that justice is done therein. Every member of that committee should have entered upon and pursued his duties with the loftiest conception of them and their importance, and while every member should have been free from, and kept himself free from, any influence of the partisanship and personal controversy that unfortunately have been injected into this discussion, even to the point where the real issue has been obscured, still the committee, if its investigation was worth the making at all, should have heard all sides of the question fully, fairly, and impartially. This, in my judgment, the committee has not done.

The minutes show that the committee immediately got in touch and conferred with the authorities who have proclaimed the perfection of the present system and decreed the punishment of those who opposed it, but they did not confer with any who disagreed with those authorities, so far as known. The minutes show that they conferred with the Secretary of War, the Chief of Staff, the Judge Advocate General of the Army, and the Acting Judge Advocate General of the Army, who had just been brought here from France to supersede me, so that the departmental view might be impregnably maintained. All these officials are uncompromising advocates of the existing system, and two of them—the Secretary of War and the Judge Advocate General of the Army—are bitterly and personally resentful of the criticism which I made of the existing system in testifying before the Senate Military Committee and for which I was promptly punished by the Secretary of War by demotion and removal from my office. Notwithstanding this, notwithstanding the fact that I had made the criticism as a result of my experience as Acting Judge Advocate General during the war, and notwithstanding my professional reputation and well-known record in the Army, I was avoided and ignored by the committee until they were, according to the announcement of the chairman, on the eve of closing their hearings.

When I appeared before the committee I deemed it my duty to say to them, and though it was disagreeable to me I did say to them, that the committee had clearly manifested a disposition to hear but one side of the case; that they had conferred only with those who were intent upon retaining the existing system; and that, with a single exception, they had heard only those officials who voiced the view of military authority that the existing system is satisfactory and had resulted in no unnecessary injustice during the war. I also said to them that I believed, and I gave them my reasons for so believing, that one member of the committee was such a close associate of that official who had been foremost in his exertions to maintain the existing system (the Judge Advocate General of the Army) and such a pronounced partisan of him and his views that such member was disqualified to sit upon the committee. Notwithstanding that the chairman of the committee announced to me just before I began my statement that the hearings were about to close, he subsequently advised me that there might be further hearings in Chicago, and such hearings were had.

I have just read all the minutes of the investigation. Now, more than ever, I am convinced of my duty. As a lawyer, as a member of the association, and, above all, as an officer of the Army intensely interested in the establishment of a system of law that will enable and, if possible, require justice to be done in the Army to the enlisted man no less than to the officer, I protest anew against the fairness of some of the members of the committee and the partiality of its proceedings. And I request that the entire record of the proceedings of this special committee be placed before the executive committee in order that they may learn the kind of hearing that was actually had and see upon what the special committee has based its report and recommendation. In my judgment the one-sided character of the investigation must destroy all reliance upon the report and recommendations, whether they are favorable or unfavorable to a liberalization of the existing code. If favorable, they must have been affected by influences de hors the record; if unfavorable, they will but be in accord with the unfair and biased character of the investigation.

The record will show that the conduct of the member whom I asked to disqualify himself was, throughout the hearing, one of oppugnance to any criticism of the existing system. The record will show that he failed to appreciate that his was a position requiring judicial conduct and fairness, and that, instead he adopted the attitude of a resourceful attorney advocating the retention of the system and laboring to secure the vindication of those who insist that the system has resulted in no injustice and not only ought to be retained but must be retained if the iron discipline assumed by them to be necessary to American military efficiency is to be retained. Witnesses who supported the system, who hailed it as superior to any civil system of justice, or who admitting its harshness condoned it on the ground that military discipline and military justice can not exist together, were led on by him and supplied with better statements than they themselves were able to make in so bad a cause.

The few witnesses—pitiably few and generally of inferior rank and humbler station in life—who expressed opposition to the system he treated with an apparent inconsideration. His questions touching the views of those opposing the present system were of a character not to elicit the truth but rather to suppress it, and his participation in the hearings succeeded, more than anything else, in establishing upon the record these propositions so orthodox and current in highest military circles: That any system of military discipline must be arbitrary, must be governed not by law but by the will of military commanders, and that our system during the war while necessarily a tyranny was a most benevolent tyranny. Notwithstanding the record facts that there have been some 30,000 general courts-martial and 340,000 inferior courts-martial within the period of a year, in which our Army could have averaged little more than 2,000,000 men, one must have believed, if one could have believed the witnesses appearing before the committee, that courts-martial were all but unknown in our Army.

I insist also that the record will show that another member of the committee was not fairly fitted for his duty. He bears the military title of colonel, and I infer from statements made by him designed to exhibit a familiarity with military administration that he was once in the National Guard and as such saw active service in the Spanish War and in more recent mobilizations on the Mexican border. Both gentlemen came to the investigation with minds fore-

closed. The former supported the system because of his regard for its chief sponsor; the latter supported it out of his professional regard for the system itself. This latter member is an example of that rigid adherence to professionalism sometimes found in those who have a commendable interest in, but do not practice, the profession itself. An examination of the record will reveal that the mind of this member, like that of the other mentioned, was foreclosed and that his appreciations were impervious to any suggestion of needed reform.

These gentlemen and the course pursued by them have not been without their influence upon the other members of the committee. All the members who sat in Chicago (Judge Bynum, of North Carolina, did not sit, most unfortunately for the cause of military justice, I think) expressed themselves toward the close of the hearing in such a way as to clearly indicate that the course pursued and the great weight of statement elicited had inclined if not persuaded them to an acceptance of the militaristic arguments relied upon to sustain the present system. These arguments were used with telling effect against the bill drafted by me and embodying the principle that military justice should be regulated by law and not be dependent upon the will of the military commander. Notwithstanding that that bill is the only affirmative proposal that has ever been made toward an amelioration of the soldiers' present disciplinary condition, the committee had it subjected to hostile and uninformed analysis in the office of the Judge Advocate General and then had the officer who had made the analysis ordered by the War Department to appear before them and present his criticisms of the bill. These views, prejudiced and uncomprehending, served to convey the most unfair impression to the committee and, in the absence of any better understanding by the committee, served as the basis of much adverse expression from them. Members of the committee, when nearing the close of the hearings, reiterated the military orthodoxies that it was one of the purposes and would be the legal effect of that bill to transfer the discipline of the Army out of the hands of the military commander into those of the Judge Advocate General, whereas the slightest uderstanding of the bill would have shown that the bill did nothing more in this respect than require the military commander to administer discipline in accordance with law, and lodged in the law officer the power to determine questions of pure law only.

Of course, if the hearings were to be fair and impartial, the committee should have been equally desirous of hearing witnesses on both sides and should have, if possible, secured equal facilities for their appearance. Many high ranking officers of the Regular Army appeared before the committee, either at their request or suggestion made to the War Department, or upon the initiative of the department itself. These men supported the existing system, some ardently and some less so. I have made inquiry of several of them and find in every case that their appearance was regarded by the department as a military duty found by it to be necessary in the military service, and that appearing on duty in accordance with the directions of the department, they received their pay and traveling allowances therefor. The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense. In other words, the Government procured for the committee the military witnesses to defend the system but none to oppose it. It is known here in the department, whether the committee knew it or not, that while the committee was sitting here in Washington the highest military authority in the department said that they were "ordering before the committee those who could give the military view"; that is, the departmental view, and the committee got little else.

Take one example: The committee might well have heard my exposition of the bill drafted by me, might have heard my statement in favorable explanation of it, as well as the views of the office of the Judge Advocate General in condemnation of it. The committee requested that the department have Col. West, the officer of the Judge Advocate General's Department, who had made a careless and unfavorable study of the bill, to appear before them in Chicago, and he did appear by order of the department, in Government time and at Government expense, and did condemn the bill, condemned it really with only the slightest comprehension of it. The committee also notified me that they would hear me at Chicago, if I chose to appear, but did not request the department to send me to Chicago. My appearance, of course, would have had to be in my own time and at my own expense.

These matters, while they may appear to be relatively unimportant, at least to the affluent and those who are indifferent to the subject, are nevertheless not only significant of the attitude of the committee and thedepartment but were very real obstacles to a fair presentation of the question as well. In my own case, having nothing of this world's goods, and having expended already too much of my meager salary in behalf of the advancement of the cause of military justice, it would have been a hardship for me to go to Chicago at my own expense. Besides, a sense of propriety forbade me to ask others to appear there in my own behalf. Was it not the plain duty of the committee to request the War Department to furnish at its own expense the witnesses against the system, as well as those in favor of it?

The hearing has not been thorough, and it has not been fair. It has not been helpful. Indeed, it has been very harmful. I ask that the executive committee of the American Bar Association themselves consider carefully this important question, that they study the record of the proceedings conducted by said committee, and that they give consideration to the statement of protest made by me to that committee here in Washington, and also to this leter which I ask you kindly to forward them.

Hoping you will do me the favor to comply with my request, I have the honor to be, sir,

Yours, very respectfully,

S. T. ANSELL.

Mr. ANSELL. I said that two of the members were committed from the beginning to the other side, and had so declared themselves, and they were chosen as the result, whether they knew it or not, of strenuous efforts being made by the War Department to bolster up their cause. It is true. And not only that, but I say that the action of that committee is proof positive to the mind of any man in calling and hearing those witnesses and having the War Department pay their expenses and their mileage, and giving no man on the other side the right to be heard, except by coming here at his own expense, except as to any who happened already to be here.

Senator CHAMBERLAIN. Did the War Department pay, or offer to pay, the expenses of witnesses against the system?

Mr. ANSELL. No, sir; nor did the War Department go so far as to ask to be furnished witnesses on the other side. I did suggest witnesses to the committee of the American Bar Association, but in their telegrams or letters sent out, about which some of the witnesses have told me, they put the cautionary statement, "We have no funds to pay for your attendance here, and if you do so, you will do so at your own expense;" and the witnesses had no time to come here, because my side of the case, so-called, was not even given the opportunity to be heard until just a day or two before the committee was to go.

Senator CHAMBERLAIN. How long had they been in session then?

Mr. ANSELL. Four or five weeks. I had no knowledge of it, except the knowledge of the street, although they were in frequent contact with the Secretary of War and the Acting Judge Advocate General and the Inspector General. Whatever respect anybody else may have for such a committee, I for one, as long as I live, will not express any respect for any such committee, no matter how high it may be, or whatever association it may be a part of.

Senator CHAMBERLAIN. Have you finished with that branch? Because I want to ask you this question: Before that committee had an opportunity to make any report, there seems to have been an uneasiness somewhere along the line that induced the Secretary of War to appoint a strictly military tribunal.

Mr. ANSELL. Oh, yes; I am coming to that. It was thought—it was in the air—that this bar committee report might be unfavorable

to the department. That was not so obvious to me, because two of the members were stacked, and the personnel had been picked; the committee had been hand picked and personally conducted by the department satellites.

But the chairman of the committee, during the hearings, came right out and declared himself as a reformer of this system while I was appearing before the committee. He said that he could hardly speak for the committee, but that he was going to say that he was going to recommend that the evils of this system should be torn up by the roots and another substituted. The old gentleman spoke more rabidly on the subject, probably, while he was talking, than he spoke in his report. Is of that type.

Another committee was appointed by the Secretary immediately upon his return from France. That committee consisted of Maj. Gen. Kernan, who has been advertised not only as a most distinguished soldier but a most distinguished lawyer, a quality that was unknown in him theretofore; Maj. Gen. O'Ryan, a major general of the New York National Guard, in high favor with the present administration; Lieut. Col. Ogden, of The Adjutant General's Department; and one Lieut. Col. Barrows, of the Regular Army. Of course, I know these gentlemen. I know these gentlemen rather well—their personalities, their habits of thought, and something of their views with respect to the Military Establishment. If the Secretary of War had gone out designedly to appoint the most reactionary set of men in the United States he could not have improved upon his selection—Maj. Gen. Kernan, Maj. Gen. O'Ryan, Lieut. Col. Barrows, and Lieut. Col. Ogden.

Senator LENROOT. How many of these are Regular Army officers?

Mr. ANSELL. I have that report here. Two are Regulars, one a National Guardsman, and the other is a National Army man. Lieut. Col. Ogden is a Boston lawyer of the Judge Advocate General's Department, who shares strenuously the view that is expressed in this report, that courts-martial have got to be the right arm of the Executive, controlled and guided by him at every point.

Senator CHAMBERLAIN. That is the so-called Kernan report, which is on file?

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. May I interrupt you there for just a moment? Were you called before that board?

Mr. ANSELL. We all got a circular letter to express our views in writing. I do not mind saying that I knew what the report of this board would be, and I was not going to waste any time in arguing before a prejudiced forum. There is no need of it. And I will say to you that many another man of rank greater than mine shared my views on that and did not put in a report. It was a foregone conclusion what that report would say.

Senator CHAMBERLAIN. Even that report recommends some 20,000 alterations.

Mr. ANSELL. Oh, yes. Not systemic; not substantial. I think, while we had all anticipated that this report would be a reactionary one, largely sustaining the existing system, nobody, even on the other side, anticipated that it would be so reactionary as it is. I have just one bit of respect for it. It is a frank, fearless statement of the opposite view, and the War Department had been afraid

to make any such statement as that before; but this report—and it is well written, concisely written, and it is a good exposition of the reactionary view—the Secretary of War has approved in toto.

Senator LENROOT. At some point in your testimony I would like to have you go through that report in detail.

Mr. ANSELL. I want to do it, sir. I mention this here to show you the extent to which the gentlemen on the other side are driven to support this view against the creation of some tribunal—appellate tribunal, if you want to call it that—to keep courts-martial in check. The committee had only one lawyer, really, on it, because Maj. Gen. O'Ryan should not any more be called a lawyer, and though he once practiced, he has been a soldier now these many years. But here is this ultra-military committee taking up 7 pages of its not long report—only 18 pages altogether—with a discussion of the legal proposition that it is not within the power of the Congress of the United States to create any such tribunal, an argument that, from a legal viewpoint, is nothing less than absurd.

I promised this committee the other day to put in the record at the proper place the record I had of at least one of the death cases from France, one that was really typical of the four, as the committee may remember, which I will do, and the incidental papers connected with that—that is, the views of the Judge Advocate General and the Chief of Staff and Gen. Pershing—and I have done so.

Senator LENROOT. That is the complete record?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Let it be inserted.

Mr. ANSELL. I also was requested—or asked permission of the committee, I have forgotten which, it does not make any difference—to put into the record a letter mentioned by the press, from the Secretary of War, and the President's reply, which is entirely congratulatory of the results of the pardons that the President has issued in two of the cases. Of course, the article fails to mention what happened to the other two, and when I last heard of them in the War Department they were serving terms in the penitentiary.

They proceeded, of course, on the theory that these young men were properly convicted—one of them now dead and the other discharged, badly wounded—that they were convicted, and that the pardon was an act of wonderful grace; whereas I will say to you gentlemen as lawyers that if you ever get the time to look at this record you will find, and can not help finding, that pardon came in this case not as an act of grace but as an effort to correct, as far as he could, the illegality of the judgment itself.

Now, going back and taking up the vices of the existing system——

Senator LENROOT. Let me understand you. As I recollect those two cases, they plead guilty to the charge of being asleep on post?

Mr. ANSELL. They pleaded not guilty. The drill people pleaded guilty.

I have a little memorandum here which I hope will explain such differences as there are between the four cases; but, taking them by and large, the four cases are really illustrative of the same points of illegality. Of course, the plea of guilty might be held to be conclusive, and it would be if the plea of guilty were taken providently, with a court that saw it was taken providently, and with counsel there

to guard the making of the plea. Of course, we know what that means in the usual civil forum. But it is not so here.

Now, coming to discuss as briefly as my interest in these propositions will permit me, the proposition illustrative of the views of this system.

I had intended to add, day before yesterday, the statement I made replying to the statement of the Secretary of War and the Judge Advocate General, heretofore referred to in the record, as presenting my side of that question. It was this document that the Secretary of War declined to give publicity to.

Senator LENROOT. It may be inserted.

The communication referred to is here printed in the record, as follows:

ANSELL EXHIBIT Y.

WASHINGTON, D. C., *March 11, 1919.*

The honorable the SECRETARY OF WAR,
Washington, D. C.

SIR: The press yesterday morning carried statements made by you and by Gen. Crowder, Judge Advocate General of the Army, in defense of the criticisms now being made against the existing system of military justice and the departmental methods of administering it. A representatave of the press has just supplied me with an authorized statement. It is dated March 8, marked for release for the morning newspapers of Monday, March 10, and consists of a letter under date of March 1, signed by the Secretary of War, but evidently prepared in the office of the Judge Advocate General, in which the Judge Advocate General is requested to respond with a statement "which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject." The letter of the Secretary is one voicing general support of the system, a declaration of his faith in the justice of the system and of confidence in the Judge Advocate General and in condemnation of my own attitude and view with respect to that momentous subject. The statement of the Judge Advocate General is one that speaks in warm support of the system and in justification of his own responsibility for it, and in consderable part consists of severe personal criticism and accusation of me because of my efforts, in the face of his opposition, to modify the existing system so that a fair meed of justice to our enlisted men might be assured. The letter of the Secretary was designed as a vehicle for placing before the public Gen. Crowder's statement in reply, which contains imputations upon my personal and official conduct which in justice and honor I can not permit to go unchallenged. Since the Secretary himself chose this means to give to the public a bitter attack upon me, it is but common fairness and justice, and I, therefore, accordingly request that the same office should give to the public this statement of mine which is designed to show the same intelligent men and women, the only forum now left to me, the character of the issues made by those who are opposed to me and my views, the extent to which they go and the methods which they employ to support and maintain a system which well-advised opinion pronounces bad, and which those most familiar with it know has necessarily and inevitably led to injustice in the Army.

The Secretary of War says:

"My own acquaintance with the course of military justice (gathered, as it is, from the large number of cases which in the regular routine come to me for final action), convinces me that the conditions implied by these recent complaints do not exist and had not existed."

This is the Secretary of War's opinion. It is based upon inadequate evidence, very limited observation, and the statements of biased witnesses. It is enough to say that under the existing system the Secretary of War sees and takes action only upon that relatively insignificant number of cases which are required under existing law to go to the President for confirmation. These few cases consist for the most part of sentences of dismissal of commissioned officers. These are not the class of cases in which appear the injustice of which I complain. The court-martial system is such and the regard for rank in the Army is such that a commissioned officer appears before a court-martial to

far better advantage than does a private soldier. The Secretary of War believes that conditions of injustice do not exist. When he denied this department the revisory power over all courts-martial cases, he denied himself the opportunity to keep in touch with the administration of justice throughout the Army, and he speaks from the knowledge obtained from only a part of the cases of commissioned officers tried, and from those alone who are interested in supporting the existing system. I say the system does not do justice. It does injustice—gross, terrible, spirit-crushing injustice. Evidence of it is on every hand to those who will but see. The records of this office reek with it. The organization of the clemency board now sitting daily and daily recommending clemency in a hundred cases is a confession of it. Clemency, however, can never efface the injustice done. In my judgment the Army will never hold the place it ought to hold in the faith and effections of our people, until the machinery for doing military justice be humanized.

The statement of the Judge Advocate General is a dexterous effort to divert public attention from the system of injustice, which he defends, and the paternity, of which he proudly proclaims, to mere personal differences which are not, or must soon cease to be, of public moment. When, in so far as it is necessary for his purpose for him to do so, he discusses the system, he become involved in inextricable confusion and patent inconsistencies. In one and the same breath he declares the system unusually excellent and then complains that Congress has failed to impose upon and above it a needed organ empowered to subject it to legal control; he declares that the military law can best be administered in the field and with virtual finality, and yet he now admits that the system would be much improved by the establishment of a departmental appellate power; he contends that courts-martial should be subject, not to legal control, but only to the power of military command, but at the same time objects to assuming the responsibility for the outrageously excessive sentences awarded when courts and commanding officers go wrong without legal restraint; he admits that our soldiery must be hurriedly drawn from civilian life and from the liberal operations of the civil code, but assumes that for such reason the military code must be the more concentratedly applied; he argues that since the soldier must on occasion yield up his life on the battle field, he should not be heard to complain if it be taken away by these "courts of chivalry and honor," applying not the modern rules of right, but the mediæval principles that governed over lord and armed retainer; he says that the officers who sit in judgment upon the private soldiery can not be considered military zealots, since the civilian clothes they doffed are not yet out of style, but in the next paragraph asserts that they are steeped in military appreciations and are more competent in their place to do justice than am I, denominated a humane critic, inexperienced in military requirements; disagreeing with the Secretary of War who asserted the contrary, he says that my briefs were not addressed primarily to the desirability of the power of departmental review, but to the question whether such power had actually been granted, and then elsewhere he accuses me of endeavoring to meet the exigent necessity of review by an earnest plea based on expediency, rather than on reason or the language of the statute.

He misstates the issue by asserting that, according to my views, Gen. Pershing in the battle of the Argonne could not have subjected one of his men to court-martial without the concurrence of his judge advocate, whereas such a question is clearly not involved; all that is involved—and that much is fundamentally involved—is that the charges should not be ordered to trial until the judge advocate could say that as a matter of law the charges sufficiently allege an offense known to the law, and that there is reasonable ground to believe they can be sustained. The issue is whether the convening authority, the court, and the officer ordering the execution shall be a law unto themselves, or whether they shall be restrained by and required to keep within the limits prescribed by established principles of law; whether military justice shall be governed by the power of military command or whether it shall be the result of the application of legal principles. Asserting at one moment there is but a small margin of controversy between us, he concedes at the next that we are separated by a world-wide gulf of principles. He insists that courts-martial shall be subjected from beginning to end to the power of military command, and I declare that military justice can never be done with assurance, unless they be made responsible to applied principles of law alone, and answerable to no commander.

In his statement the Judge Advocate General recognizes some deficiencies to which he has been peculiarly blind ever before, and concurs, verbally at least, in remedies which he has ever hitherto opposed. He says that I contend that the great fault with the system is to be found in the lack of departmental power to review courts-martial proceedings and to modify or reverse unlawful judgments. I have ever contended that this was one great fault, but not the only one. As to that one fault, he now says that he agrees with me and that there is no controversy about it. But when did he become of that mind? In November, 1917, he went out of his way to reverse the opinion rendered by this office, and insisted upon misconstruing out of existing law that very power which this office had fairly found there; in doing so he not only denied that the power was to be found in existing law but contended there was nothing wrong with the absence of such a power, and also not only that there was not but, in effect, that there ought not to be in this department any such power of review. He has constantly voiced that view and acted accordingly. In his instant statement he argues that a commanding officer, in subjecting his men to courts-martial, should suffer no legal restraint, and argues as a practicality that such legal restraint would work the destruction of all discipline. In his instant statement he contends that the purpose of the Army is not to maintain justice, but to procure victory, as though the one can be achieved only at the sacrifice of the other; I say that there can be no discipline in any army without justice, and that the efficiency of our arms will ever be dependent upon the sense of our soldiery that they can expect justice.

The Judge Advocate General says that he was so much in favor of establishing an appellate power over these unjust judgments that in January, 1918, he submitted a draft of legislation for that purpose, which the committees of Congress permitted to die. It would be well for those who are interested to look up that bill. It is well that that bill was not taken seriously. That bill would have virtually put this appellate power, not in the hands of the President, but in the hands of the Chief of Staff, the highest military official, whose every instinct and element of training is ultramilitary, an official who can not be actuated by the more lenient views which characterize those familiar with legal principles or skilled in the administration of justice. It would have authorized the setting aside of an acquittal, the changing of a finding of innocence to one of guilt, and the substitution of a heavier penalty for a lighter one awarded by a court. All this is consonant with the prevailing tendency of military practice.

But did the Judge Advocate General make a bona fide effort toward the establishment of such an appellate power? Not only did he go out of his way to misconstrue that power out of the existing statutes, not only did he voice the view that the military code was one that could be most fittingly administered in the field, but there is another evidentiary circumstance that brings to my mind the absolute conviction that his efforts were not in good faith and were simply designed to allay public apprehension and inquiry. Shortly after he submitted this legislation to the committees of Congress, he took occasion to address a letter to the senior officer of the Judge Advocate General's Department in France, in which he said, with reference to an administrative palliative which he had adopted as a remedy, that it was necessary to do something to head off a threatened congressional investigation, to silence criticism, and to prevent talk about the establishment of courts of appeal, and to make it appear to the soldier that he did get some kind of revision of his proceedings other than the revision at field headquarters. It is significant also that his interest was not such as to produce subsequent effort to secure the enactment of this legislation.

It may well be that, now the constraint is removed which seemed to him to oblige him to take an opposite course, the Judge Advocate General reverts to his first view which he on one occasion expressed as one of honest intellectual approval of the effort that our office was making to establish such an appellate power in the department. That effort was made near the beginning of the war in the latter days of October, 1917, and, with the concurrence of every officer serving at that time in this department, we deduced out of 1199, Revised Statutes, that power. These views of this office were embodied in an office opinion to the Secretary of War dated November 10, 1917. It is of this opinion that Gen. Crowder in his statement says:

"Indeed, the first time I was advised of such a view was in November, 1917, on the occasion of his presenting to you—not through me and entirely without

consulting me—the first of the elaborate briefs of which so much has been made."

And it is of this same brief that he later refers to in the statement as one "urging a revolution in the military system and his circulation of a document of such grave consequences among every officer in my office without giving me the slightest information of his efforts." The statements are at variance with the facts. When I came to be the head of this office in the latter days of August, 1917, Gen. Crowder at that time, doubtless placing in me the utmost confidence, came to me and said that he never intended to return to this office again; that he had always aspired to a line command and that he intended to use his office of Provost Marshal General in the raising of this new Army to secure for himself a field command. He told me to manage the office in my own way and without further reference to him.

I particularly asked whether I should consult him upon matters of general policy, and especially upon appointments, of which many would have to be made. He said, "No," but added, "If I should wish the appointment of any particular judge advocate for my special purposes, I will let you know." The study and preparation for the opinion establishing the revisory power were participated in by all the officers, covered a period of two or three weeks, and required many office conferences. One day while I was at one of the conferences Gen. Crowder appeared in the adjacent room and took up with me some matter of common interest. I took that occasion to tell him what the office was then engaged upon and the subject of the conference in the next room. I explained to him the necessity of discovering some means for correcting the grave injustice done to a large number of noncommissioned officers who had been very unjustly tried and convicted in Texas, the record of which trial had just reached the office. I told him my view that with the new Army it was absolutely essential to establish some such revisory power and that I was delighted to find that the office was about to agree unanimously that section 1199, Revised Statutes, was designed for that very purpose. His reply to me, in words that are impressed upon my memory, was:

"I approve heartily of your effort. Go ahead and put it over. I suspect, however, that you may find some difficulty with the military men arising out of article 37."

He then adverted to the fact that he himself had drafted and had had enacted that particular article, and added that, of course, it was never designed to prevent any such power. I then returned to the conference and announced to my associates that Gen. Crowder had spoken with approval of our course. Under my instructions, I did not have to consult him, and did so only because it was convenient and appropriate for me to do so on this occasion.

I knew of no change of attitude in him until shortly thereafter I was advised in the department that he was preparing a brief in opposition to the office view, and two or three days thereafter he resumed charge of the office and filed the brief. When I found this to be so, I went to Gen. Crowder and accosted him about his change of attitude. In explanation thereof he said:

"Ansell, I had to go back on you. I am sorry, but it was necessary to do it in order to save my official reputation."

He then added that he was nearing the end of his service; that he could not afford to be held responsible for the injustice that had gone on, if the existing law could have been construed to prevent it. He further adverted to the fact that fixing such a responsibility upon him would injure his career in this war. Upon my having told him that I was unable to see how he was responsible for a practice that had continued for nearly 40 years, he went on to say that the Secretary of War held him personally responsible; that the Secretary of War had seen him at the Army and Navy Club shortly after I had filed my opinion and had "upbraided" him for sitting by during the time that he had been Judge Advocate General and permitting this injustice to go uncorrected; that the Secretary had particularly asked him how long he had been Judge Advocate General and charged him with his failure to seek a remedy for the situation which I had presented. Gen. Crowder then said that, humiliated by such imputation, he had gone back to the Provost Marshal General's office, had consulted some of his friends there, and had decided that it was necessary for his self-protection to oppose the opinion this office had written and the effort it had made to establish this power, and that two of the officers there had helped him to prepare the counter memorandum.

It is obvious that Gen. Crowder committed himself to the opposing view, a view which he has ever thereafter maintained, out of a mistaken notion of the necessity of self-protection and a desire to soothe his wounded pride.

Gen. Crowder further says that the order appointing me Acting Judge Advocate General, and subsequently revoked, had never been published, but was obtained by me from the Chief of Staff without consulting the Secretary of War and without his knowledge. With respect to this order, he says:

"Gen. Ansell asked me in a formal written memorandum to help him secure an order appointing him Acting Judge Advocate General in charge of my functions. I did not wish to be relieved but did not wish to embarrass you. I therefore replied in writing that he could take the matter up directly with the Secretary of War in his own way. He did not take the matter up with the Secretary of War in his own way. He did with the Acting Chief of Staff, with the remark that I concurred. Upon this showing the Chief of Staff marked the draft of an order that Gen. Ansell had prepared for suspended publication. By accident I learned of this order."

This statement reproduces a story far different from what actually occurred. The facts are these: Col. White, the executive officer of the department, called my attention to the fact that I was directing the policy of the office and exercising sole power, but had never been designated so to do under section 1132, Revised Statutes, and that for my protection I should place the matter before the department and suggest that I be designated in accordance with the statute. I told him that I ought to confer with Gen. Crowder, called up his office on the telephone and found that he was out, and then wrote a memorandum, the purpose of which was not to help me secure an order for my own benefit but to present an official situation to him as it had been presented to me. I recommended for purely official reasons that such an order should issue, and asked whether or not he concurred. He replied by memorandum, saying:

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday."

It never occurred to me that this language was not other than frank and candid, and that his agreement was conditioned upon personal presentation to the Secretary of War. I took it up, as I took up all other official business, except when the Secretary of War had manifested a desire for personal conference; that is, I filed a memorandum with the Chief of Staff, in which I used the language of Gen. Crowder, and in due course I was furnished with a typewritten copy of the order, signed by the Chief of Staff, by order of the Secretary of War. I know nothing about any mark on the order for suspended publication, nor do I know what that term means. I only know that I got the usual typewritten copy of the order. I saw nobody in person on the subject. Everything was done officially and by written memorandum. Surely Gen. Crowder will not now deny that he concurred in the step taken—namely, that I should be designated by order to control the policy of the office, since I was responsible for all the work—and he can not deny that in such matters the Chief of Staff acts for the Secretary of War, and that regulations require that normal transaction of business through him.

A reference to the order itself will show that it is not in the form in which I recommended it, but that it proceeds to confirm the verbal directions which it was assumed the Secretary of War had previously given. The language of the order is this:

"By direction of the President and in accordance with section 32 of the Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duty."

Gen. Crowder says nothing from the truth than that I was relieved from duty in connection with the administration of military justice when I filed the original brief. He surely can not mean this. He returned at that time, took over the duties of the office, and sent all matters to my desk for my views and supervision before presentation to him, except matters affecting military justice. He established for the officer in charge of that division of work a direct relation and channel of intercourse whereby the work of the Division of Military Justice was not subjected to my supervision or to that of

Col. Mayes, my immediate assistant. Both Col. Mayes and I believed that this method of office administration of military justice was bad, and on April 15, just before sailing for France, having been invited by Gen. Crowder to express my vews upon the management of the office, I frankly told him so. The fact is, from the middle of November, 1917, until the 19th day of April, 1918, when I left for Europe, I had nothing to do with the administration of military justice and, of course, nothing to do with it until after my return.

I have not shared the view that the department has done all it could under existing law. I so organized this office as to achieve much in spite of the law as the department has construed it and in spite of the departmental practice and orders. I have at all times insisted upon the location of revisory power in this department, and I have said, and said in the beginning, that while I prefer that that power be located in the highest law officer of the Army, I was content to have it located in the department somewhere. This was not done. From the time of Gen. Crowder's return to the office in November, 1917, to the time I left for Europe in April, 1918, I urged in several memoranda the necessity of closer supervision of courts-martial procedure.

I filed a report upon returning from Europe that indicated to my mind what I once said to the Secretary of War, that the enlisted man in our Army receives less protection before a court-martial than an enlisted man in any other army with which we were associated. I organized two boards of review in this office, but they were limited by orders of the War Department to giving advice. I instructed the reviewing officers of this department themselves to submit cases for clemency upon their initiative, notwithstanding the fact that by general orders of the War Department this department was limited to advising simply upon the question of legality and clemency, consideration could be had only upon application, and application could be had only once in six months.

If responsibility for such maladministration as has existed in this office is to be located, it must be located first upon the Secretary of War. He specially instructed me in November that no matters of particular importance, no matter concerning the policies of the office, and no matters concerning appointments should be dealt with by me, except with the approval of the Judge Advocate General himself. The difficulties of administration have been due to the fact that I have been in fact responsible for the output, but have had no authority of direction or choice of help and means. That authority was reserved for Gen. Crowder, who had but little time and attention for this office. He knew little or nothing about the administration of this office during this war and was entirely absorbed and consumed in his other duties. Though charged by the Secretary of War with the policies of this office, he was at the same time the provost marshal general, member of the war council, and, as it was termed in the department for a while, legislative liaison officer. It was impossible for one man to be both provost marshal general, judge advocate general of the Army, and war counsellor and do his duty by either place, and this I clearly showed him when in November, 1917, I asked for the issuance of an order under section 1132 designating me, the senior officer in the office, as in charge of the policies of this office. It was a case in which Gen. Crowder desired and the Secretary of War permitted him to assume more duties, duties that were in no sense related, than a man of greater capacity than Gen. Crowder could carry. This was bad administration, operated to the great injury of this department. It proved an insuperable obstacle.

Gen. Crowder takes credit that the existing clemency board, upon which I am still held as the president, was established by him upon his return to this office, as though he discovered the situation necessitating it. As a matter of fact that board came about from a report that I filed with the Secretary of War during Gen. Crowder's absence—a report showing that the situation was fast growing intolerable, due to the more strenuous efforts that were being made to maintain a certain rigid standard of discipline after the signing of the armistice.

I am charged wth being a new convert to these views, and that during the revision of the Articles of War and before I contributed no constructive ideas. The views I now hold I have held since my cadet days. I held them and expressed them throughout my seven years of instructorship at West Point. I held them and practiced them, so far as able, in my company, as those who served with me would testify. In 1906, in the celebrated case of Grafton against the United States, then pending in the Supreme Court, Grafton, the soldier appellant, having no money for the employment of counsel, I asked the permission of the War Department to represent him as counsel, inasmuch as I

desired to establish in that case what I think the court did establish, that courts-martial are subject to the great principles of the bill of rights. Gen. Crowder himself must remember my correspondence with him in 1911, in which I expressed the opinion that the revision proposed by him was not sufficiently liberal, and he must remember also—and if he does not others will—that upon the few occasions when I had an opportunity on evenings to assist in the revision of the manual I always insisted upon a liberalization. I recall one instance well. The old rule of the manual was that the court, upon sustaining a plea in bar of trial, would submit their ruling to the convening authority and take his orders thereon, and I contended that the court should not be thus interfered with, and that a court, upon a final sustaining of a plea in bar of trial should not be ordered to proceed, but that their judgment should dispose of the proceeding and operate like an acquittal as against double jeopardy, and this view after much resistance was but partially adopted in the present manual. It ought to be said, however, that at no time, until I came to the command of the office, were courts-martial matters a part of my duty. I was assigned to an entirely different and unrelated class of work.

I think a comparison of the military code in its present form with the form in which it existed prior to 1916 will show that the so-called amendment of the code, for which Gen. Crowder claims great credit, introduced not one single systemic change and not one single liberal feature, but, on the other hand, imported more of the old idea that a court-martial is a court of chivalry and honor, not governed by ordinary rules of law.

Gen. Crowder says that all the facts concerning this subject are now to be ascertained upon the investigation by the Inspector General. I have already notified the Inspector General that I would take no part in that investigation unless compelled to for the reason that such matter is entirely beyond his jurisdiction, and for the further reason that he himself is absolutely disqualified. It was of him and his office that I spoke when I said in my brief to the Secretary of War in November, 1917, that the views of the Inspector General of the Army, together with those of others of your military advisers, are reactionary and savor of professional absolutism. I stand upon one side of this question and he stands upon the other, and thus we have stood since the beginning. I will submit to no such unfair, partial, and unjust investigation, and I have so expressed myself to him in a communication of the 10th instant, which is as follows:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigaton has to do with my statement before the Senate Committee on Military Affairs, that statement for which of course I am responsible, speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it, are not, when fairly considered, particular incidents to which your special capacity of inquiry can be properly applied, they are extra-departmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides, whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War whose subordinate you are. Even more: it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation and excepting, as I do and for the reasons given, to your jurisdic-

tional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it, voluntarily.

Of course, this subject ought to be investigated. The part that the Secretary of War has played in it ought to be investigated. The part that the Judge Advocate General has played should be investigated; and I myself do not ask to be excused from such an investigation; on the other hand, I welcome any fair and impartial and helpful investigation, but such an investigation, to be helpful, and impartial, must come from without the War Department.

There is a great principle in the issue here, and I have preferred that the discussion be confined to a discussion of principle, but it is obvious to me now that I am under attack because I stood for a principle, because I opposed the existing system, and because I have expressed my opinion of it, that it is unjust, un-American, and ought to be destroyed.

S. T. ANSELL.

Mr. ANSELL. I also request that Senator Chamberlain's statement made upon the denial of his request that my statement be published be put in the record. Also that my statement made in reply to a second and more broadly published statement of the Judge Advocate General and Col. Wigmore, made to Senator Chamberlain publicly and formally, be also put in the record.

Senator LENROOT. Those statements may be inserted in the record.

The statements above referred to are here printed in full, as follows:

MARCH 19, 1919.

Hon. NEWTON D. BAKER,
Secretary of War.

SIR: On the 16th instant I addressed you a telegram in which I asked that you give to the public a statement made by Lieut. Col. (formerly Gen.) Samuel T. Ansell, in reply to statements made by you yourself and by Gen. Crowder, the Judge Advocate General of the Army, in which you both gave warm support and approval to the present court-martial system, and in which Gen. Crowder besides indulged in severe personal criticism and accusation against Gen. Ansell, who in testimony recently given before the Senate Committee on Military Affairs had condemned the existing system of military justice and the administration under it. I asked you to make the statement public, primarily because it was a clarifying contribution to the subject now agitating the people, to which the people are entitled, and, secondarily, because it was only fair and just to this officer that you should do so. I believed that you would make this statement public, and do so immediately, in order that the people might have the opportunity of considering it as nearly contemporaneously as possible with the opposing views publicly expressed by you and the Judge Advocate General. In that I am disappointed.

I have just received from you the following telegram:

"Your telegram received. More than a year ago I asked of the Military Committees of both the Senate and House legislation to correct the evils in the present court-martial system. I shall renew the request when Congress reassembles. There would seem to be, therefore, no controversy on the merits of the subject. Have not yet seen the letter in question, and can not imagine any reason why my consideration of it on my return will not be time enough.

"(Signed) NEWTON D. BAKER,
"*Secretary of War.*"

It is painful to me, Mr. Secretary, to find you fencing upon a question which means so much to the tens of thousands of enlisted men who have suffered injustice under the present system, a question which means so much to you, the Army, the Nation. In the instant telegram you say that more than a year ago you recognized the evils of the present court-martial system and requested legislation to correct them, and that inasmuch as you intend to renew that request, there can be no controversy on the merits of the subject.

Your present recognition of existing evils of the court-martial system is strangely irreconcilable with your published statement no more remote than March 10. In that statement of warm approval of the existing system, you seemed blind to any deficiency. You say therein:

"I have not been made to believe by a perusal of these complaints that justice is not done to-day under the present law, or has not been done during the War period, and my acquaintance with the course of military justice (gathered as it is from the large number of cases which in the regular routine come to me for final action) convinces me that the conditions implied by these recent complaints do not exist and had not existed."

You further say that you are "absolutely confident that the public apprehensions which have been created are groundless." And then you put the capstone upon your monumental confidence in the system by further saying:

"I wish to convey to you here the assurance of my entire faith that the system of military justice, both in its structure as organized by the statutes of Congress and the President's regulations, and in its operation as administered during the war, is essentially sound."

And finally you call upon the Judge Advocate General to make a statement for the purpose of reassuring the people who "must not be left to believe that their men were subjected to a system that did not fully deserve the terms of law and justice"; and then you conclude, rather lightly, that after all, it is but "a simple question of furnishing the facts, for when they are furnished, I am positive that they will contain the most ample reassurances." On March 10 you were blind to any deficiencies in the existing system; as, indeed, the evidence abundantly shows you have been deaf throughout the war to complaints about the injustice of this system, complaints which should at least have challenged your earnest attention, rather than provoked your undisguised irritation.

But, as you say, you did propose certain legislation to the committees which they did not see fit to recommend for enactment and which, very fortunately, did not become law. I can hardly believe that that bill, prepared by the Judge Advocate General of the Army and submitted by you, was a bona fide effort to reform the existing system, and the slightest consideration of the bill will show that had it been enacted into law, it would have made the system even more reactionary, if possible, than it is now. I can hardly believe that this was a bona fide effort at reform, because you already had had an opportunity to establish in your department a legitimate and necessary revisory power over, and supervision of, courts-martial procedure. Gen. Ansell was at that tmie Acting Judge Advocate General of the Army, and his opinions were entitled to be respected as such, and in all other matters they were so respected.

In order to keep courts-martial procedure within just and legal limitations, he wrote an office opinion, in which he clearly demonstrated that this power of supervision was to be found in existing law, and in that opinion all the officers of the department, among whom were many most distinguished lawyers from civil life, concurred. And yet, in order that that opinion might be overruled and that you might rely upon the theory that you were entirely without power, you either ordered or permitted Gen. Crowder himself, who was not at that time connected with the office, to return thereto and write for you an overruling opinion, which you approved, and in doing so voluntarily denied that it was your right and duty under existing law to supervise the system. You approved the opinion of the Judge Advocate General, which was to the effect that this supervisory power did not exist, and, furthermore, ought not to exist, inasmuch as the law military is the kind of law that should be left to be executed at the will of the camp commander. If you had really desired to establish a legitimate legal supervision of courts-martial, you could have done so simply by approving the opinion of the Acting Judge Advocate General, which was not a personal opinion, but was an office opinion, which in ordinary course of administration would have been adopted. Advised to do the proper thing by your chief law officer, and having been shown by him the way to do it, you declined to do so upon some slight legal technicality. This is evidence to me that you did not desire to do so.

You supplanted the officer who had seen fit to call to your attention at the beginning of the war the necessity of keeping the strictest supervision over courts-martial procedure by an officer who contended that such supervision was not necessary and that such supervision would derogate from the power of the commanding officer and destroy discipline. You elbowed aside the one officer who even then had the courage to condemn the system and the provision to point out its terrible results, Gen. Ansell, and took into the bosom of your confidence a trio of men who are pronounced reactionaries—Gen. Crowder, the then

Acting Chief of Staff, and the Inspector General—the last named of whom is even this day engaged, by your order, in a so-called "investigation" designed, in my judgment, to destroy the man who exposed the injustice of the present system. You accepted those views. But, in order that any future responsibility might be shifted from your shoulders to Congress, you presented a bill which, even if you did not your advisers did know, could not be passed. Your advisers did not wish any modification of the existing system. They and you declined to accept the views of the Acting Judge Advocate General that would have gone far toward alleviating the situation on the ground that those views were not fully justified by the letter of the statute. You were thus solicitous that your power be found in the letter of the statute. And yet in the very bill proposed you asked for the power of suspension of sentences, when you were already suspending sentences by administrative order without one word of legal authority therefor.

There is another evidentiary circumstance that indicates the effort was not made in good faith, but was simply designed to allay public apprehension and inquiry by the appearance of doing something. It is shown by the records of your department that the Judge Advocate General of the Army, in correspondence with the senior officer of his department in France shortly thereafter, said, with respect to an administrative makeshift which he had proposed for adoption, and which you did adopt, that it was necessary to do something to head off a threatened congressional investigation, to silence criticism, to prevent talk about the establishment of courts of appeal, and to make it appear to the soldier that he did get some kind of revision of his proceedings other than the revision at field headquarters. How can it be said that such an attitude of mind is consistent with an honest desire to alleviate the situation? It is significant also that your interest upon this subject was not such as to produce that active participation of the department which characterizes its efforts when it desires to secure legislation.

The bill to which you refer and the nonenactment of which you plead as shifting the responsibility for the maladministration of military justice from you to Congress, if honestly submitted, is conclusive evidence that you yourself are entirely reactionary or that you have been imposed upon and deceived by advisers who are. That bill is Senate 3692, and provides, so far as immediately pertinent to this discussion, that section 1199, Revised Statutes, be amended to read as follows:

"The Judge Advocate General shall receive, revise and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and report thereon to the President, who shall have power to disapprove, vacate or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside."

Do you really know, Mr. Secretary, the purpose and legal effect of that bill? In the first place, it would have to be construed together with that statute which makes the Chief of Staff the trusted military adviser of the President and Secretary of War, whose authority he habitually exercises, on the one hand, and places him in supervision and control of all bureau officers, including the Judge Advocate General of the Army, upon the other hand. The President's power, therefore, as a matter of law, over the control of courts-martial cases would under that bill be habitually exercised by the Chief of Staff, an ultramilitary official, without the slightest competency to pass upon those errors of law which prejudice the rights of the accused and thereby render it necessary to modify the judgment, and with a disposition to disregard such rights. And, also, the Chief of Staff, and not the President, would be the one to exercise this power, in fact. There were some 350,000 courts-martial from the time we raised the new Army until July 1, last. Nobody would expect the President to review such a number or any appreciable part of them. Nobody, indeed, could expect the Chief of Staff himself to do so. The work would have to be entrusted to some military minion, inexperienced in law and the administration of justice, and whose training had disqualified him for such functions.

The Judge Advocate General, when he appeared representing you before the Military Committee, admitted that this would be the course of administration and contended that the Chief of Staff ought to have that power. He said that that was necessary in order to maintain discipline.

But worse than this, that bill would authorize the Chief of Staff to disapprove, vacate, and set aside a finding of "not guilty" and substitute upon his view of the evidence a finding of his own. Notice, the language is that

he shall have the power to disapprove, vacate, or set aside "any finding," and also to modify, vacate, or set aside "any sentence." This is a power which ought not to be granted to any man, and I feel safe in saying will never be granted by Congress. This alone was sufficient not only to condemn the bill in the mind of Congress, but to show the attitude of those who proposed it. Do you believe, Mr. Secretary, that the President of the United States, the Secretary of War, the Chief of Staff, or any other official, should have the power to set aside an acquittal and substitute for it a conviction or to set aside one sentence and substitute for it a harsher one, or to set aside a finding of guilty of a greater one? That is what the bill which you proposed authorizes.

But the bill further provides "that the President may return any record through the reviewing authority to the court for consideration and correction." This power is on a par with and supplemental to the absolute power which I have just referred to. If the Chief of Staff were not satisfied with a finding of "not guilty," he could return the record to the court-martial with instructions to make a finding of guilty. If not satisfied with a light sentence he could instruct the court to award a heavier one. If not satisfied with a finding of guilty of a minor offense, he could instruct the court to find the accused guilty of a more serious one. Do you believe that the President, the Secretary of War, or the Chief of Staff, or any other official, should have such power? If you stand for that bill you evidently do.

The Judge Advocate General who appeared before the committee in representation of your views testified:

"I want the President authorized to return the record which we get here, back through the convening authority to the trial court, and ask a reconsideration of their action so that he may proceed, if he desires, upon the revised findings of the court, and thus make the court participate with him in the final judgment."

When asked the question whether a commanding general could disapprove a finding of not guilty and send it back, he said:

"Yes, when in his opinion the finding is not sustained by the evidence"; and he argued that that power was necessary to the maintenance of discipline, was now possessed by all commanding officers and ought to be possessed by the President and Chief of Staff. In further argument sustaining that view he said with respect to cases in which very small sentences had been awarded:

"I do not know anything that could attack discipline more if the commanding general, who is also the reviewing authority, or the Secretary of War, or the President, who will become the reviewing authority of that class of cases under this legislation, could not invite the attention of the court to the effect of such a sentence upon the discipline of the Army generally. I do not think this power would have survived throughout the centuries if it were intrinsically wrong."

Obviously he was unaware that this is one of the few countries in which such a barbaric practice has survived. These views you doubtless approved inasmuch as in your letter to the committee you invited it to hear the views of the Judge Advocate General in explanation and support of the proposed legislation.

For the moment, at least, you now conceive that there should be a power of revision. That, to use your language, is "structural," "organic." The lack of a proper revisory power is a lack of legal control at the top. There are many other deficiencies of the same character. There is an absolute lack of legal control at the bottom and throughout the proceedings. You have said that the cases that come to you in regular routine convince you that the complaints against the system are groundless. Unfortunately, Mr. Secretary, you are not in touch, and apparently do not desire to get in touch, with the administration of military justice. You must know that under the existing system the Secretary of War sees and takes action only upon that relatively insignificant number of cases which are required under existing law to go to the President for confirmation. He sees none others. These few cases consist in the far greater part of a few sentences of dismissal of commissioned officers. These are not the class of cases in which appears the injustice of which I have complained. The courts-martial system is such, and the regard for rank in the Army is such, that a commissioned officer appears before a court-martial to far better advantage than does a private soldier. You do not see the system in operation. You do not see its tragic results. When you denied the department [illegible] courts-martial cases you denied yourself [illegible]

the administration of justice throughout the Army. Your knowledge is obtained from this insignificant number of cases of commissioned officers and from those persons surrounding you who are interested in supporting the existing reactionary system.

The existing system does injustice—gross, terrible, spirit-crushing injustice. evidence of it is on every hand. The records of the Judge Advocate General's Department reek with it, and upon proper occasion I shall show the people that this is true. The organization of the Clemency Board, now sitting daily and grinding out thousands of cases, is a confession of it. Clemency, however, can never correct the injustice done.

You have, of course, adopted the statement of the Judge Advocate General, which you invited and published. That statement is involved in as inextricable confusion and patent inconsistencies as your own pronunciamentos upon this subject. In one and the same breath it declares the system unusually excellent, and then blames Congress because it has failed to enact the bill which you proposed and has heretofore been referred to; it declares that military law can best be administered finally in the field, but at the same time argues that the system would be much improved by the establishment of a departmental appellate power; it contends that courts-martial should be subject, not to legal control, but only to the power of military command, and at the same time objects to assuming responsibility for the outrageously excessive sentences awarded when courts and commanding officers go wrong, without legal restraint. It admits that our soldiery must be hurriedly drawn from civilian life and from the operations of the more liberal civil code, but assumes that for that very reason the military law ought to be more harshly applied in order to obtain discipline. It argues that courts-martial are not courts of justice, but "courts of chivalry and honor," and concludes that since the soldier must on occasion yield up his life on the battle field, he should not be heard to complain if it be taken away by these courts of chivalry; it places courts-martial in high esteem, though admitting that they apply not the modern rules of right, but medieval principles that govern over lord and armed retainer. It says that the officers who sit in judgment upon the private soldier can not be military zealots, because it was only yesterday that they got out of their civilian clothes, but in the next paragraph asserts that they are most competent to award military punishments, because of their military appreciations. It argues that the primary purpose of a court-martial is to maintain discipline, as though discipline in any real sense could be maintained in our Army without doing justice.

I beg to assure you that there is controversy on the merits of the subject. There is great difference between you and me. That would be relatively unimportant. But there is great difference between you and Congress, and there is great difference between you and the American people. I do not believe that a court-martial should be controlled from beginning to end by the fiat of military command. I do not believe that a commanding officer should order the trial of an enlisted man on a charge that is legally insufficient. I do not believe that he should order a court to overrule pleas made in behalf of an accused which upon established principles of law would bar the trial. I do not believe that the court and the commanding officer can cast established rules of evidence to the winds and insist upon the conviction of a man upon evidence that no court for a moment would entertain. I do not believe that the court and the commanding officer should be permitted to deprive an accused of the substantial right of counsel and railroad him, unheard and unrepresented, to a conviction. It was only yesterday that I was shown a record in which the counsel for the accused was intimidated from examining his superior officer as a witness by a threat made in open court by the superior officer, that any question asked him, reflecting upon his credibility, would promptly bring charges against the youthful counsel. I do not believe that the conduct of a court should be controlled by a commanding officer. I do not believe that a court should be directed or instructed to reverse its finding of innocence or to impose a harsher punishment than that originally awarded. On the other hand, I believe, and I insist that the courts-martial having in their care and keeping the lives and liberties of every single one of our soldiers shall be courts of justice, acting as judges, controlled by and responsible to no man controlled by and responsible to their own oaths, and to the great principles of law which have been established by our civilization to protect an accused wherever he is placed on trial.

Surely you have been misled. Officers of your department who have supported the iniquitous system and who have imposed upon you, or most unfortunately persuaded you, have been busy preparing their defense. You have been presented lengthy reports designed to controvert the speech which I made in the Senate on this subject, which reports I have shown you to be misleading and utterly unreliable. Volumes of statistics are being prepared to show that, after all, the system is not so bad. Whether you do or not, the American people see and have the evidence; Members of Congress have the evidence. You have taken a terrible stand upon a subject which lies close to a thousand American hearthstones. The American people will not be deceived by such self-serving, misleading reports and statistics. Too many American families have made a Pentecostal sacrifice of their sons upon the altar of organized injustice.

Very sincerely.

GEO. E. CHAMBERLAIN.

MILITARY JUSTICE.

RIGGS BUILDING,
Washington, August 16, 1919,

Hon. GEORGE E. CHAMBERLAIN,
United States Senate, Washington, D. C.

SENATOR: At a recent interview you referred to the defense made by the Judge Advocate General of the Army and the Secretary of War on "Military Justice During this War," as contained in the document so entitled, consisting of a letter from the Secretary of War to the Judge Advocate General, and of a letter from the Judge Advocate General in reply, published and distributed throughout the country at public expense as official business.

You expressed yourself at the time as of the opinion that the presentation made by these public officials was not helpful to the true interests of the public or of the Army. I said to you then that that presentation could be shown to be of such character that it could but misinform and mislead the public mind. I shall endeavor to show you now that such is its real character.

In the very beginning we are made to see that—

THE SECRETARY OF WAR BLINDLY SUPPORTS THE EXISTING SYSTEM.

Military justice is a subject in which the people should have deepest interest and the Secretary of War keenest concern. It involves in a very direct way our national safety. It affects the morale of our soldiery, and influences the attitude of our people toward military service. Like all matters of justice, it should be the object of sustained solicitude upon the part of the people and a highly sensitive regard upon the part of their officials who have immediately to do with its administration. Thereby alone may imperfections in justice be seasonably revealed and remedial action taken. Hardly could it be denied that the maintenance of justice in the Army requires that the Secretary of War be receptive to all complaints of injustice to our soldiery, alert to discover imperfections in the system of its administration, quick to take or recommend the amplest remedies. Throughout the war his attitude has been the very opposite.

At the beginning of the war, in the actual absence of Gen. Crowder, who had been appointed Provost Marshal General, I, by virtue of seniority, came to be the acting head of the office of the Judge Advocate General, which includes the Bureau of Military Justice, just when the mobilization of the National Army began. The instances of palpable and unquestioned injustice through courts-martial soon became so numerous, so gross, and of such a tendency to aggravation as to seem to me to call imperatively for legal check. More than ever before it was becoming apparent to me, and to my office associates as well, that we could not apply the existing system of military justice to the new Army, as it had been applied to the old, without doing great injustice to the soldiery. Some of the gravest deficiencies of our system, as applied to the old Regular Army, became perfectly apparent. It was more clearly revealed than ever before that that system belonged to other institutions and to another age. It is one in which military justice is to be achieved, as it was achieved in England and on the Continent 150 or more years ago, through the arbitrary power of military command rather than through the application of principles of law; a system governed by man—and a military commander at that—instead of by law. Designed to govern a medieval army of mercenaries, it is utterly unsuited to a national army composed of our citizens called to the performance of the

highest duty of citizenship. Designed to govern military serfs obligated by personal fealty and impelled by fear, it is utterly unsuited to American freemen serving the State as soldiers, acting under the impulse and inspiration of patriotism. All this was borne in upon us and impelled us to contemplate remedial methods. It is regrettable that it should not have been seen and appreciated by our professional officers charged with the making of this new Army, whom, unfortunately, the department insisted upon chaining to the medevial system under which they had been trained.

Confronted immediately by a case of shocking injustice, conceded to be such by the department, and still conceded to be such by the Judge Advocate General in his defense (p. 50), in which eight or ten old and experienced noncommissioned officers of the Army had been arbitrarily and unlawfully charged with and tried and convicted of mutiny, we in the office of the Judge Advocate General set to work to reexamine our authority to review the judgment of a court-martial for errors of law, with a view to setting this judgment aside by reason of its illegality. In a unanimous opinion, having for the moment the concurrence of the Judge Advocate General himself, we found this power conferred by section 1199, Revised Statutes, which in terms enjoins the Judge Advocate General of the Army to "revise" the proceedings of courts-martial, a Civil War statute designed, in our judgment, for the very purpose. We conceived that this power of revision of the judgments of courts-martial would largely answer the necessity for the legal supervision of the procedure and judgments of courts-martial, for the establishment of legal principles and appreciations in the administration of military justice, and for giving legal guidance to the power of military command over such judicial functions. That necessity was thus early apparent to the office of the Judge Advocate General, the office that was in daily contact with the administration of military justice and charged with such legal supervision over it as War Department administration would permit; but it was not apparent to the military officials of the War Department insistent upon the view that a military commander must be absolute and unrestrained by law. In control of the Secretary of War they, led by the Judge Advocate General, who had been induced to change his views, won and had their way throughout the war. The old system, applied without legal restraint, was maintained in its full flower throughout the war. The commanding officer was to have full and final power beyond all review. Thereafter the best we could do was to appeal to the natural sense of justice of those who wielded the power of military command.

Throughout the war, upon every proper occasion, I strove with all the power within me, with such reason, argument, and persuasion as I could command, first, to establish legal regulation of the power of military command in its relation to the administration of military justice, and, when I had failed in that, to induce military authority of its own accord to act justly. The records of the War Department will show that this was my insistent attitude throughout, an attitude with which the department disagreed consistently, except when coerced by expediency into the adoption of some administrative palliative. The department would not stand for the legal supervision of court-martial procedure, but insisted that it should be controlled from beginning to end, and finally, by the power of military command. Surely beyond departmental circles and departmental influence, fairminded men who know aught of this subject know that the administration of military justice during this war has resulted in injustice, tyranny, and terrorization. The evidence is on every hand. Tens of thousands of our men have been unjustly tried and unjustly punished by courts-martial, and large numbers of them, not tried, have been arbitrarily placed in prison pens and subjected therein to barbarous cruelty, physical violence, and torture. If there be those not willing yet to concede so much, they will be overwhelmed by evidence later on. With our system of military justice, as it was considered and decided upon by the Secretary of War and the military authorities, the results could not have been otherwise. Those who are responsible for that decision, namely, the Secretary of War, the Judge Advocate General of the Army, the Acting Chief of Staff, and the Inspector General of the Army, must assume the responsibility for the gross injustice done.

Such injustices can not be concealed, however, even during war. Members of Congress became apprised of them from many sources. They became, and properly they ought to have become, a matter of congressional consideration. Bills were introduced for their correction. You were the leader in this remedial movement. In the middle of February last I was summoned before the Senate Military Committee, of which you then were the chairman, and, without having

had any previous conference with you upon the subject, to testify out of my experience as Acting Judge Advocate General during the war, and I did testify to the effect that our existing system and the administration of it had resulted in the most cruel injustices. I should have been false to my duty and to my oath had I done otherwise. There had been outcries against the system while war was flagrant. Complaints were everywhere to be heard by all who had not closed their ears. To the extent of my ability, I lost no opportunity to acquaint both the Secretary of War and the Judge Advocate General of the Army with them. But the Secretary, as many another stronger man has done, exhibited unusual strength in adhering to his original commitment.

WAR DEPARTMENT METHODS OF DEFENSE.

The matter was now before the public, and the department had to act. The Secretary immediately set about not to inquire, not to investigate, but to make a defense. Therein he was guided, as upon this subject he has ever been guided, by his Judge Advocate General. They appreciated and acknowledged that they were responsible for the injustice, if injustice there had been. They denied that there had been any injustice, and prepared to support and make plausible that denial. Within 10 days after I had testified before the Senate Military Committee the Judge Advocate General and the chief exponent of his view had a conference with the Secretary of War, at which they formulated a plan for the defense of the existing system and their administration under it. The system was to be maintained at all costs. The authority of the department was to be used to reassure the people as to the merits of the existing system, to deny or condone its results, and to destroy the force of all criticism or condemnation of it. Power of government was to be liberally used to this end. Bureaus of the department were set to work to prepare a defense, public funds generously used, and a campaign of propaganda initiated. Officers of high rank, under Col. John H. Wigmore, in charge, and an adequate clerical force were assigned to the task. Much since then has been said and done in the execution of the plan. The methods employed were such as when employed in private affairs habitually receive the condemnation of honest men and discredit any cause; public funds have been improperly used; official favors have been lavishly bestowed upon those in the office of the Judge Advocate General who would actively support the system, and official power has been used to suppress, discredit, menace, demote, and discipline those who oppose it; clemency boards have been "packed" with friends of the system, and simplest mercy denied in order to vindicate the system and those involved in its defense.

Speaking now to the document under discussion: First, the chief of the propaganda section prepared for the signature of the Secretary of War the letter standing first in the document discussed, in which the Secretary of War was made to convey to the Judge Advocate General an assurance of his entire faith in the system and of his confidence in the Judge Advocate General, and to declare that injustice had not been done during this war. And especially did he call upon the Judge Advocate General to prepare for publication a statement to the end that the public mind should receive ample reassurance on the subject. The chief propagandist then prepared a responsive statement for the signature of the Judge Advocate General, under date of March 8, which consisted of a general defense of the system and largely of a personal attack upon me. The Secretary of War gave this statement to the press, having arranged in the meantime for the fullest publicity. With all possible patience I prepared a statement pointing out the deficiencies of the system and my own attitude toward it, and asked the Secretary of War to give my communication the same publicity he had given his and that of the Judge Advocate General. This he declined to do, though this communication of mine afterwards appeared in the New York Times, but without any knowledge or connivance upon my part. In that communication I pointed out conduct upon the part of the Secretary of War and the Judge Advocate General in their relation to this subject that was clearly inconsistent with official or personal integrity, notwithstanding which both have ever since kept silent and taken no action, although I remained in the Army for nearly four months thereafter in order that I might continue amenable to such disciplinary action as they might choose to take. However, there was not one word in the communication that I had not previously spoken to the Secretary of War in person, and without denial from him, on the last night of February last.

Not content with this first statement which was given to the press, the chief of the propaganda section prepared the far more comprehensive defense contained in the letter signed by the Judge Advocate General in the document under discussion, between seventy and one hundred thousand copies of which were published and distributed to the lawyers and others throughout the country at public expense. The circumstances attending the publication of this document, when contrasted with contemporaneous representations of the Secretary of War, will mildly illustrate the character of the official methods employed throughout this controversy. This communication, though bearing date of March 10, was not authorized by the Secretary of War until March 26, and was not given to the public until April 9. In the meantime, on April 5, the Secretary of War had assured me in writing that he deprecated the public controversy and that it ought to stop on both sides, and cordially invited my cooperation in remedying the existing system. This assurance I accepted in good faith, only to find four days later this comprehensive publication launched against me and sent broadcast throughout the country.

An artful incident of the common authorship of the three communications is to be found in the fact that the author has the Secretary, in his letter of March 1, give strong and unqualified approval to the system of military justice and its results. But after reflection he has the Judge Advocate General, in his defense, concede many deficiencies and admit much injustice. He might also have taken the Secretary from such an exposed position. This letter, or defense, of the Judge Advocate General is designed to be the last word, the final avouchment, upon the subject, the complete vindication of the system, its supporters, and the department, and to bring about the utter discomfiture of those who have criticized the existing system and have sought and are still seeking a better one.

The system can scarcely be stronger than this skillful representation of it would have it appear. If this representation is weak, the system may be presumed to be weaker still. I would have you first look into the strength of that represenation for the moment, not as though it were factitious, but regarding it as of face value and indulging the presumption that it is an expression honestly arrived at and honestly entertained.

THE SECRETARY'S LETTER.

Please look at it. It is from the highest authority, from the chief guardian of the soldier's rights, who should have been watchful for any weaknesses in the system and sympathetic for all who suffered by them. It was his supreme duty to discover its deficiencies and to exert his power for progress and improvement. His letter, saved of its inconsistencies, consists entirely of prejudgment and expressions of satisfaction. This was his state of mind toward the code and the criticism made of it, and he would so express himself without making the slightest investigation. In his letter he first affects surprise at the complaints and resolutely expresses the "firmest determination that justice shall be done." But at once he says he does not believe the complaints and is convinced that injustice has not been done. He arrives at this conviction, he confesses, through the confidence he has in his Judge Advocate General and the faith that he has in the system. Then, observing that, though entirely satisfied himself, "it is highly important that the public mind should receive ample reassurance on the subject," he directs the Judge Advocate General to prepare a statement for that purpose. He does not withhold judgment upon the specific complaints and have them investigated; he does not direct an inquiry; he resents the complaints, sees in them an attack upon "the department and its representatives, who have not been in a position to make any public defense or explanation and have refrained from doing so." His proclaimed purpose is not to determine the facts, but to assume them to be what he wants to believe them to be, and he calls for a statement, based upon that assumption, in order "to reassure the families of all these young men who had a place in our magnificent Army." You can understand his predicament, the necessity for loud asseveration to impress public opinion by assuring it and himself that all was well. It was necessary that he continue to repeat the unreasoned assertions that led to his commitment to the system in the early days of the war. Having committed himself to the views of those intent upon maintaining that system, it was necessary that ever afterwards he soothe his conscience by closing his ears to the cries of justice. Never thereafter would he hear me, an officer of rank,

experience, and some repute, with a responsibility that placed me in immediate contact with the unjust results of that system. Holding their hands, he had taken the plunge, and to them he must look for safety. They told him that the department as a matter of law did not have, and as a matter of policy ought not to have, general supervisory power over courts-martial in questions of law, but that the views of the commander in the field should be final. When he denied the department that supervisory power he shut his eyes to his responsibility, he denied himself the opportunity to keep in touch with the administration of justice in the Army, and, relying upon a mere convention which had no basis in law, he turned his back upon the demands of justice and screened himself from its sufferings. He stands or falls with the system.

THE JUDGE ADVOCATE GENERAL'S DEFENSE.

His defense consists of blind professions of faith in the system, unreasonable assertions of its excellence, and a sympathetic appeal that they be believed in even as you would believe in him. It does him less than justice; it would have you believe that sheer cruelty of the system made him happier than Caligula's minion, whereas he is only blind to its cruelty. The statement does reveal his immovable mental attitude upon the subject, which was not to be unexpected. Trained to the line of the Army and not to the law, finding the work of his own department uncongenial, ever ambitious for a line command, orthodox in every military appreciation, he has, throughout his long years of service, taken not the judicial but the professional soldier's "rough-and-ready justice" point of view. He regards the system as so organically perfect and vital to military efficiency that even its form is to be touched only lightly. His mind has repelled all criticism of the system and is incapable of contemplating that it might be fundamentally and structurally wrong. This fixed mental attitude obtrudes throughout the statement. So addicted to regard the system with blind veneration he can never perceive its wretched incongruity as an American institution. He refers to his "firm belief in the merits and high standards of our system of military law." He asserts his vital interest "in vindicating the honor of the Army and War Department as involved in the maintenance of that system." At every point he declares the inherent superiority of courts-martial to the civil system. He resents even those criticisms based upon specific instances of injustice since "they are calculated to undermine unjustly and needlessly the public confidence in that system." He would have the people "know confidently and take pride in the fact that we possess a genuine and adequate system of military justice." He takes "consolation in believing that if the public at large and particularly the families of those men who have been subjected to military discipline during the past two years could realize the thoroughness of this system they would feel entirely satisfied that the system is calculated in its methods to secure ultimate justice for every man." He refers to some futile proposals of his affecting military justice as tending to show that his attitude "has been an advanced one, at least in comparison to others whose authority was superior to mine at the time." He refers to his own career as Judge Advocate General "as demonstrating that it is inherently improbable that any state of things, even remotely justifying some of the extreme epithets recently used in public criticism, could have existed in our Army during the last two years." These expressions alone reflect a stagnant mental pool.

HIS STANDARDS OF JUSTICE.

The Judge Advocate General asserts that he was actuated by the spirit of justice throughout this war, and that he has not been satisfied with anything less than the highest standards of justice. Doubtless swayed by the demands of discipline as he understood them, he did not deliberately do what he knew to be unjust. It is simply a matter of standard of appreciation. He insisted, however, upon maintaining the system unmodified, and the system has led, was leading, and might have been expected to lead, to the grossest injustice. Let us examine his standards as illustrated by the very cases used by him.

(*a*) The case of the Texas "mutineers." In that case certain old noncommissioned officers of the Regular Army had been subjected to the tyrannous and lawless conduct of a superior officer. Their innocence is conceded. They acted well within their rights in quietly refusing to submit to a palpably unlawful command, and for that refusal they were tried and found guilty of mutiny and sentenced to dishonorable discharge and imprisonment for terms from 10 to 25

years. In this case officers, not men, should have been tried. The trial in its entirety was illegal; the substantial rights of the men were at no point protected; and yet this procedure received the approval of the entire military hierarchy, capped by a major general who approved the sentence and dismissed the men. The Judge Advocate General protected the officers over my protest and denied justice to the men. That was the first case of gross injustice to come to the office after I became its head in August, 1917. I and my associates in the office knew that there would be many like it during the war. The Judge Advocate General admits that this was a "genuine case of injustice" and that it "illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice." The military minds of the War Department conceded the injustice, conceded the illegality of the proceeding if it could be reviewed for error, but contended that the approval of the major general in command was final and placed the judgment of the court, whether legal or illegal, beyond all power of review. This case presents the crux of the entire difficulty and reveals the fundamental deficiency of the entire system. Courts-martial are controlled not by law but by the power of military command. I held that this could not be, and deduced the authority to review the judgments of courts-martial for errors of law out of existing statutes enacted during the Civil War for the very purpose, statutes which the War Department and compliant Judge Advocate Generals had permitted to become obsolete. The present Judge Advocate General, though he had relinquished all control of his office to become Provost Marshal General, returned to the department and filed an overruling opinion which the Secretary of War was induced to approve. That opinion established the law for the department that the judgments of courts-martial once approved by the convening authority, however erroneous they may be when tested by legal principles, are beyond all power of legal review and correction. This case presented no more illegality than thousands of others that have since been tried. Clemency was resorted to in that case and the unexecuted punishment remitted, though the men themselves, excellent soldiers of long service, had been branded as mutineers and expelled from the Army in disgrace. Clemency has been resorted to in all such cases as a means of curing, as best it can, the injustice resulting from illegal trials that must go uncorrected. Mercy is given for offenses never commited, and pardon is used where judgments are illegal and should be reversed. This accounts for the wholesale clemency in which the department is indulging. The Judge Advocate General, in order to protect the power of military command, opened the gates to all the injustice of this war. His view was injected into the question. He overruled the opinion of the entire department, consisting of 12 eminent lawyers from civil life, but he succeeded in maintaining supreme the power of military command over military judicial functions. It was under such ruling that the same commanding general in Texas was permitted to hang a half score of negro soldiers immediately upon the completion of the trial and before the records had been reviewed or had been dispatched from his headquarters to the Judge Advocate General of the Army for whatever revision the statute might be thought by him to require. In those cases the Judge Advocate General, as a result of his construction, engaged in the futile task of "reviewing" the proceedings four months after the accused men had been hanged.

(*b*) "Burglary" case, No. 110595. This is another case used to illustrate the benificence of the system. This accused was charged with burglary, and at the end of the trial the court acquitted him. But the commanding general disagreed. He ordered the court to reconvene, and told it that the evidence, to say the least, looked "very incriminatory." The court upon reconsideration as ordered found the accused guilty and sentenced him to be dishonorably discharged and to confinement at hard labor for five years. The Judge Advocate General, in his statement, says: "His (the accused) story was disbelieved and he was found guilty." That is not true; his story was believed and he was acquitted, and it was not until the camp commander ordered a reconsideration that the court convicted him. The Judge Advocate General further says:

"This office reached the opinion that though there was sufficient evidence to sustain the finding, the evidence did not go so far as to show his guilt beyond a reasonable doubt."

A lawyer would be expected to suppose that in a criminal case the evidence in order to be sufficient must be such as to convince the court beyond a reasonable doubt of the guilt of the accused. However, the record shows that the office of the Judge Advocate General said in the review of this case:

"After careful consideration of the evidence, this office is firmly convinced of the absolute innocence of the accused."

As indicating a lack of power in the Judge Advocate General's office to give effect to a conclusion of this sort, a copy of the review was addressed to the camp commander "in order that the reviewing authority may have the benefit of the *study* referred to."

The Judge Advocate General's report also says:

"In such a situation no supreme court in the United States would interfere and set aside a jury's verdict. Nevertheless this office recommended a reconsideration of the verdict by the reviewing authority."

The great fact to be noted is that such a case as this would never have come to any appellate court, because the original acquittal could never have been set aside. And if the case could have gone to any appellate court upon evidence as weak as this after a fair jury had once found an acquittal, there could never be any doubt about what action the court would take. However, the office of the Judge Advocate General did not recommend the reconsideration of the verdict by the reviewing authority. It only expressed its own serious doubt and referred its "study" to the reviewing authority "for such consideration as he may deem advisable to give it." This case well represents the whole difficulty due to the lack of authority in the office of the Judge Advocate General to do more than present "studies."

Gen. Crowder's defense says:

"It (the verdict) was, in fact, reconsidered; but the court adhered to its findings."

This is not true. After the Judge Advocate General's office had "studied" the case it never went back to the court. The "study" was simply sent to the reviewing authority and the court never had any opportunity to see that "study."

The Judge Advocate General's report says:

"But the feature for emphatic notice is that reconsideration was given, not by exercising the 'arbitrary discretion of a military commander' but by referring the case to the judge advocate of the command as legal adviser."

The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of the Judge Advocate General. This illustrates the necessity for final power in the office of the Judge Advocate General. It is to be noted here (1) that the judge advocate who made the elaborate review was the same judge advocate that recommended trial in the first instance; (2) he was the officer on the staff of the camp commander who ordered the trial and who insisted on a conviction instead of an acquittal; (3) to show his bias, he undertakes to say in his review that the court could not have been influenced by the camp commander when it was instructed by him to change its findings from not guilty to guilty; (4) he himself says that he believed that the court was impressed with the "ring of sincerity" of the case when it first voted his acquittal of the charges, and added that he himself was so impressed when he first preliminarily examined the case; (5) the judge advocate's review consists of a belabored argument of 18 pages and is supplemented by a semipersonal note to the Judge Advocate General insisting upon the guilt of the accused. This is a good example of the fact that under the present law judge advocates do not consider themselves as judicial officers at all, but simply as staff officers supporting the views of the camp commander; nor do they consider the office of the Judge Advocate General as a judicial office, for such a relation would bar such semipersonal correspondence. Moreover, this review speaks many times, in what amounts to a slurring manner of the "study" made by the Judge Advocate General.

The Judge Advocate General's report further says that this reconsideration on the point of proof beyond a reasonable doubt "was a measure of protection which the law does not provide in any civil court for the control of a jury's verdict." As indicated before, the verdict of the jury would have promptly acquitted this man. There would have been no occasion to review it. If a case should get to an appellate court in which the evidence was so weak as to result first in an acquittal, and then required military direction to change it to a conviction, and then two superior reviewing judge advocates pronounced the evidence insufficient to sustain the finding, nobody can have any doubt what a court of appeals would do.

The Judge Advocate General's defense says:

"The case is a good illustration of the feature in which the system of military justice sometimes does even more for the accused than a system of civil justice."

This should be admitted. It does do more. It does it hard and plenty.

It may be well to add that since the Chamberlain speech was made the justice of the sentence in this case has been reexamined in the office of the Judge Advocate General upon an application for clemency, and as a result Gen. Crowder, on February 12, 1919, recommended that the unexecuted portion of the sentence be remitted and that the prisoner be released and restored to duty. This recommendation contains the ironical statement that the accused had served nearly one year of his sentence. Here is also a strange admission in the general's memorandum:

"This office is strongly of the opinion that injustice may have been done to this man, and that it should be righted now, so far as possible."

It is a remarkable coincidence that Gen. Crowder signed this memorandum on the same day that he signed his defense in which he vigorously contends for the rightful results of the case.

(*c*) The four death cases from France: The next cases cited by the Judge Advocate General as illustrating the justice with which the system meets "the stern necessities of war discipline" were four death sentences from France in the cases of four 18-year-old boys, who had volunteered at the beginning of the war—Nos. 110753, 110754, and the companion cases, 110751 and 110752. These were the first death sentences received from France. In the first two the death penalty was awarded for a charge of sleeping upon post, and in the last two for refusal to go to drill. The trials were legal farces, as any lawyer who will look at the records will see. In each of two of the cases the trial consumed about three-quarters of an hour, and the record occupies less than four loosely typewritten pages. The other two consumed slightly more time, and resulted in a slightly larger record. The courts were not properly composed and in two of the cases were clearly disqualified. The accused were virtually denied the assistance of counsel and the right of defense. A second lieutenant as counsel made no effort to assist. That they were hindered rather than helped in their defense by counsel is demonstrated by the fact that in the case where a plea of guilty was entered the sole effort of counsel consisted of his calling a witness and asking him this question:

"Q. Was the accused's record good up to this time?—A. It was not. It is one of the worst in the company."

Two pleaded guilty to a capital offense and the other two made not the slightest fight for their lives. Even if the men had been properly tried and convicted, no just judge could have awarded the death penalty. These young soldiers had been driven to the point of extreme exhaustion. At the time of commission of the offenses, the military authorities evidently regarded them lightly. The two who were charged with sleeping on post were not relieved from post nor were they arrested or accused for 10 days thereafter, and the two who were charged with refusal to go to drill were not arrested or charged for a month thereafter. But at this juncture the authorities abruptly changed their policy, and decided to make an example of these men. Gen. Pershing, who under the law had nothing whatever to do with these cases, injected his power and authority into the course of justice, clamored for the death-penalty, and asked that the cable be used to transmit to him the mandate of death.

According to the Judge Advocate General, Gen. Pershing urged the adoption of the inexorable policy of awarding the death penalty in all cases of sleeping on post, and he insists that no one should be criticized for agreeing with this policy or acceding to Gen. Pershing's urgent request. And then the Judge Advocate General makes this surprising statement:

"I myself, as you know, was at first disposed to defer to the urgent recommendation of Gen. Pershing, but continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency."

The record shows an entirely different attitude. It shows that on March 29 to April 4 Gen. Crowder wrote the reviews in these cases, but did not as yet conclude them with his recommendation. On April 5 he sent them to Gen. March in this unfinished state, accompanied by a letter in which, while indicating that by right and justice these boys ought not to die, he suggested, nevertheless, that since Gen. Pershing insisted upon the death penalty the department should uphold him and present a united front to the President. He asked for a conference with the Chief of Staff in order that there might be unanimity in the department to that end. Here is his language:

"You will notice that I have not finished the review by embodying a definite recommendation.

"It would be unfortunate indeed if the War Department did not have one mind about these cases. There is no question that the records were legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think if we extend clemency that we have not sustained him in a matter in which he has made a very explicit recommendation.

"May we have a conference at an early date?"

He did confer with Gen. March, and they agreed to present the united front, to uphold the hands of Gen. Pershing, and to recommend the execution of the sentence of death. On April 6 Gen. Crowder brought back from his conference with the Chief of Staff the unfinished reviews and immediately concluded them by adding to them the following recommendation:

"I recommend that the sentences be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his acton thereon, together with an Executive order designed to carry this recommendation into effect should such action meet with your approval.

"(Signed) E. H. CROWDER,
"*Judge Advocate General.*"

Gen. Crowder says that he was "disposed to defer" to the urgent recommendation of Gen. Pershing, but the record shows that he did defer.

The record also contradicts his statement that—

"continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency."

And the record also disproves his statement that after an examination by several of the most experienced judge advocates of his staff "no reversible error was found, and there was no doubt of the facts in either case, the only issue in the cases being the severity of the sentences." The record shows that on April 15 I, accidentally hearing about these cases, filed a memorandum in which I pointed out with all the power within me not only reversible error, but annihilating error, and urged that these sentences be set aside and these young soldiers be not executed. And three other judge advocates expressed full concurrence in my views. The record further shows that on April 10 still another judge advocate of high rank, whom Gen. Crowder esteems as a splendid lawyer and who supports the general's views on military justice, filed with him a long memorandum to the effect that these trials were a tragic farce and concluded that—

"it will be difficult to defend or justify the execution of these death sentences by way of punishment or upon any ground other than that as a matter of pure military expediency someone should be executed for the moral effect such action shall have upon the other soldiers."

These memoranda the general did not forward to superior authority, but the record shows that upon reading them and "upon continued reflection" the next day, April 16, he addressed a memorandum to Gen. March, which began as follows:

"Since our interview on the four cases from France, involving the death sentences, at which interview we agreed that we would submit the cases with the recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited."

He then sets out some, but by no means all, of the facts of these memoranda, simply passing them on to the Chief of Staff "for his information." He did not deem them sufficient to modify his own conclusion or his agreement with the Chief of Staff, for near the close of the memorandum he expressly declared that he submits them without any desire "to reopen the case," and he then concludes as follows:

"It will not have escaped your notice that Gen. Pershing has no office of review in those cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his views that all four men should be placed before the firing squad. I do not make this statement for the purpose of criticizing his action—indeed, I sympathize with it—but it is fair in the consideration of the action to be taken here to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official rela-

tion to the prosecution, but as commanding general, anxious to maintain the discipline of his command.

" (Signed) E. H. CROWDER,
" *Judge Advocate General.*"

No case could furnish better evidence of what happens when the chief judicial officer of the Army is subject to the power of military command, is " supervised " by it, and must rely upon it for his appointment to and retention in office; and the fact that these men did not die, as the military hierarchy would have had them die, was not due to the Judge Advocate General of the Army, and the fact that they came perilously close to an unlawful death and were deprived of protection for themselves, and have been unlawfully subjected to penitentiary servitude, was due to the Judge Advocate General of the Army.

When Gen. Crowder first replied to the Chamberlain criticism and my own, he made reference to other cases, which he deemed to be beyond criticism and illustrative of the justice of the system, which he now significantly omits. I will supply them:

(*d*) John Schroeder, Machine Gun Company, One hundred and fifty-sixth Infantry, was convicted of absenting himself without leave from May 9 to 15, when his command was about to embark for overseas service. The gravamen of this offense is obviously the intention to avoid overseas service, as pointed out in the Crowder report, by the division judge advocate, and by Gen. Hodges, who, in his review of June 19, 1918, congratulated the court " in adjudging an adequate sentence and thereby demonstrating its disapproval of an act of a soldier's absenting himself " without permission immediately following his designation for overseas service. This, of course, is one of the most serious offenses, notwithstanding which the accused, represented by an inexperienced first lieutenant as counsel, pleaded guilty; and it is also shown that while without counsel he was approached by an investigating officer, who reported that " the accused declines to make a statement, but says that he will plead guilty," indicating that there was some inducement for the plea. The accused, however, at the trial and after his plea of guilty, stated under oath that he went home for the purpose of seeing a sick mother, and, besides, that he did not know that the company was going abroad and had never been informed of that fact. This statement, absolutely inconsistent with his plea, required the entry of a plea of " not guilty " and a trial of the general issue. There being no evidence whatever to show that the accused was informed that his company was going abroad, the court should have taken the statement of the accused as true and acquitted him. This is an excellent example of a meaningless trial. The accused had no counsel worthy of the name; he did not appreciate nor was he advised of the gist of the offense; he made an ill-advised and uncomprehending plea of guilty, and then made statements absolutely inconsistent with his plea, all of which went unnoticed and resulted in his being sentenced to be dishonorably discharged and to be confined at hard labor for 25 years.

(*e*) No. 106800 is a sort of companion case to the immediately preceding one. The gist of the offense, here as there, is to be found in the intention to escape overseas service. This accused was also defended by worse than no counsel. The whole proceeding is invalid for the reason that the court disposed of it as though the accused had entered a plea of guilty, whereas he pleaded " to the specification, not guilty; to the charge, guilty." The important part of the plea is, of course, the plea to the specification, the plea to the charge being mere form and may be ignored.

This being a plea of not guilty, the accused should have been tried accordingly. As showing the lax method of the court, even on an assumption of a valid plea of guilty, the accused made a sworn statement absolutely inconsistent with his plea, saying that he did not know and had not been informed that he was ordered to overseas service. He was sentenced to 15 years' confinement and the court was commended as in the previous case.

(*f*) No. 114717 was a charge of sleeping on post, in this country, and a plea of guilty. The accused, referred to as " but a little kid," was said to have been found asleep by a lieutenant. This was a capital crime in which the accused, but 17 years old, was permitted by inexperienced counsel to plead guilty, for which he was sentenced to 10 years. The whole proceeding occupies seven pages of loosely typewritten matter double spaced. The court submitted a recommendation for clemency, asking for a reduction of the sentence on the ground that inasmuch as the accused had pleaded guilty they had been reluctant but compelled to give him a sentence commensurate with the offense, and also on the ground of his youth.

(g) No. 113076. This is a case in which Gen. Crowder contended that the sentinel had been drinking whisky before going on guard and that, having been found asleep thereafter, the case was plainly one for severest exemplary punishment. It is passing strange how justice can hurdle the salient point that an example ought to have been made not so much of the man as of an officer who in violation of regulations and common sense will post as a sentinel a man who had obviously been drinking.

These cases—and there are thousands like them in point of illegality and injustice—are sufficient to show what the Judge Advocate General terms "the general state of things in the administration of military justice."

HIS SPECIFIC CONTENTIONS.

(1) He contends that courts-martial procedure is in accordance with the "rigid limitations of the criminal code" and not according to the arbitrary discretion of the commanding officer.

There are no "rigid limitations" of the code. That is the trouble. The military code is worthy of the name of law only in the sense that any absolute and unregulated power established by law is worthy of it. Congress has authorized military power to do as it pleases in the exercise of this highly penal jurisdiction. Look at the articles from first to last. Is there a word to regulate the preferring of the charge, the arrest, the sufficiency of the charge, the rights of the accused before, at, and after trial? Is there any standard of law to which the court-martial procedure must conform? Is there a single provision for the legal ascertainment of errors and the correction of them? None. All this is committed not to law but to the power of military command. The power of military command determines whether or not there is reasonable ground to believe that the offense has been committed and that the accused committed it. Military power determines whether there is a prima facie case. Military power selects the judges. Military power selects such counsel as the accused may have. Military power determines the legal sufficiency of the charge. Military power determines the kind and competency and sufficiency of proof. Military power passes finally upon every question of law that can arise in the progress of the trial. And military power finally passes upon the legality of the judgment and the entire proceedings. This is one code, criminal in character, that does not recognize principles of law and does not contemplate the services of a single man skilled in the law. Thus there is no standard by which error may be determined, except the view of the commanding general. Whatever he determines is right is right, and whatever he determines is wrong is wrong, by virtue of his determination alone. Under such a system, of course, there can be no such thing as error of law; there can only be a variation from whatever the commanding general believes to be right. And from his decision there is no appeal. There is no power on earth to review his decision with authority to say that it is wrong as a matter of law.

And should not a criminal code define the offenses and prescribe the penalties if it is worthy of the name of law? Look at the code. There are 29 punitive articles. Not one of them defines any offense. The definition is to be found in the common law military or what military men conceive to be the customs of the service. Not one of them prescribes the penalty.

The court-martial is authorized to award any punishment it please. Twenty-nine of these articles conclude by each declaring that the offense punishable therein shall be punished "as the court-martial may direct," which means any punishment less than death. Eleven of them authorize any punishment "that a court-martial may direct, including death," and two of them mandatory prescribe death. Why should there not have been shocking punishments, shocking both because of their harshness and because of their senseless variations, when courts-martial have unlimited authority to punish as they please? I myself can not conceive that lawyers believe in such delegations of legislative power, either on principle or as a matter of policy. True it is that in times of peace Congress has authorized the President, if he sees fit, to prescribe certain maximum punishments, thus limiting the discretion of courts-martial. This is, nevertheless, an unwise if not an unlawful delegation, inasmuch as a matter of practical administration the military authorities, and not the President, prescribe such limits. Its only effect is to transfer the unlimited power of prescribing the punishment from the several courts-martial to a single military authority of the War Department. It is equally an abdication by Congress itself to prescribe the offense and the punishment.

Does the code contemplate the participation of a single lawyer? Of course, lawyers are used in the system. During this war we had a large corps of judge advocates. But they are without authority. They were upon the staff of the commanding general, and like all other staff officers are to do his bidding and be governed by him. No distinction is made between the legal staff and the purely military or administrative staff. It is presumed that the commanding general is as competent in the field of law as he is in the field of tactics, and as a general rule the word of his staff officer means little to him. The authority is the authority of the commanding general. Congress has conferred it upon him, and we may expect a military man, of all men, to exercise it. Lawyers are like other ordinary human beings. They are dependent upon the commanding general for advancement and recognition and professional success in the Army. Having no power and authority of his own a lawyer may not be expected to do other than support the view of his commanding general as best he can, whether right or wrong. Indeed, that he should do so is one of the tenets of the military profession. There is but one will—that is the will of the commanding general. I have seen lawyers placed in this position abase themselves in the face of military authority to the point where one would incline to doubt whether they had not abandoned their professional principles altogether. A member of the Board of Review appearing before the committee of the American Bar Association recently made the following statement:

"While in many cases the trials of enlisted men are not so elaborate as the trials of officers, and in many cases the rules of evidence are not observed and counsel is obviously inadequate, while in a considerable percentage of cases we find that the decision is not sustained by the fact, still I do not recall a single case in which morally we were not convinced that the accused was guilty."

And in this statement other judge advocates concurred. Verily they have received their reward. Such a statement shows to what extent subjection to the power of military command deflects legal judgments, imposes itself upon professional appreciations, and obscures those first principles which are normally regarded as the foundation stones of the temple of justice. The last man in the world to be expected to prefer his personal impression of moral guilt to guilt duly adjudged, his own judgment to the judgment of a court of law, should be the lawyer. Think a moment what it means for a lawyer sitting in a judicial capacity to say:

"We find the soldier has not been well tried; we find that the rules of evidence were transgressed in his case; we find that he had not the substantial assistance of counsel; we even find that the decision was not sustained by the facts of record; yet we are morally convinced that the accused was guilty, so let him be punished."

That means something worse than injustice to the accused; that is the argument of the mob; that is the road to anarchy. I myself prefer the statement made by Warren in answering the same contention in the British Army nearly 90 years ago:

"It concerns the safety of all citizens alike that legal guilt should be made the sole condition for legal punishment; for legal guilt rightly understood is nothing but moral guilt ascertained according to those rules of trial which experience and regulation have combined to suggest for the security of the State at large. * * * They (these fundamental principles of our law) have, nevertheless, been lost sight of and with a disastrous effect by the military authorities conducting and supporting the validity of the proceedings about to be brought before Your Majesty."

And the chief of all judge advocates, the Judge Advocate General himself, is also subject to this military power at its very height. He himself has not one particle of authority; he also may advise and recommend to the Chief of Staff, the highest exponent of military authority. By statute the Judge Advocate General is placed under the "supervision" of the Chief of Staff; by the statute also the Judge Advocate General will hold office for a term of four years unless sooner relieved or unless reappointed. He is subject to the supervision, power, and control of the Chief of Staff just as is the chief of the department that issues the rations, supplies, and matériel, or makes a military plan. His retention of office depends upon the approving judgment of the Chief of Staff. Such a man can not be independent, and in the end must be influenced by what the military authorities would have him do. That this is so is observable daily.

From top to bottom the administration of military justice is not governed by the rigid limitations of the code, but by the rigid powers of military command.

It is to be noted that throughout his defense the Judge Advocate General claims that the punishments have been comparatively light, since the code imposed no limit. The code should limit punishment. The difficulty is, it does not.

(2) He contends that the code is modern and enlightened.

He admits that prior to his "revision" of 1916, it was the British code of 1774, and I say that his "revision" did not revise, and that we still have the British code of 1774, itself of even more ancient origin. The best proof that our present articles are organically the British Articles of 1774 is to be found by comparing the two. The next best evidence is to be had out of the mouths of the highest officials who proposed the so-called revision of 1916, now relied upon as a complete modernization of the old British code. The British code was adopted under the exigency of the Revolution, and John Adams, the chief instrument in securing the adoption, attributed his surprising success to that emergent situation. There were few minor changes made during the Revolution, and up to the so-called code of 1806. In his statement to the Military Committee, the Judge Advocate General on May 14, 1912, said:

"As our code existed, it was substantially the same as the code of 1806."

And he also showed that the code of 1806 was substantially the code of 1774. Of this code of 1806, he said:

"The 1806 code was a reenactment of the articles in force during the Revolutionary War period, with only such modifications as were necessary to adapt them to the Constitution of the United States."

The modifications that were deemed necessary were simply such modifications as were necessary to make the articles fit into the mere machinery of our Government, and introduced the requisite terminology therefor. Speaking of his so-called revision of 1916, the Judge Advocate General said:

"It is thus accurate to say that during the long interval between 1806 and 1912—106 years—our military code has undergone no change except that which has been accomplished by piecemeal amendment. Of the 101 articles which made up the code of 1806, 87 survive in the present code unchanged, and most of the remainder without substantial change. Meanwhile, the British articles from which, as we have seen, these articles were largely taken, has been, mainly through the medium of the Army annual act, revised almost out of recognition, indicating that the Government with which it originated, has recognized its inadaptability to modern service conditions."

The so-called revision of 1916 was only a verbal one and not an organic revision. This, a comparison with the code as it previously existed will demonstrate. The proponents of the revision themselves so stated; they did not contemplate the making of a single fundamental change. This was clearly shown in the letter of the Secretary of War to the Committee on Military Affairs under date of May 18, 1912, and it is equally clearly shown by the letter of the Judge Advocate General, submitting the project in which he described "the more important changes sought to be made" as those of "arrangement and classification." Nobody, either the Judge Advocate General, the Secretary of War, or either committee of Congress, has ever regarded the project of 1916 as a substantial revision. The Judge Advocate General took occasion to deny that it was anything but a restatement of existing law for the sake of convenience and clarity. He himself pledged the committee—

"If Congress enacts this revision, the service will not be cognizant of any material changes in the procedure, and courts will function much the same as heretofore."

Such revision as was made made the structure rest even more firmly upon the principles that courts-martial are absolutely subject to the power of military command.

(3) He contends that the commanding officer may not put a man on trial without a preliminary hearing into the probability of the charge.

Notice, he does not say the code requires such hearing, but that regulations and orders of the War Department do. Therein lies the deficiency. Law is a rule established by a common superior, and as between the man to be tried and the officer ordering his trial such a regulation is not law. It establishes no right. Its only sanction is in the authority that issued it. It may be inadequate, ignored, disobeyed, modified, revoked, or its violation waived without involving the rights of the man to be tried. As a matter of fact, well known in the Army, such preliminary investigation as is prescribed is as a rule per-

functorily made. It must not be presumed to be very thorough when 96 per cent of all charges drawn are ordered for trial. The failure to provide for an investigation whereby it shall be legally determined that there is a prima facie case is at the origin of the great number of trials, and is therefore the source of much of the injustice.

Any officer can prefer charges against any enlisted man by virtue of his official status alone. The Judge Advocate General says that the Army follows the Anglo-American system of filing an information by a prosecuting officer. Of course not. Any officer may prefer charges. He acts under no special requirement or sense of obligation. The Judge Advocate General naively says that "this protection is invariable." Would you call it a protection if every man under the sun standing one degree above you in wealth or social position or official position had the power to indict you or inform against you and subject you to a criminal trial? Would you agree that even every civil officer in the land should have such a power over a civilian? And yet, every Army officer has that power by virtue of his office alone.

(4) He insists that there have not been too many trials; indeed, that there have been comparatively few.

He admits that in the year preceding the armistice there were 28,000 general courts-martial and 340,000 inferior courts. He uses 4,000,000 as the size of the Army during the period, whereas the average for the period was, of course, less than 2,000,000. Applying the ratio of Army trials to the population of the United States, you would have 1,500,000 felonies and 19,000,000 misdemeanors tried annually. Comparison will also show that we tried seven times as many men per thousand per year as either France or England. He takes great consolation in the fact that the percentage of trials was smaller in the war Army than in the old Regular Army. That is true, but a cause for shame, not consolation. The system as applied to the Army in peace was intolerable. General courts-martial in the Regular Army averaged six per hundred men per annum. Applying the Regular Army ratio of trials to the National Army, the result would have been for the year mentioned 120,000 general courts-martial and 1,500,000 inferior courts-martial, surely a number that would have destroyed any army.

The Judge Advocate General and the War Department now say that the injustices revealed during the war have been due largely to the new officer. Quite the contrary. The records show that the new officer, bringing into the Army his civilian sense of justice, has preferred and ordered fewer courts-martial than the regular. It must be remembered also that the old experienced Regular Army officers have been the officers with the authority to convene general courts-martial and approve the punishments awarded by them. They are therefore responsible.

In any event, inasmuch as our wars are to be fought by citizen soldiers, no system ought to be maintained that must inevitably result in injustice by reason of the inexperience of the men.

(5) He contends that our officers are sufficiently grounded in the law to be military judges.

This, again, is a matter of standards. It may be informative to point out the inconsistency between the statement that the new officers are responsible for the deficiencies of the administration of military justice developed during the war and the contention that they are competent military judges. Of course, they are not competent as judges. A case before a court-martial involves the entire criminal law. Courts-martial are judge as well as jury. His regard for the judicial requisites can be properly appreciated in view of his argument that the study of the brief course in the elements of law at West Point or of the course by the new officers, in the three months' training camp is sufficient "to insure an acquaintance with the law by the members of a court-martial."

In any event, he says, the deficiencies of the trial court will find its corrective supplement in the reviewing judge advocate—one system of legal mechanics that stands the pyramid on its pinnacle.

(6) He contends that the judge advocate does not combine the incompatible function of prosecutor, adviser of the court, and defender of the accused.

The law and universal practice are otherwise. The judge advocate shall prosecute in the name of the United States (art. 17). If accused is not represented, the judge advocate shall, throughout the proceedings, advise him of his legal rights (art. 17). This is defined to be the substantial duty of counsel (par. 96, M. C. M.) The judge advocate is the legal adviser of the court (par. 99, M. C. M.). There are cases in which a single officer set a trap for the

accused, was the prosecuting witness, was appointed judge advocate to prosecute the case, and, besides, was also specially detailed as counsel for the accused, and performed all functions. For such an instance, see case of Pvt. Claud Bates, in which, when I pointed out these inconsistencies, the commanding general complained I was "trying to break up our court-martial system."

(7) He resents the criticism that second lieutenants, knowing nothing of law and less of court-martial procedure, are assigned to the defense of enlisted men charged with capital or other serious offenses.

He admits, however, that in an examination of 20 cases a lieutenant appeared as counsel in 13 of them. I can go further and say that in an examination of 5,000 cases lieutenants of but few months' experience appeared in 3,871, or 77 per cent of them. This was perfectly natural; under the system of administration the duty of counsel is an irksome one, imposed upon those who have not enough rank and standing to avoid it. He also contends that all officers are properly equipped to perform the duties of counsel, by reason of the fact, already stated, "that graduates of every training camp have studied and passed an examination upon the Manual for Courts-Martial, and therefor the above criticism is upon its face unfounded." He also finds that after officers of rank and experience have been assigned as members of the court and as judge advocate it is not feasible to find legally qualified officers to act as counsel. "No one," he says, "who has any acquaintance at all with conditions in the theater of war would suppose for a moment that this is practicable." He then dismisses the whole subject by saying that, no matter how incompetent is counsel, he finds in the scrutiny subsequently given the cases, "the most satisfactory assurance that such deficiencies as may from time to time occur through the inexperience of officers assigned for the defense have been adequately cured." It might be remarked that it is a rather sad criticism of any judicial system that it regards military rank as the main assurance of efficiency.

(8) He is inclined to resist the view that improvident pleas of guilty are received from those charged with capital crimes.

He says the percentage of such pleas is a small one; and so it should be hoped, although such pleas are known to be surprisingly frequent. As an argument to offset the inference of resultant injustice, he relies upon "the common instincts of fairness and justice of the officers taken recently from civilian life to sit upon the courts as judges." It is interesting to note that shortly before this, in a public address before the bar of Chicago, the Judge Advocate General attributed the harshness of the system to the inexperience of the new officers, as follows:

"Undoubtedly there are things wrong with the administration of military justice. We have brought over 100,000 officers into the Military Establishment of the United States within the brief space of a year. Their commissions are their credentials to sit in the courts and administer justice, and it would be strange, indeed, if there were not a number of cases in which a disproportionate punishment is given."

(9) He admits that commanding generals return acquittals to the courts with directions to reconsider them.

He thinks, however, that "the very object of this institution is to secure the due application of the law," and he adds: "My own experience in the field can recall more than one case in which the verdict of acquittal was notoriously unsound, and in which the action of the commanding general in returning the case furnished a needed opportunity for doing full justice in the case." He finds "that this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to abuse of the commanding general's military prestige." He finds that out of 1,000 cases there are only 95 acquittals, anyway, and he says:

"Of these 95 acquittals 39 were returned only for formal correction; of the remaining 56 the court adhered to its original judgment in 38 cases, and in only 18 cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty of any offense."

Though of every 95 acquittals 18 are changed into convictions by the direction of the commanding general, this he considers negligible. This leaves only 77 acquittals out of a thousand tried. Out of deference to unreasonable public opinion, however, he would recommend a change to accord with "the British practice," which he regards as the limit of liberality.

(10) He contends that under all the circumstances the sentences imposed by courts-martial are not, as a rule, excessively severe.

He indicates clearly that we would have profited by "keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes" in the Civil War, that the inexorable attitude of shooting all deserters would prove merciful in the end, and argues that, inasmuch as we did not adopt that policy, we should not be "reproached for severity." Dealing with the offense of absence without leave, he would have us believe that "this offense is in many cases virtually the offense of an actual desertion," whereas exactly the opposite is true. The records will show that absence without leave is more frequently than otherwise charged as desertion, since in cases of "doubt" the higher offense is always charged; besides, several commanding officers ordered that all absences, even for a few days, be charged and tried as desertion. There has been no greater source of injustice than the indiscriminate treatment of absence without leave as desertion and the procurement of convictions accordingly. Along the same line, the Judge Advocate General argues that disobedience of orders is always to be punished most severely, without regard to the kind or materiality of the order, and he asserts that the disintegration of the Russian Army was due not to age-long tyranny or oppression or reaction, or any other like cause, but entirely to a failure to treat "disobedience in small things and great alike."

Finally, however, after much argument, he concedes that these sentences were long, but justifies them on the ground that "the code prescribes no minimum," and on the further ground "that probably none of these officers (who pronounce sentences) supposed for a moment that these long terms would actually be served"; and he reminds us that there has already been a 90 per cent reduction. He ignores the fact that, whether such sentences were or were not intended to be served, they greatly outraged justice. If intended to be served, they abused justice; if not so intended, they mocked it. He says, "Nobody intended they should be served," which, as one writer has recently put it, is "like hanging up a scarecrow to frighten the birds that does not scare them as soon as they learn that it is a sham, and then use it to rest on."

(12) He admits that the sentences of courts-martial are very variable for the same offense.

He delights in the fact, however, that "this very matter of variation in sentences is one of the triumphs of modern criminal law," and finds virtue in a situation that gives courts-martial "full play for the adaptation of the sentences to the individual case." A court should have sufficient latitude to make the sentence fit the offense; but I had not supposed that this "modern triumph" would authorize any court—not even a court-martial possessing the virtue of being untrained, unlettered, and unskilled in the administration of justice—to punish an offense, however trivial, "as it may direct," with life imprisonment or death if it pleases.

(13) He denies that the Judge Advocate General's office partakes in the attitude of severity.

His defense speaks rather loudly for itself. I must be permitted to say this: Every organ of that office designed to secure correctness of court-martial procedure or moderation of sentences—which now he calls so effectively to his aid—was instituted by me and by me alone. Without any authority from or help of the War Department or of the Judge Advocate General I organized the several divisions of the office—the board of review and the first and second divisions thereof—and the clemency board—and it was my effort, taken in his absence, that showed the necessity for the special clemency board, which, though restricted in every covert way by the department and the office of the Judge Advocate General, has done so much recently to reduce sentences. The Judge Advocate General's attitude has been one of absolute recation. He has not approved of such organization; he has not approved of my efforts to secure correctness of court-martial judgments or moderation of them. Twice have I been relieved by him from all participation in matters of military justice and superseded by officers who shared his views. He says:

"On the 20th of January you (the Secretary) approved a recommendation of mine, dated January 18, proposing the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency."

He does not say, however, that this was done at my insistance, not his; that when he returned to the office last January he published a written office order relieving me from all connection with administration of military justice.

He does not say that on or about January 8 I went to him and urged that something be done to modify courts-martial sentences, and that he declined to take any action, as "to do so would impeach the military judicial machinery."

He does not say that while he was absent from the office a few days thereafter I filed with the Secretary of War a memorandum, dated January 11, 1919, in which I depicted the shocking severity of courts-martial sentences, and that I was driven to take advantage of Gen. Crowder's absence to bring this to the attention of the Secretary of War. He does not point out that he had me demoted because I did not share his views upon the subject of military justice and had me superseded by an officer who did. He does not point out that notwithstanding he kept me as president of the clemency board, as an assurance to the public that clemency would be granted, he "packed" that board with the officer who wrote this defense of the Judge Advocate General, the chief propagandist for the maintenance of the system, and with other friends of his who shared his reactionary views. He does not point out that the clemency board was given no jurisdiction to recommend clemency for the prisoners in France, since "the people at home were not so interested in the men who had committed offenses in the theater of operations"; that is, the prisoners in France were not in a position to become politically articulate or embarrassing to the department. He does not point out that the dissolution of the clemency board had been determined upon, and I had been notified accordingly, without its having passed upon any of the cases in France, and that those cases were not taken up until recently, and would never have been taken up except for my written official insistence. He does not point out that a special board of review, composed of men sharing his own views, was constituted, with the sole function of reexamined and revising all fidings made by the clemency board wherever clemency was to be based on inadequate trial.

(14) He contends that the action taken in the Judge Advocate General's Office has been effectual for justice.

He reaches this conclusion on the ground that seldom or never is the Judge Advocate General's Office overruled. Of course, so long as the Judge Advocate General of the Army does what the military authorities want him to do he will not be overruled. When the Judge Advocate General of the Army does, as he did in the death cases from France and as he habitually does, seeks an agreement with the Chief of Staff as to what his decision ought to be, when he regards himself not as a judge but as an advocate to uphold the hands of the military authorities, he is not likely to be overruled. I, as Acting Judge Advocate General, was overruled. I was told by the highest military authorities, in a certain case in which a half score of men were sentenced to be hanged, and in which the military authorities insisted on the execution, notwithstanding the fact that they had not been lawfully tried, that I was disqualifying myself ever to be Judge Advocate General by my insistence upon their rights. Through my insistence, however, these men were not hanged.

You can not expect the Judge Advocate General of the Army to be a judicial officer when the law does not make him one. He himself is subject to the power of military command. By section 4, act of February 14, 1903 (32 Stat., 831), the Judge Advocate General is placed under the "supervision" of the Chief of Staff in the same way that the Subsistence, Quartermaster, Engineer, Medical, Ordnance, and other departments are. He is appointed for four years, he may be relieved if he incurs the displeasure of the department, and he will not be reappointed except with the recommendation and approval of the department. He holds his office, in effect, at the will of the Chief of Staff, under whose supervision he is. If the highest law officer of the Army is subject to such military "supervision," how much more effective must the same "supervision" be over the subordinate officers of the Judge Advocate General's department assigned to the staff of a military commander?

HIS REMEDIES.

The Judge Advocate General now says he favors vesting the President with power to review courts-martial judgments for errors of law, and therefore recommends the enactment of the bill submitted by him last year—section 3692, H. R. 9164. Please look at that bill. If enacted it would (a) effectually place the power in the hands of the Chief of Staff, the head of the military hierarchy; (b) authorize the reversal of an acquittal; (c) authorize increasing the punishment; (d) authorize increasing the degree of guilt determined by the court.

The truth is, the Judge Advocate General does not believe in revisory power. He has ever insisted that military law is the kind of law that "finds its fittest geld of application in the camp," and that such revision would militate against the requisite promptness of punishment. He has not acted in good faith. In

correspondence with the senior officer of his department on duty with Gen. Pershing's staff, shortly after his submission of the above bill, he expressed his real views and purposes. In that letter, of April 5, he said something had to be done to head off a "threatened congressional investigation," "to silence criticism," "to prevent talk about the establishment of courts of appeal," and "prove that an accused does get some kind of revision of his proceedings other than the revision at field headquarters."

The other remedies proposed, consisting of a few more orders and changes of the manual and empowering the department to prescribe maximum limits of punishment in peace and war, I deemed unworthy of comment.

The Judge Advocate General assumes that he has reached the limit of liberality when he approaches in a few respects what he conceives to be the British system, not appreciating that, though that system is far more liberal than our own, it, too, has become the subject of criticism throughout Britain. The British Government has appointed a committee of inquiry of civilian barristers to examine "the whole system under which justice is administered in the Army." Differing from our own War Department, that Government gives evidence of a desire to know the facts and to find a remedy.

HIS CRITICISM OF MY PERSONAL CONDUCT.

1. He claims that my efforts to establish a revisory power within the department through the office opinion of November 10 to that end was without his knowledge.

Assuming this to be true, it was well known in the department at that time that he had authorized me to manage the office in my own way and without further reference to him, except for certain appointments having political significance. But, as I heretofore said to the Secretary of War in the paper published in the New York Times, I did take occasion to consult Gen. Crowder upon the subject, and he replied:

"I approve heartily of your effort. Go ahead and put it over. I suspect, however, that you may have some difficulty with the military men arising out of article 37."

I knew of no change of attitude in him until I was advised shortly thereafter that he had prepared a brief in opposition, and two or three days later he resumed charge of the office and filed the brief. When I found this to be so, I went to Gen. Crowder and accosted him about his change of attitude. In explanation thereof he said:

"Ansell, I had to go back on you. I am sorry, but it was necessary to do it in order to save my official reputation."

He then added that he was nearing the end of his service; that he could not afford to be held responsible for the injustice that had gone on, if the existing law could be construed to have prevented it, and adverted to the fact that fixing such responsibility upon him would injure his career in this war. He then told me that the Secretary of War held him personally responsible and had "upbraided" him at the Army and Navy Club for sitting by and permitting this injustice to go uncorrected. The general then said that, humiliated at such imputation, he had gone back to the Provost Marshal General's office and consulted some of his friends there, and they decided that it was necessary for his self-protection to oppose the opinion the office had prepared, and that two of the officers there helped him prepare the countermemorandum.

2. He says that I surreptitiously obtained an order appointing me as Acting Judge Advocate General in his absence.

Please look at his defense, pages 54 and 55. He admits that he said:

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday."

I did take it up in a formal memorandum addressed to the Chief of Staff, the channel of communication prescribed by orders. I never spoke to the Chief of Staff on the subject, and never endeavored in any way to obtain favorable action upon the memorandum. I let it take its course. Under 1132 Revised Statutes it was necessary that I be designated as Acting Judge Advocate General if I was to be charged with the policies and responsibilities of the office. Otherwise, the policies and responsibilities were Gen. Crowder's, who was not in a position to assume them. In furtherance of his ambitions he held three and sometimes four positions during this war, and he was in no position to perform the duties of Judge Advocate General or prescribe the policies of that office.

Therein lies the difficulty. I was held responsible for the output, but for means and power was kept dependent upon an officer who was absent, absorbed in other tasks, and who differed with me on the policy of military justice.

The General bases his charge of surreptition solely on the ground that his approval of my designation as Acting Judge Advocate General was conditioned upon my taking it up "directly" with the Secretary of War. I had assumed that his language was frank and candid and not governed by the quibbling construction he now places upon it.

His other charge of surreptitious method is likewise based solely upon the fact that I made a recommendation on the subject of military justice in France to the Chief of Staff in a written memorandum which spoke for itself and which was never supplemented by any word or action of mine in support of it to secure favorable action. It is quibbling to say, as he does say (p. 58), that my statement to the effect that the commanding general of the American Expeditionary Forces was opposing means for a better supervision of military justice was untrue for the reason that the opposition was officially voiced to the department not by Gen. Pershing in person but by his senior judge adovcate and staff officer, Gen. Bethel; the staff officer, of course, representing the views of his chief.

3. He says that I myself had at first approved the death penalty in the cases from France. If I had done so, the record would show it. The record is to the contrary. Neither is it to be expected that I should have once approved them and then have written a strong memorandum against approval without reference to my former position. The truth is, at the time the cases were being studied by Gen. Crowder, so far as he did study them, and his assistants I was away from the office in Canada. Col. Mayes, senior officer in my absence, has recently called my attention to this fact and informs me further that he has recently testified before the Inspector General that he had looked over the cases, but that I had not.

CONCLUSION.

The War Department has indeed undertaken to maintain this vicious system at all costs and by methods which reveal the weakness of both the system and the department.

Very truly, yours,

S. T. ANSELL.

Mr. ANSELL. Now, if the committee please, my first proposition was that our code of military justice—the Articles of War—is absolutely archaic, taken from the British military code of 1774, which was of even more ancient origin.

I have shown that that was true, of course, unless the Crowder revision of 1916 modernized it. I wish to say that was admitted as an argument for changing the code in 1916.

The Judge Advocate General, in proposing that revision, pointed out the fact that the code was the code of 1774, and even after the speech made by Senator Chamberlain in the Senate pointing out the archaic character of this code and the injustice done, had been made, the Judge Advocate General in an address in the city of Chicago, reported in the press, which he has frequently referred to since, is shown as saying that all that the American Bar Association's president, Mr. Page, and Senator Chamberlain and other people who were going after this system, said, was true, except for the revision of 1916 of which he was the author.

So I wish the committee would look at the character of the revision of 1916, which of course constitutes our present Articles of War, and compare the revision with the articles as they existed prior to the revision. That could be rather easily done, though it would be something of a task, by comparing them in the committee print of that year, or both years, 1912 and 1916. In one column you will find the Articles of War as they existed prior to the revision, and in the other column you will find the proposed revision; and I say

to you that you can not find a single substantial change; and I say to you that Gen. Crowder and the Secretary of War, then Mr. Stimson, did not contemplate a single substantial change. Such is clearly stated by Secretary Stimson, in his letter of April 18, 1912, to the Senate Committee on Military Affairs, in submitting the proposed legislation.

Mr. Stimson described the broad features of the project as a matter of such draftsmanship as would bring together all this disassociated material and make it accessible and easy of enforcement. He did ask for a new inferior court, which was a rather real improvement, as it took the place of two inferior courts of similar jurisdiction; and certainly, as he says, we undertook this revision in a conservative spirit.

Gen. Crowder in his letter to the Secretary of War of April 12, 1912, submitting his project for revision, describes the more important changes sought to be made as: "Those of arrangement and classification." And that revision did nothing but assemble and classify and render more definite the old articles. It is that kind of revision.

Senator CHAMBERLAIN. The only real reform in the articles of 1915 was that which admitted the creation of the disciplinary barracks where young men who had been convicted by court-martial might be restored to the colors.

Mr. ANSELL. Yes; of course there had been, in the year before, legislation by your committee that did that also.

Senator CHAMBERLAIN. Yes; it is very interesting, since you have brought up that subject, and the committee can understand just what respect the War Department paid to liberalizing legislation.

Mr. ANSELL. In 1878 the Congress of the United States, upon rather more thorough than usual consideration, passed an act authorizing the Secretary of War to restore men to the colors who had been dishonorably discharged, and I say to this the committee that up until the time I came to the War Department there had never been a single man restored to the colors of the army under that statute, which was then 40 years old—not one. And I wrote an opinion, soon after I got here, reviving that statute, resurrecting it; and that was one thing, Senator, that we did talk about, as you may remember, since you were intensely interested in such reformation.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. And that opinion, while Mr. Garrison was Secretary of War, was adopted after a great deal of study and after a great deal of opposition in the War Department; and then they thought that there was not machinery, and the proper appropriations, and all that sort of thing, and the barracks were still called a prison, and they came and finally got a redeclaration, a reenactment, of that act,changing the name of the prison and modernizing it, out of your committee in 1915, and it was reenacted in the Articles of War in 1916.

Senator CHAMBERLAIN. Yes.

Mr. ANSELL. It shows you that there sat the War Department all these 35 or 40 years with a statute that permitted the reclamation of these men, and not one of them had ever been restored to the colors.

Now I wish, without taking up the time of the committee, to insert in the record the results of a study made by me of just what Gen.

Crowder said, and I have taken it from the hearing, with respect to every one of these Articles of War, and I ask that that be inserted in the record of the hearings. It is taken briefly, but quoted from the hearings, beginning in 1912 and terminating in 1916, with respect to each article.

Senator CHAMBERLAIN. Stating its purpose, with respect to each article, and defining its purpose?

Mr. ANSELL. Yes, sir; exactly. If I may have permission to do that, I will turn this over to the stenographer, Mr. Chairman.

Senator LENROOT. Certainly.

(The matter referred to is here printed in full, as follows:)

ANSELL EXHIBIT A-2.

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The author of the project, discussing it before the committees, article by article, was quick to assure them upon every occasion that the project made no substantial change in the articles, which he truthfully traced to the British articles of 1774 and beyond.

The enacting clause: The enacting clause of the project, he said, defined those who are subject to military law by bringing together related provisions of the statute. He said:

"I invite your attention to the fact that we had to look at the enacting clause of the old law and then at article 64 of that law to ascertain who were subject to the articles and governed by them. An attempt has been made to remedy this in section 1342 on the first page and article 2 on the next page."

Article 1: "The first article is given over wholly to definition, and subdivisions (*a*) and (*b*) are a substantial repetition of the enacting law." The other changes "have been done for convenience in drafting subsequent articles to get certain descriptive terms that will avoid the necessity for repetition." (P. 24.)

Article 2: "We now come to article 2 of the revision. There has been such an enumeration here as will make it unnecessary if this code is enacted to look elsewhere to ascertain who are within the military jurisdiction. I have drawn into the domain of this article all the special legislation we have had on this subject of jurisdiction as to persons." (P. 24.)

Article 3: "Article 3 is simply declaratory of the three classes of courts." (P. 24.)

Article 4: "Article 4 will now claim your special attention, because it involves a radical change in the existing law." (The change authorizes Regular officers to sit on the trial of "other forces.") (P. 25.)

Article 5: "Article 5 places the number of officers on a court-martial within the discretion of the convening authority," where it was explained it had ever been by construction. The old article declared that a general court shall not consist of less than 13 when that number can be convened "without manifest injury to the service." In 1810 Attorney General Wirth held that a court was not a legal one if 13 could have been convened without manifest injury to the service. But the theory that the question of "manifest injury" is reviewable by the President or any superior authority ceased to be admissible by virtue of the decision of the Supreme Court in Martin *v.* Mott (12 Wheaton, 34). (P. 26.)

Article 6: "Article 6 provided a new court taking over the jurisdiction of regimental and garrison courts provided in the eighty-first and eighty-second articles of war." (P. 26.)

Article 7: "In article 7 the summary court is left as it was in the old law." (P. 27.)

Article 8: "I have included the President of the United States (as a convening authority) for the reason that notwithstanding he was the commander in chief of the Army, his authority to convene a general court-martial was denied in one case, or rather questioned because of the fact that the existing law provided that he could appoint only when certain other officers were the accusers. They said that that statute by necessary inference denied his right to act in other cases; but in the Judge Advocate General Swain litigation the Supreme Court of the United States held that the authority is inherent in the President as commander in chief, and that he could always convene a court-martial when necessary. Therefore I have inserted the term 'President of the

United States.' Now, when you come to the next—the commander of a territorial division or department—you are repealing existing law." (Pp. 27, 22.)

Article 9: "Article 9 refers to the new special court. While there is a good deal of underscoring in that line, it is simply a restatement of the old law." (P. 27.)

Article 10: "Article 10 is simply a restatement of the summary court act." (P. 27.)

Article 11: "Article 11 carries one change, and that is for the appointment of an Assistant Judge Advocate General and general court-martial." (P. 23.)

Article 12: "Article 12 is a new article. It simply declares the jurisdiction of the existing court-martial (now left to construction). I take it there is no impropriety in making that a matter of express provision." (P. 28.)

Article 13: "Article 13 deals with the jurisdiction of the new special court, and it is substatially identical to the old articles 81 and 82." (P. 28.)

Article 14: "Article 14 fixes the jurisdiction of a summary court-martial both as to persons and offenses and follows the language of the old law, except in one regard (a verbal one)." (P. 28.)

Article 15: "Article 15 was designed to give express recognition to the military commission in our service. The general said:

"'While the military commission has not been formerly authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. * * * there will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of war courts, and the question will arise whether Congress having vested jurisdiction by statute, the common law of war jurisdiction was not ousted. I wish to make it perfectly clear by the new article that in the subject case the jurisdiction of the war court is concurrent.'" (Pp. 28, 29.)

Article 16: "Article 16 repeats with only slight verbal changes the provision of article 79." (P. 29.)

Article 17: "We now come to article 17, which deals with the duties of the judge advocate. The underscored language in this article introduces a modification respecting the representation of the accused by counsel (the modification was to relieve the judge advocate of his duty to advise accused when the latter is represented by counsel). With respect to the right of the accused to employ counsel, the Judge Advocate General says:

"'The authority we have for the employment of counsel is given by an Army regulation which works satisfactorily, and in the experimental stage I would be glad to have it left, and there is no complaint from the service in that regard and the general objection to bringing into the statute the recognition of the practice of employing civil counsel.'" (P. 29.)

Article 18: "We now come to article 18 which deals with challenge. The new article is a departure from the old in but one regard—the Government is given the right of challenge, whereas the old article gave it to the accused only; but the article has been construed from time immemorial as making the right mutual. It is not desirable, however, that this important right should continue to rest upon construction. I have, therefore, made it a matter of express provision. With respect to allowing a few peremptory challenges, the general said: 'It would be an innovation and an unwise one.' The right of peremptory challenge which is common to our civil courts has never had a place in our military jurisprudence. This is a concession of the summary character of the military jurisdiction and is not the only instance where the fact is made manifest that a soldier, when he takes on the obligations of an enlistment contract, surrenders rights which he had as a civilian. Our military jurisprudence is based upon this fact which has constitutional recognition in that the Constitution excepts from the requirement that no person shall be held to answer for a capital or otherwise infamous crime except upon an indictment from grand jury cases which arise in the land and naval forces. It is likewise held that the constitutional right to be confronted by witnesses and to have a speedy public trial have relation to prosecutions before civil courts of criminal jurisdiction of the United States and do not apply to military courts. While we have extended by legislation many of these constitutional rights to an accused before a military court, this right to peremptory challenge has not been recognized, and I am inclined to think that its introduction would be fraught with grave consequences." (Pp. 30, 31.) The articles from 18 to 37 deal with procedure. None of these changes is fundamental.

Article 19: "New article 19 states the oath of members and judge advocate of the court-martial. There is no change from the old law except in one regard" (minor). "In article 19 the old law is repeated with one omission and one addition" (minor changes). (P. 32.)

Article 20: "Article 20 deals with the subject of continuances and repeats the provision of the existing law" (art. 93). (P. 33.)

Article 21: "In article 21 the word 'accused' is substituted for the word 'prisoner'—a mere verbal change." (P. 33.)

Article 22: "Article 22 is based upon section 1202, Revised Statutes, which was enacted in 1863. That section was in the nature of an article of war, and is properly transferred from the general body of statutes to the new code." (P. 33.)

Article 23: "Article 23 sets forth oaths of witnesses. This is the same as the old law except in one regard the words 'in case of affirmation the closing sentence of adjuration will be omitted,' have been added."

Article 24: "We now come to article 24, which is taken from the act of March 2, 1911, already referred to."

Article 25. "We now come to article 25, which relates to the admissibility of deposition. The existing article (91), which this article substitutes, provides that depositions of witnesses residing beyond the limits of the State, Territory, or District in which any military court may be ordered to sit, may be taken upon reasonable notice. I have preserved this provision, but have given the authority also to take depositions of witnesses residing beyond the 100-mile limit following in this record the Federal statutes."

Article 26: "Article 26 specifies the persons before whom depositions may be taken. The existing law contains no provisions of this character (and has left the subject to regulation)."

Article 27: "Article 27 deals with courts of inquiry. There is no substantial change from the old law." (Art. 121.)

Article 28: "Article 28 simply repeats the provisions of the old law."

Article 29: "Article 29, like article 28, is substantially the rule of evidence and substitutes that part of existing article 50 which is in its character administrative." (Note.—This is an extension of the definition of desertion.)

Article 30: "Article 30 is a new article and prescribes a form of oath for reporters and interpreters (left heretofore to regulation)."

Article 31: "We now come to article 31, which deals with closed sessions of the court. Inasmuch as existing law requires that the judge advocate be excluded, I have also excluded the assistant judge advocate. This is the only new provision."

Article 32: "Article 32, the order of voting, has already been called to your attention. There is no substantial change."

Article 33: "Article 33 deals with contempt. There is no substantial change."

Article 34: "Article 34 relates to the records of general courts-martial. This is a new article. It is nowhere expressly provided in the existing code that a general court-martial shall keep a record, but the statute refers to approving, forwarding, and preserving the court-martial record and therefore evidently contemplates that a record shall be kept. As a general court-martial is a court of general jurisdiction and tries crimes of the gravest character, it seems it should be important that there should be express provision of statute on the subject of the record to be kept. This matter has heretofore been governed by Army regulation."

Article 35: "Article 35 makes a similar provision respecting special and summary court-martial preserving the language of the old law relating to the summary courts."

Article 36: "Article 36 simply provides for the disposition of the records (heretofore governed, as you will notice, in the old article 113)."

Article 37: Not discussed.

Article 38: "I come now to articles which I think will claim the special attention of the committee. They are new. Article 38 deals with rules to be prescribed by the President, regulating the mode of proof and procedure of courts-martial. I have followed section 862, Revised Statutes, in drafting that article which provides that 'the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.' The President is our supreme court in trials by courts-martial, and I have undertaken to paraphrase that and give him the corresponding power in respect to courts-martial." (Note.—This is one of the three real innovations of the Crowder re-

vision. It is entirely reactionary. Therefore, courts-martial have been regarded as bound to apply the rules of evidence as they were recognized and applied by the civil criminal courts of the United States. This article authorizes the President to prescribe rules of evidence which has not been done and in the absence of which courts-martial and revising authorities have deemed themselves authorized to do largely as they pleased. It needs no argument to show that courts-martial try men for the most serious offenses with the most serious penal consequences and should be compelled to abide by the well-established rules of evidence.)

Article 39: "The next article is 39. It will be noticed that article 39 is based upon existing section 1025, Revised Statutes, and goes no further in granting immunity from error to courts-martial than the Congress of the United States has extended to those courts trying criminal cases. But that statute is now about to be amended and apparently the consideration given the new legislation shows substantial unanimity of opinion in its favor." (This is the second of the three innovations made by the Crowder revision. It should be remembered that up to this time there was no authority in the War Department to set aside or reverse or grant new trials, no matter how erroneous the judgment. The convening authority could approve or disapprove for any reason he saw fit. This has been considered as a limitation upon that power. Furthermore, as authorizing the finding of guilty upon a charge for an offense that was not charged, it provides solely for and constitutes an offense made punishable by the Articles of War. No article has given so much trouble as this during this war.

Article 40: "The next, article 40, is our statute of limitations, and it takes the place of article 103."

Article 41: "The purpose of article 41 is to extend to the Military Establishment by statute a substantial guarantee against double jeopardy. There is no change."

Article 42: "Article 42, which is existing article 98, is retained without substantial change."

Article 43: "Article 43 is a substitute for existing article 97, which is defective (in a minor way). We have been doing this by construction right along—but I have been apprehensive that some one would serve a writ of habeas corpus and would say that it was not authorized under the strict letter of the statute which permits confinement in a penitentiary only for offenses so punishable by a civil law. I want a definite rule in the law. I do not want to be taking the risk any longer."

Article 44: "Article 44 contains a charge which illustrates again this point to which I have just referred. (Note.—His reference was to writing in the law what construction alone had sanctioned. His statement was as follows:

"'As I have already pointed out, I hope the committee will give us a law sanctioning the meaning we have had to read into the old articles by construction alone. This is the real argument for this project of revision. I want to get off the uncertain ground where we have been for 106 years.'

"Note further: By this article there was crystallized into the law by statute for the first time the theory that a majority of the court-martial only was necessary to convict in the general case. When the committee called the Judge Advocate General with respect to the advisability of requiring unanimity in the case of death penalties, he said:

"'To require a unanimous vote for the infliction of the death penalty in time of war would be going a long way, I think, toward impairing the success of the field operations of an army.'

"And again:

"'I request that the committee consider very carefully the question of introducing into our military jurisprudence the principles of the civil law, which requires, in addition to these safeguards, a unanimous verdict.'

"But in the same connection, he said:

"'I am asking you further on in this revision to sanction trial by court-martial for murder in time of peace, committed by a person subject to military law outside the geographical limits of the United States and the District of Columbia; that is, in our foreign possessions. It is one of the more important provisions of this revision.'"

Article 45: "Article 45 is a revision of article 100 of the old code, and certain language has been omitted."

Article 46: "Article 46 is a repetition of the old law."

Articles 47 and 48: "Gentlemen, there is nothing in articles 47 or 48 which involves a substantial change of the old law. There is no change; it is simply rearrangement such as I ought to call to the attention of the committee. I have included rape among the offenses where the confirmation of the President is not required in time of war."

Article 49: "In article 49, I have incorporated new language (authorizing the commanding general to approve a proper sentence for a lesser included offense, when he thinks the larger offense is not proved). There is nothing further in the article which is not new."

Article 50: "Nor is there anything new in article 50, except in line 9, commencing with the last word 'for' to the word 'held' in the tenth line."

Article 51: "Article 51 is simply a repetition of the old law."

Article 52: "Article 52 has some new language taken from the existing regulations."

Article 53: "Article 53. The new article does not undertake any enumeration."

Article 54: "Article 54. You will notice in article 54 there is nothing new."

Article 55: "I have omitted from article 55 the (certain) phraseology."

Article 56: "There is no change in article 56."

Article 57: "We now come to article 57 for punishing deserters, to which I have already referred. The defect sought to be remedied is in old article 47 on the subject of desertion. The intention of the old article was undoubtedly to punish desertion in time of war differently from desertion in time of peace. You will notice the word 'shall' is misplaced in the second line so as to carry the construction that the article deals only with punishment in time of war. There is another defect which is corrected by the insertion of the words 'when under orders for active service when war is imminent.' A war might be imminent and we might send orders to the 15th Cavalry at Fort Myer to be ready to march, and a desertion committed after receipt of such an order would be just as harmful as one occurring after the war had been declared. I have worked those two ideas into the new article."

Article 58: "Article 58 is the same as the old law, but I have made the phraseology a little clearer."

Article 59: "Article 59 is simply a repetition of so much of existing article 50 as was punitive in character."

Article 60: "In article 60 I have combined six articles of existing code into one short article."

In Gen. Crowder's introduction to the punitive articles he contended strongly for a retention of the authority that courts-martial may punish all offenses denounced therein at their discretion, and said:

"This principle of punishing at discretion is old in military codes and it is observed in the British code to-day. It is what is distinctive of the military code of to-day. I think that the service would feel very handicapped if that discretion were limited in the way it is in the civil codes. I do not think there is anything more vital in this legislation than the preservation of the principle of punishment at the discretion of a court-martial restricted only, as I have stated, as to the imposition of death sentences, penitentiary confinement, and in time of peace as the President may prescribe in orders issued under the authority of the legislation of 1890. It would be a radical departure if that principle should be impaired in this revision. As I have pointed out, it is a principle that characterizes the military code as distinguished from the civil code and characterizes the code of England as well as of this country. It is a fact that the British code does not undertake to limit the discretion of courts-martial in the assessing of punishment, except in a very limited way. I do not think that the discretion of the court-martial should be further restricted."

"Mr. SLAYDEN. You do not think it would be wise to define the offense and fix the maximum and minimum in the statutes?

"Gen. CROWDER. No, sir."

Article 61: "Article 61 extends the authorities against whom contemptuous language may be used punishable by these articles to include the Secretary of War."

Article 62: "The next article 62 is a related article. It treats of disrespect toward superior officers, and the only change is from the word 'commanding' in the old article, in the left-hand column, to the word 'superior' in the new article." (Note this is a very large extension of a punitive article, and subjects to its penalties disrespect to any superior officer whether he is a commanding officer or not.)

Article 63: "I have inserted the word 'willfully' to conform to the accepted construction of the present article."

Article 64: "Article 64 is new and is introduced into the code in order to emphasize in a separate provision the necessity of obedience to and proper deportment toward a noncommissioned officer in the execution of his office. This is carrying out the policy which has been favored by the military authorities for some time, namely, to instill into the soldier in the ranks a high respect for his noncommissioned officer." (Note.—This was formerly punishable under the general article, old 62.)

Article 65: "We now come to the offenses of mutiny and sedition, punished by article 65, which is practically the existing article. There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised."

Article 66: "The only new language in article 66 is the phrase 'and having reason to believe,' the insertion of which would seem to require no explanation."

Article 67: "There is no substantial change from existing article 24."

Article 68. "Article 68 is a restatement of the existing law with additions necessitated by the fact that the existing law was lacking in comprehensiveness and defective in the regards which I will now indicate. (Indicating the accepted construction.)"

Article 69: "New article 69 relates to investigation of and action upon changes and substitutes—articles 70, 71, and 93."

Article 70: "The next article (art. 70) carries no change in the existing law, which is article 67 of the present code, except to give that article what it lacks in the existing code, namely, a penal sanction."

Article 71: "Article 71 is existing article 68 without substantial change."

Article 72: "New article 72 is existing article 69, and no substantial change has been made."

Article 73: "We now come to new article 73, which is rather an important one. It is a substitute for existing article 59. (After stating the changes, he concluded:)

"'This is a matter of construction under the existing article, and I have deemed it best to make it a matter of express provision and let the military trial proceed unterrupted by the demand.'

"In examination it was reiterated that the changes were in the nature of expressions of existing construction."

Article 74: "Article 74 is a consolidation of articles 41 and 42. I believe there is nothing in particular to call attention to in that article."

Article 75: "Article 75 has some new language. The existing article says 'any garrison, fortress, or post.' I have added 'camp, guard, or other command,' giving the article broader applications. In other respects the article remains unchanged."

Article 76: "You will notice a change has been made there to distinguish between war and peace."

Article 77: "The only change in that is to substitute for 'whatsoever belonging to the Army of the United States' the words 'any person subject to military law.'"

Article 78: "Article 78 deals with captured property, but without penal sanction, which is here supplied."

Article 79: "This is an attempt to make the Articles of War out of section 5313, Revised Statutes."

Article 80: "The same may be said of article 80. That is section 5306, Revised Statutes, which was in the nature of the Articles of War and is transferred to the new articles."

Article 81: "Article 81 is a combination of existing articles 45 and 46, without substantial change."

Article 82. "Article 82 is section 1343 of the Revised Statutes, incorporated without any change whatever."

Article 83: "Article 83 substitutes article 15 of the existing code."

Article 84: "Article 84 is a combination of articles 16 and 17 of the existing code. I have made no change in it, but I desire to ask the committee to make a change. The words 'to him' in the sixth line ought to be omitted to cover the situation."

Article 85: "In the next article 85 there is an important change. (The change was from mandatory to a discretionary sentence of dismissal.) I have also suggested a change to distinguish between drunkenness in time of war

and in time of peace. I do not think there can be any question about the advisability of these changes."

Article 86: "Making a like distinction between peace and war sentences."

Articles 87 and 88: "Articles 87 and 88 on the next page may well be considered together. They came down to us from the ancient codes, and were useful in the days when armies were without the trained and efficient commissariat of the modern army. The articles are not without their use to-day." (The penalty was broadened.)

Article 88: "Article 88, you will observe, is a related provision. It comes to us from the code of Gustavus Adolphus (1621), and had a place in all the early British codes. I have stricken out the words 'foreign parts,' and I have omitted the death penalty."

Article 89: "Article 89 is a partial substitute for existing articles 54 and 55. It preserves the punitive part of these articles. The administrative part is transferred to new article 105, to which I will later call your attention."

Articles 90 and 91: "Articles 90 and 91 are related articles and are substantially articles 25, 26, 27, and 28 of the existing code."

Article 92: "This is a rewriting of old article 58 so as to extend the jurisdiction of military courts over murder and rape outside of the geographical limits of the Union."

Article 93: "Article 93 is a substitute for article 62 of the existing code, but not a complete substitute."

Article 94: "Now we come to article 94, which was taken from the Revised Statutes and made an article of war in the revision of 1874. New article 94 is existing article 60 with absolutely no change except the phrase, 'Any person in the military service of the United States' is made to read in the new article 'Any person subject to military law.'"

Article 95: "That takes us to article 95. There is a very slight change in article 95."

Article 96: "I have taken some liberties with article 96, which is our old article or existing article 62. * * * I have changed the order of statement so as to make it absolutely certain that the phrase appearing in the existing sixty-second article of war, namely, 'to the prejudice of good order and military discipline,' does not qualify the phrase 'all crimes not capital' by only 'disorders and neglects.'"

Articles 97 to 103: "The next chapter relates to courts of inquiry. So very few changes are made in the articles under the subject of 'Courts of inquiry' that I think we can pass over them rather quickly."

Article 97: "You will notice in the first article (97) under that heading that I have omitted certain language much for the same reason that we have asked to have omitted the preachment in the article about dueling."

Article 98: "The next (98) relates to the composition of courts of inquiry. The old article said that the court should consist of one or more officers, not exceeding three. There has been but one instance in the history of our Army when we convened a court of one officer. There has always been the maximum, and our most important courts of inquiry have been convened under special legislation authorizing five or seven, or whatever number of members was deemed appropriate."

Article 99: "The next article is a new article (99). I have made what was a matter of construction (challenge) a matter of expressed grant."

Article 100: "The oath of members is preserved in the form in which it appears in the existing articles. Of course, I have added that formal conclusion in case of affirmation."

Article 101: "Powers and procedure of courts of inquiry" is the existing law, with the obligation written into it that the reporter and interpreter shall take the oath of a reporter and interpreter for a court-martial, formerly left to regulation.

Article 102: "This article is old article 119 without change."

Article 104: "Article 104 is a new article. I have undertaken and written into a new article the provisions of the existing regulations on this subject which have stood the test of experience."

Article 105: "We dealt with article 54 of the existing code at Saturday's hearing. A part of it, namely, that part that was administrative, was left unprovided for, and I then notified the committee that it had been made the subject of a special article (105)."

Article 106: "Article 106 is an attempt to make an article of war out of the act of June 18, 1898, section 6, giving authority to civil officers to arrest deserters.

There is no change in article 106 except that I have introduced the words 'a possession of the United States' to cover civil officers in the Philippines or Porto Rico who may arrest deserters."

Article 107: "I have attempted to combine the various legislative provisions into a new article."

Article 108: "I have taken those three statutes—they are widely scattered provisions—and combined them into an article of war which states the manner in which a soldier may leave the service. I think I have them accurately stated in the new article."

Articles 109 and 110: "Not discussed, but made no substantial change."

Article 111: "Article 111 is a repetition of article 114."

Article 112: "Article 112 substitutes article 125, article 126, and article 127 of the old code and adds much new matter. It is a matter of probate jurisdiction."

Article 113: "Article 113 is a new article and deals with inquest."

Article 114: "Article 114 extends the authority to administer oaths to the president of a general or special court-martial, the president of a court of inquiry, of a military board, or any officer designated to take a deposition."

Article 115: "New article 115 makes such assistant judge advocate competent to perform in substitution of the regular judge advocates the duties of the latter."

Article 116: "I have taken that legislation and built an article of war upon it."

Article 117: "Article 117 is simply a reenactment of article 99 and two acts of Congress."

Articles 118 and 119: "Article 118 has to do with relative rank and 119 with authority of command when different corps or commands happen to join together, and have no relation to military justice."

Mr. ANSELL. Now, here is rather high evidence with respect to this Crowder revision, coming finally and at the end of the hearings, out of the mouth of the Judge Advocate General himself. He says:

If Congress enacts this revision, the service will not be cognizant of any material changes in proceduce, and the courts will function much the same as heretofore. The revision will make certain a great deal that has been read into the existing code by construction.

I say nobody, neither the Judge Advocate General, the Secretary of War, nor the committees of Congress, ever regarded this project as a real revision, a substantial revision, and certainly not such a revision as to change the whole theory upon which the articles proceeded, and they took occasion to assure the committee every moment, as though the committee did not want any revision, that there was not any real revision here.

When we come to talk about the head of the bureau of military justice and revisions that he has proposed, and remedies that he is proposing, it is well enough to examine the attitude of this official as evidenced by his official acts toward the liberalization of this code. He and I are just like this [indicating] on this subject. He says that the code is great and I say it is rotten. Now, one or the other of us is right and one or the other of us is wrong.

Now, let us just see if we can appreciate the state of mind with which this very high and able official approaches this subject. First, he argued before your committee every time there was a liberalization suggested—as, of course, there was bound to be by members of the committee. One, I remember, suggested that there should be peremptory challenges, because the Army community was such that there must be these prejudices, ill defined, of course, such that a challenge for cause would not lie, and that challenges should be peremptory. But Gen. Crowder said with respect to that, "I think it would be very harmful, indeed, for this committee to undertake to

modify these Articles of War by injecting into them any of these civil protections."

When a member of the committee suggested that the rights of counsel ought to be declared by statute, Gen. Crowder said, "We have it in our regulations now; it is working out now pretty well the way we have got it; let the commanding officer do as he pleases"; and again he says, "I must warn you to be careful about injecting into this system these civil principles that give you counsel, and protection at every stage of the proceeding, because it will disturb discipline." He said that on pages 18, 20, 29, 30, 44, and 48 of the hearings, and repeated it time and time again. "If there is one thing we must not have in the Military Establishment it is an appellate tribunal." He said:

In a military code there can be no provision for a court of appeal. Military justice and the purpose which it is expected to subserve will not permit of the vexatious delays incident to the establishment of an appellate procedure. However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be, in addition, the confirmation of the President.

The latter statement is not accurate. It is only in cases of certain sentences of death and dismissal that the President must confirm. Gen. Crowder wanted no appellate procedure. And, mark you, you speak to any Regular Army officer to-day, colonel, major, or what not, and ask him "What do you think about this court of appeals?" "Oh, it is perfectly splendid in theory, but it will destroy discipline." "Why?" "Time consumed." Time consumed! We have consumed, Mr. Chairman, I say conservatively five times more time with this futile and unauthoritative review that we make, and arguing back and forth with commanding generals, arguing because we have no authority, than we would have consumed if we had had a set of judges up there independent of military authority, speaking with authority as to law. And then, "time consumed." I invite your attention to this formal statement made in 1916 by the Judge Advocate General of the Army to the committee over which Senator Chamberlain then presided as chairman, a long argument of three closely typewritten pages as to the distinctions growing out of the necessity of the military service being such that you could not govern these trials by legal principles; and he quotes Gen. Sherman. And if he had only quoted all of Gen. Sherman I would not have minded, because that stern old soldier, in addressing the graduating class, when he was commander of the Army in 1882, at West Point, subsequent to the time of the quotation extracted from his works and placed in here by Gen. Crowder, said this. Senator Harrison had spoken to the graduating class that day, and he was an able man with long public experience, and he had deplored the uncertainty of justice in courts-martial, and the fact that they were such that the public did not have confidence in them, and he said "We are swamped here at this late day (1882)—the Congress is swamped—by efforts to get men back into the service when the public, at least, are convinced that they ought not to have been put out of the service."

Of course everybody remembers the historic case of Fitz-John Porter in which as great a commander as Gen. Grant made up his mind inflexibly one way; and it was not until Gen. Grant came down almost to the very day of his death that he would actually listen to the other side; and when he did loosen up his mind, and had ceased to be impervious, he all at once said, "I have done this man one of the grossest injustices, and I will devote the rest of my life to the correction of it." And he did; although the court-martial, of course, was a tragic mistake. After Senator Harrison had gotten through with his address to the graduating cadets, Gen. Sherman, none too liberal, rose and said this:

Now, as to the court-martial question alluded to by Senator Harrison in referring to the appeals to him. It must be remembered that a court-martial must consist of thirteen members and its findings be approved by the President.

They are swamped just as you gentlemen will be swamped, 1, 5, 10, or 50 years hence, unless you do something now, as I believe we ought to do something to revise for errors of law in courts-martial that have been had during this war.

Senator CHAMBERLAIN. The Senate has been revising those by remedial legislation every day during the war.

Mr. ANSELL. Yes; but you know what it means to get a case through Congress; counsel, and toil, and a long struggle. I am not criticizing Congress.

Senator CHAMBERLAIN. Yes; of course you are right.

Mr. ANSELL. You see what Gen. Sherman said. And do you observe that even Gen. Sherman did not understand the court-martial system, as the Secretary of War to-day does not understand it? He does not know where the President comes in. His statement shows that he does not. Gen. Wood got up here before this Bar Association Committee and also wrote an article in the Metropolitan predicated upon his belief that there was a revision of every court-martial case by the President and that every court-martial case also came to him as Chief of Staff. He had been Chief of Staff for more than four long years, and of course he had not seen but one case in a great number. This shows you the extent of the appreciation that the ultra-military man has for the administration of justice. Now, to cease the interjection and go on. [Reading:]

I am quite willing to see a court of appeals on courts-martial established. It would settle a great many vexed questions and give a legitimate channel for subsequent operations instead of those who make the laws being told the findings are all wrong by some fellow working up his own case on ex parte statements.—Gen. Sherman's remarks to graduating class at West Point, June 12, 1882 (New York Herald).

Now, I must admit that the old general there was speaking probably as much from the viewpoint of expediency as principle. He was, however, in favor of a court of military appeals, that stern old Roman was, here at the close of his life. He had seen so many miscues and knew that the Congress was so much importuned.

Now, here is a most complete argument to the Army idea that court-martial proceedings and their conclusion and execution must be summary, or else the discipline of the Army will perish, made by that most distinguished officer whom the present Judge Advocate General so frequently refers to, Gen. Fry, the Provost Marshal Gen-

eral of the Union Army during the Civil War. Gen. Fry, student of military affairs as he ever was, writing long after the Civil War, in the eighties, saw that a great number of officers were being restored, not so much because a man could say that they were guilty or not guilty, but because of the uncertainty and distrust of what had been done during that war, though it was not one-hundredth part as bad as what has been done in this war. I would like to put in this record this article, because it is rather difficult to find. It is an article on a military court of appeals, written by Gen. Fry in the eighties.

Senator LENROOT. Very well; it may be inserted.

Mr. ANSELL. But I want to call your attention to the one fact that this article smothers, as you would suppose it would if it were well written—the argument that we must have this expedition and summariness if we would get the effect of discipline. Quickness is not the only thing we want. I think we want certainty of results first and then quickness. To be sure, nobody wants a system of appeal after appeal, and delay after delay because of technicalities. Nobody wants that, but that is not inherent in the idea that we need to have a review, because we have a review now which while no good is time-consuming and not authoritative.

(The article referred to, found at page 182 of "Military Miscellanies," by James B. Fry, retired Assistant Adjutant General, United States Army, is here printed in part in the record as follows:)

A MILITARY COURT OF APPEALS.

Col. Lieber, judge advocate, is one of the best authorities on military law. He holds that military obedience "can only be enforced by prompt punishment; that the recognition of this has led to a departure from the ordinary forms of trial, and to the building up of a new system for the very purpose of having one sufficiently summary in its nature; that in carrying out this object a common law, military, has grown up of necessity, to a large extent, at variance with the common law, civil," etc.; that "military law is founded upon the idea of a departure from the civil law and should not become a sacrifice to principles of civil jurisprudence at variance with its object"; that "the fundamental principle of a code of military punishments is the enforcement of prompt obedience by prompt punishment," and he adds: "Because we have made progress in the amelioration of punishment, we must not, however, jump to the conclusion that this includes delay in its execution * * *. The admission of new features favoring delay is inconsistent with the object," etc.

These propositions admit of some explanation or qualification. They do not justify the conclusion that the efficacy of military punishment depends on its promptness alone. The claim in favor of promptness is, of course, based on the assumption that the finding is correct. The proceedings of courts-martial should be sound as well as summary. Inasmuch as the military is a more arbitrary and despotic system than the civil, so is uniform and even-handed justice the more necessary in it.

The claim in favor of prompt punishment is a claim for prompt proceedings and true findings. The amelioration of punishment is due to progress in enlightenment. Promptness in military punishment is a feature designed to increase the exemplary effect by adding to the terror of the infliction. But in the Army, as well as out of it, government through terror is gradually yielding to the control of a higher sense of justice. Promptness must now submit to all the delay which legally constituted authority finds necessary to the ascertainment of truth according to the highest lights of the time. It is not so important that the punishment be prompt as that it be inevitable. That, nowadays can not be, until guilt is clearly established. The practical question, therefore, is, What shall be the procedure to attain this end? Col. Lieber says: "Military law, like other sciences, is progressive. It is not a

stagnant pool. But it has, by virtue of its nature, been to a large extent progressive within its own sphere independently of others."

The science of military law is progressive, and so is the science of civil law in a greater degree and in a larger field. If progress in the science of civil law has brought to light principles or modes of procedure which are essential to the ascertainment of truth, they could not be "at variance with the objects of the military code," and they ought to be applied to it. Any lack of promptness in punishment which might result would be outweighed by the increased chance of certainty of just punishment.

It is probably in deference to a deeply-seated conviction that all available means of ascertaining truth are not invariably resorted to by courts-martial—that their findings and sentences are so often interfered with by the legislative and executive branches of our Government. The President and Congress are the only sources of appeal in such cases. They often receive evidence which satisfies them that the findings of courts-martial are not just. The fact that the proceedings were summary and the punishment prompt, is usually a point in favor of the complainant, and thus, promptness—on the presumption that it has interfered with justice—tends to defeat the good effect which it is designed to secure. The certainty of punishment is overthrown by doubts which might be forestalled by less promptness. Cases are reopened which were supposed to be closed, and are retried by tribunals without legal power and without judicial modes of procedure. This is probably more injurious to the Service than less promptness and unquestionable judicial proceedings would be.

During the past eighteen months, bills or resolutions have been introduced in the United States Senate or House for the restoration of about 36 officers of the Army who have been dismissed by sentences of courts-martial. There are now on the rolls of the Army eight officers who were dismissed by sentences of courts-martial, and after remaining out of service for some time, were re-instated by special acts of Congress, and eight similarly dismissed, who were reinstated or reappointed by the President. These facts suggest the inquiry: Is not the progress of military law kept rather too closely "within its own sphere" for our Republic, by continuing to regard our ordinary courts-martial as courts of final jurisdiction in cases of sentences to death, or dismissal of officers? Could we introduce to advantage a Supreme Court-martial with final jurisdiction in such cases, by appeal from lower tribunals of military justice?

Congress can "raise and support armies," and "make rules for the government of the land and naval forces."

Courts-martial are what Congress chooses to make them under this provision of the Constitution. At present they are regarded as courts of final jurisdiction, but they are not so in fact. Appeals from them are entertained, as already stated, both by the executive and legislative branches and by both are their findings set aside. Not only this, but after courts-martial have been dissolved, new tribunals (as in the Hammond and Fitz-John Porter cases) have been constituted, for the purpose of rehearing questions long before setled by defunct courts. In the light of these facts the question is repeated, would it be wise and practical for the law-making power to create a Military Court of Appeal and final jurisdiction in the cases which the Articles of War now require shall go before the President for confirmation?

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It is true that the power of Congress and the President's pardoning power would exist with a military court of appeal, just as they do without it, but the temptation and the opportunity to exercise these powers would be materially reduced. Moreover, the rights of the accused must be fully weighed. The sentences of dismissal awarded by courts-martial are sometimes wrong. While the President's pardoning power or an act of Congress may prevent some of the consequences of the wrong, neither the President nor Congress can proceed judicially in ascertaining the truth, nor can they rectify the wrong. That could only be done fully on ascertainment of truth through a judicial tribunal, created and empowered for such cases. Do we need one?

The sentence of dismissal (with which we are dealing, as the matter of practical importance) is blasting in its consequences. It involves loss of profession, loss of pay, and loss of reputation. The same "rude tribunal" which has had final jurisdiction of it for centuries, has it still. Yet, as we are told and admit, "Military law is not a stagnant pool. Within its own sphere it is progressive." Will that progress justify the establishment of a military court of

appeal as a remedy for the evils which have been indicated? Would the remedy be worse than the disease? Military punishment should be prompt, but it must be just. Taking things as they are in our service would delay in final action in cases of dismissal be increased or reduced, by having a court of appeal, with all the finality of jurisdiction that law could confer upon it? Neither the legislative nor the executive branch of the Government is disposed to violate its trust in the action of which we hear so much complaint concerning dismissals. They merely grope for justice, which such a tribunal as that under consideration might make so clear as to prevent their interference, or at least so probable as to give them good grounds for declining to interfere.

Mr. ANSELL. My point 3 is that this code is an anachronism that came to us out of a system of government and out of an age that we have long since turned our backs on. Why, this system came to us from the time when the armies were the result of a press gang; that is the truth; when the people had no affection for the Army; when naturally they had a hate for it; when the army was the army of the king.

Just look at the old articles of 1774, which are equally the articles of Gustavus Adolphus, which John Adams says were the original Latin articles—Roman articles—of war. I can not find the original Latin articles. Are you going to take any system out of Europe of the seventeenth century? Not much. And especially military systems, press gangs, or hired men surrounding the king to prosecute his little wars in Europe against the desires of the people?

Compare those articles with the present articles, and see: King-legislator; king-judge; king-executive. King says who shall be tried; king says whether he will have counsel or not (and usually none, of course); king or king's officer says who shall constitute the courts; king tells them when to meet, and when to stop, and rules on everything that comes up in front of them. And then when they get through the king says "I will approve or disapprove of what you have done, and if I disapprove, you will do it all over again." That is exactly what these articles of war provide, except for three or four of them. Congress prescribes that the court shall take an oath, for instance; but that very oath itself does not say that you shall try according to the law. No; "You will try largely according to the facts and to the customs of war as you understand them in like cases." Customs of war! The unwritten law military, which takes you back to our friend Gustavus Adolphus, also to the system that was made for an army of that day.

Not being a military people, we have not maintained large armies except in an emergency, and we have not gone to the people to get them, except in an emergency, and then we get rid of them as soon as we can. So that armies do not come from the people in English-speaking nations except in cases of these great modern emergencies, and if you are going to have a system of law that fits these armies coming from the people, you are certainly not going to find it in that system of law that governed this king's establishment hundreds of years ago. And yet, between our article, and the king's, the counterpart is complete. Our commanding officer, just as the king does, convenes the court, passes upon the legality of the charges—the legality such as it is—and the competence of the members to sit; and then every single case that can arise, every question that can arise in criminal procedure, he decides; and then he approves or disap-

proves what they do, and if he disapproves he makes them do it over again.

That is no court. I believe the pithiest statement of what we may describe as the irreconcilable difference between what Mr. Baker approves and the views I adhere to is to be found in an editorial in the New York Evening Tribune of the early part of this week. Discussing this Kernan report it is obvious that they misapprehend the issue, because of the fact that they do not understand the kind of Army that we are bound to have from now on, if we have any from now on—an Army of citizens. Even if we go back to the old military establishment, still the idea is becoming established that a man is a citizen even though a soldier and his soldiership is but an incident of his citizenship, and the tendency should be to give him the protection of a citizen to the utmost possible extent while he is performing this duty incident to citizenship. He is not a mercenary owing this personal obligation to a king or to a president or to some army officer.

Senator LENROOT. May I ask you, General, has any case come to your knowledge where, a commanding officer having disapproved the verdict of a court-martial, there has been a new trial of the case?

Mr. ANSELL. Disapproved? There is a kind of a new trial, according to Gen. Crowder's statistics, which I accept as true, and I believe they are true; not a new trial, but a reconsideration.

Senator LENROOT. I did not mean that. I meant where there was an actual new trial with new evidence taken.

Mr. ANSELL. Yes; we have had a few of those cases, where the War Department has held that the court was absolutely without jurisdiction. But we have had some during this war, probably at my instance, whether I was right or wrong, and I was willing to stand the test of a civil court. There was the case from Rockford, Ill., that I referred to the other day. You see there, Senator, a most flagrant case. Somebody had ravished this girl, and the court said these 17 men did it, with no trial worthy the name. Now, no man on his conscience and his oath of office, no man who appreciated his profession, could ever pass such a record as that; though, strange to say, officers of the Regular Army tried to prevail on me to select 5 men out of those 17, and recommend that they hang. They said that they thought really those 5 were guilty, anyway. Never mind the other 12, but hang those 5 in order that the law might be vindicated. They said that was rough-and-ready justice. But could you not see, Senator, that no responsible man could let that record stand and hang those 17 men when he knew that they had not had a fair trial; and yet no man appreciative of the responsibility could turn them loose, because some of them, or somebody, at the time and place alleged, had committed this most grievous offense. As I say, I worked that case as far as I fairly could under the theory that by rushing them to trial and otherwise depriving them of the assistance of counsel the court lost jurisdiction. It was not a trial at all. If, of course, it was not a trial at all, the judgment was not a judgment at all; and should it be so held you could have another trial without its being a new trial. It would have been a trial in the first instance.

But, I also said that I believed if we had the power to review at all, we had the power to reverse the judgment and allow a new trial.

Senator CHAMBERLAIN. Did they have a new trial?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. How many were convicted?

Mr. ANSELL. Some were convicted and some were acquitted. That is the point. I have no doubt that the new trial was a fair trial. I selected ex-Gov. McGovern, and two other distinguished lawyers to help him, and we saw those negro soldiers got the best of counsel, and they had the most thorough trial. Some of them have been convicted and some of them acquitted.

Senator CHAMBERLAIN. But all of them would have been convicted?

Mr. ANSELL. All of them were convicted and they would have been hanged by this time.

Senator CHAMBERLAIN. You did not answer succinctly the question of the chairman. There have been cases where the commanding general did not approve the sentence of the court-martial, and there was a retrial or a rehearing or something, and as a result of it a party who had been acquitted in the first trial was convicted on the second?

Mr. ANSELL. Yes; but of course in those cases he never put the word "approved" on the judgment.

Senator CHAMBERLAIN. What did he do?

Mr. ANSELL. He said, "I do not approve of what you did, and I send it back for your reconsideration, and these are my instructions."

Senator CHAMBERLAIN. Practically he determined the case?

Mr. ANSELL. Why, that is the whole situation. The commanding general's control over the court is such that even upon an acquittal the commanding general or the convening authority can order the court to reconsider, subject to his instructions; and that came up in the bill that Gen. Crowder and the Secretary of War submitted to your committee for this revisory power. They were going to give this revisory power to the President and also give him this same power to reverse an acquittal and direct that the case be tried over again.

Senator LENROOT. The reason I asked that question is that it has been stated there had never been a new trial for prejudicial error where that error did not go to the jurisdiction.

Mr. ANSELL. I tried to explain that we worked—or at least I worked—in a case of this sort to correct what ordinarily would be called, perhaps, in a civil court, simply reversible error, into jurisdictional error.

Senator CHAMBERLAIN. The point is that you did, in endeavoring to get a new trial, endeavor to show a want of jurisdiction?

Mr. ANSELL. Yes; I endeavored to get under the cover of jurisdictional error as a safeguard if the writ of habeas corpus should be sued out. But I want to say that the most distinguished lawyers in my department agree that there is a statute, if the War Department would properly construe it, to reverse the judgment and order a new trial.

Senator CHAMBERLAIN. That is under the power of revision?

Mr. ANSELL. Yes. That was the view of Col. Rumbaugh, professor of constitutional law at Harvard; Prof. Morgan, professor of law at Yale; and a dozen of the best lawyers, all men of long, practical legal experience. The War Department took the other view. But I think it ought to be stated that from the time of Judge Holt's régime up until the time of this war there had been no retrials or new trials except in the case where clearly there was a lack of jurisdiction in the composition of the court or in the capacity of a court to pass upon this kind of case. So, here is what happened, I might say, Mr. Chairman: Even after we started up this review during this war, and we advised the commanding general to disapprove of the judgment which he had approved subject to this review, see what the effect was. It always turned the man loose. The general could disapprove of the judgment of a court-martial, but he could not order a new trial. Therefore, the reversal turned him loose.

I say that this code is in sharp conflict with the principles of government which, in my judgment, our Constitution evidently contemplated should apply to our Army. The Constitution of the United States provides that Congress shall make rules and regulations for the discipline of the Army. It is not conceivable to me that the framers of that historic document intended that the Congress should adopt this monarchical theory in toto, substituting the Presidents and commanding generals for kings and kings' subordinates.

The theory has been all along that this system was so absolute and detached from the Constitution that it was not subject to any legal principles, those found in the Bill of Rights or elsewhere; that every right that a man had on a trial before a court-martial came by reason of the statutory grant, and that in the absence of statutory grant, of course the power of military command could do as it pleased.

It was on this theory—this early theory—that in 1806 the Congress of the United States, accepting it, wrote into the code the inhibition against double trial; and so the Government, really accepting the War Department's views, proceeded until 1906.

Senator CHAMBERLAIN. 1906?

Mr. ANSELL. Yes; and I refer this committee, because it is composed of lawyers, to the Grafton case, which I have adverted to. It is a landmark in the military law. The Grafton case holds that the protection against double jeopardy a man gets when tried by court-martial comes not from statute but from the Bill of Rights of our Constitution. I believe that if the officers of the War Department had studied that case, had determined what it actually decided, and had acted accordingly, we would have had a different situation during this war. A fair trial. A man can not have been tried fairly if he has been tried a second time, and he can not have been tried fairly if he did not have witnesses, or if he did not have counsel for his defense. He can not have been tried fairly unless there is somebody he can address his legal objections to. Yet the War Department says that if Congress is silent on these matters or does not clearly inhibit, it simply authorizes the power of military command to do precisely as it pleases.

Let us take the punitive articles of the present Articles of War. There are 41 of them. Now, one would naturally think that inas-

much as this is a penal code, and inasmuch as Congress has been endowed by the Constitution to make the rules of discipline of the Army, where Congress says a man shall be tried, Congress should say what he shall be tried for, and Congress should prescribe within reasonable limits the penalties. I ask the committee to look at these 41 punitive articles, the very gist of the code. Twenty-seven of them terminate this way, "Whosoever violates this article of war shall be punished as a court-martial may direct." Eleven of them say, "Whosoever shall violate this article shall be punished by death, or as a court-martial may direct." Two of them make death mandatory. Not one of them describes or defines the offenses.

Is it any wonder that we have had an actual case of felonious homicide punished with only three days' confinement and another felonious homicide punished with death? And we have had trivial cases of absence without leave punished with sentences of 99 years' confinement.

The court has been authorized by the Congress of the United States to do just as it pleases. We talk about the great variations of punishment. How, in heaven's name, can we expect anything like a fair and reasonable uniformity of punishment when the code itself tells courts-martial "Punish these offenses as you please, any way you think is right"?

Now I, for one, am not going to deceive myself with all this talk about "Well, the court did the best it could." I assume it. I do not hold much of a brief for them, but they probably did just what any other set of men would have done if they were told to do arbitrarily as they pleased and there was no check on them.

But I say there ought to be a check. Now, Col. Wigmore in his most remarkable document here—he is a sort of a new-thought man in the legal world, notwithstanding his work on evidence—says, and a North Carolina friend of mine wrote me yesterday saying, "Ansell, this court-martial system is far superior to anything we have got in the civil administration of justice." Of course, there are men in this country who believed that the German system was superior to our form of government, that the British system of government is superior to ours and the French system. They just disagree about premises. There is in such a case no use continuing the argument.

Col. Wigmore has done a lot in that direction. He is a teacher, a new-thought man in regard to the Constitution and everything else. To such men the Constitution does not mean very much. To them it seems to have been the result of a long course of foolish thought by our people. It does not mean very much to these new-type scientific lawyers. They look at the logic of the situation and resolve everything in the forum of pure reason, not of human experience. If you told them that you were going to start a new government in the South Sea Islands somewhere, they would write a most wonderful constitution for you, but I doubt very much if anybody would ever see it work. The rules of evidence are not much to them; the Constitution is not much to them; and naturally "this military system we have got is far superior," because, I suppose, it is so different. That is what they say in this defense here; what this letter from that friend of mine said yesterday. It would be a great thing, then, to change all this civil system and supersede our safeguards by some

Army officers going around applying this very effective military system. To my mind, the absurdity of the whole proposition is shown when men have such a mental attitude that they can put up an argument like that, when they say that the Constitution of the United States and its principles do but little more than save a few criminals from just punishment. They are men who are always criticizing our courts. Our courts ought to be criticized; they are not above it. But, nevertheless, they should be critiicized for the administration rather than for the principles of the system.

I want to make this point rather especially: Our Articles of War are based on the king theory. Congress has taken the reins that the king held and then turned them over to those military gentlemen who have succeeded to the king's authority here, and said, "Now, you drive as you please." Any officer of the Army can put any charge against an enlisted man. Their defense says that that is a wonderful thing; that it is nothing but an adaptation of the new American method of prosecution by information to the Army; that we were ahead of the civil system on that, and that the civil copied that from the military system. That would be like saying that all Senators could prosecute all people at will, or that all Congressmen could prosecute all people at will, or that all preachers could prosecute all people at will; that all of the upper ten could prosecute at will; that every farmer could prosecute his hired men at will. Why, of course, the information theory is that an officer of the law must have been specially designated by sovereignty and must have taken a special obligation as a quasi judicial officer to do what is right in this case, and there is only one man representing the sovereignty in the particular jurisdiction who can do that, and he is substituted for a grand jury. Now, I ask the committee, how far does an argument of that kind get with you? How far ought it to get? What ought to happen to the whole case when its defenders argue like that?

They believe that every officer ought to put in charges, not under any special sense of obligation; that he ought not even to swear or certify, "I have investigated this case and believe it ought to be tried, and therefore I submit it to trial," but should act simply by virtue of his office. Of course, an enlisted man can not prefer charges against an officer, though. Oh, no! It must be adopted by this sacred thing, official caste. And then, when I tell you that between 96 and 98 of every 100 charges preferred result in trial and conviction, I say my point is made, that officers of the Army can try anybody they please, at will, and Congress is responsible. Congress says "You try anybody you please." And then, even if the charge is murder or rape or arson or mayhem or manslaughter, is there any way whereby that man can have the legal sufficiency of that charge tested? No; Congress says that the power of military command must do that. Congress does not say that military command shall be advised by a judge advocate, even, and it is not so advised. You have not got legal personnel enough. You never had but 13 in the old Army, and they were made mostly for duty right here in Washington. You did detail a line officer who had some special proclivities, and put him at the right hand of the commanding officer as a staff officer, and he advised him. In any event, the commanding officer

takes the advice if he wants to; just as he takes, or rejects, the advice of the man who issues the rations, the man who plans the operations. The judge advocate is just like any other staff officer. So that Congress has said to every man who under these articles of war is empowered to convene a court-martial, "By virtue of your rank you are also a judge, absolute and final, with authority to do as you please."

When we try a man in a civil court for murder, for instance, you know how meticulously we guard him—probably too much so; and surely there is a way of having a judicial determination, at the very beginning of the trial, of whether the charge actually alleges an offense known to the law of the land sufficiently to justify trial. But here let the commanding officer say, "That charge is good," which he says when he refers it to a court for trial, and there is no power on earth to say otherwise.

Now, a man tried for murder or anything else over in the military forum gets the same punishment rather more and more expeditiously than he gets when he is tried by the civil court for the same offense. The effect upon the individual is just the same. It means a long term of imprisonment or deprivation of life or property; and yet we leave everything, not to the law, but to the power of military command. Now, I ask the committee, are they satisfied with letting a major general sit up and determine whether or not this offense is actually an offense against the articles of war and the law of the land, and make that final? And then, after he has determined that it is final, let us look at the challenge. You have got to challenge one at a time and for cause stated. That is a challenge for cause only. No peremptory challenges and no challenges to the array.

Mr. Chairman, if there ever was a community anywhere where there ought to be peremptory challenges and challenges to the array both, it is in the Army of the United States. The commanding general who designates that panel is frequently a prejudiced person. In that case he does not know it. Of course not. We usually do not know when we are prejudiced. But he is prejudiced all the same, and if there were a proper judicial authority to determine that fact, it would frequently be so determined.

But let us take a case like this. I can recall four cases that I have had during this war in which there were men who had committed offences under circumstances of such similiarity that you could not try one, without, indeed, passing upon the case of the others. Two men, we will say, are tried jointly, it may be properly, so far as the offense is concerned. Suppose they should be given a severance. Would you think, in a civil forum, of trying the second man by the same jury that tried the first? Of course not. And yet the same military court, when a whole crowd of soldiers are involved in the same transaction, will try them all separately, the same court will sit there and try one after another, one after another, until really, in one case that I know of, it was a perfect farce, and the men knew it was a farce also; and yet under the law of Congress you are limited in your challenges to a single challenge, and for cause stated, and the triers of the challenge are the other members of the court?

Now, let us see how it works out in a case of this sort where they are actually sitting as a second jury in the trial of a case of similar circumstances. You challenge one man under the law, and he steps aside, and you have got the other twelve, and they sit there and pass upon that challenge, when the challenge lies as much to them as it does to the first challenged. Now, that may seem puerile, and yet the army argues that it is all right. "We are officers of the army, and we can divest ourselves of any predilections we had in the other trial. We are intelligent and superior, and you must not make the charge of prejudice against us." Surely you are not going to let a thing like that keep up.

Now you come to the actual trial. No rules of evidence; none prescribed. The law of Congress actually, under this so-called Crowder revision, has authorized the President to make any rules of evidence he pleases. Gentlemen, if there is one thing in the world that ought to be stopped, it is the further abdication by Congress, to the power of military command, whereby a man may be tried before a court-martial not according to the rules of evidence and law, but according to some rule prescribed by the President of the United States, which, of course, means the Judge Advocate General of the Army and the Chief of Staff.

Why, I recall a case where I resisted the entire military hierarchy, the evidence being this: They actually extorted a confession out of a man and a man's wife. I say "extorted." I am not using too strong a word. Everybody agreed that the confession was thereby incompetent; had been dragged out of them by third-degree methods. Yet by means of that confession, and other means, they got other evidence. And they said that that record was good, because if you struck down the confession, struck it out entirely, there was enough left to justify the man's conviction. Now, they went that far. They said that a confession extorted by those methods resorted to by the Government, which it would not have resorted to unless it had to, an extorted confession which was used for the purpose of conviction, the most credible of all evidence when properly obtained, can be relied upon without doing any prejudicial error to the accused because there is other evidence in the case. When I said that I would have conclusively presumed error from that confession, at least, they said, "Well, it is true that the Supreme Court of the United States has held that, but we are not bound by that." And they are not. They do not follow it. They are not bound by any principles of law. Our rules of evidence may not be the most logical in the world, but they are what we have got; we have got nothing better; they are really a basic part of our jurisprudence and of our civilization, and I, for one, am not ready to give them up in the trial of an important case before a court-martial in favor of rules, or no rules, prescribed by military command.

So military command can do as it pleases when it comes to court-martialing a man. It selects the man, selects his counsel, determines the court procedure, defines the offense, applies any rule of evidence that it pleases, and then when it comes to sentence it can impose any sentence it pleases, from 1 day to 100 years, or from a penny to death. The commanding general can then do as he pleases, governed by no principle of law.

Now, I can tell you one great reason why these punishments were so harsh. Everybody knows that these courts are afraid of the commanding officer. Why, men have actually been sentenced to sit on courts-martial by commanding officers for purposes of "instruction," and it is the most arduous duty known in the Army, and Army officers hate it like sin. They do not want to do it. They know they are under the general's hand. He will likely change their station and punish them if he does not like the way they do on a court. So they say this—this is common, and they will all tell you so when they are speaking frankly and personally—they say, "The Articles of War say we can do as we please. The commanding general up there is pretty stiff. He cussed us out, that last case, you know. We said the man ought to have a small sentence, and he came back and cussed us out and said he was going to dissolve us and put a lot of his remarks on our record, and all that kind of thing. Now, I suggest, since we can do as we please, that we put it up to the old man. We will give a sentence high enough, so that the general can cut it down to suit him." They say, "Let us give this fellow a sentence of 25 years, and let the commanding general cut it down to 5 years, if he wants to." So Congress tells the court-martial to do as it pleases, and they pass it up to the commanding general and tell him to do as he pleases. They make that arrangement because they say the commanding general has authority to cut down or control it.

If that seems like a puerile sort of conduct of official business by a lot of grown men, let it seem so. It is true.

It is true, then, Mr. Chairman, that from the beginning to the end courts-martial are governed by the power of military command, not by the law of Congress. You have not required your military commander mandatorily to do certain things or not to do them. Quite the opposite. You have not told your court mandatorily to do certain things or not to do them. Quite the opposite. You have just simply adopted the old kingly system of Great Britain, foisted it upon our Army, and told them all to do as they please.

Now, quite truly, Mr. Chairman, Gen. Crowder in his proposition to revise the articles in 1912 and 1916 said, "These articles come from the British system, and the British have revised their system out of recognition." It is true, to our shame, that though the British Government is not the most liberal Government in the world to its soldiers, it is far more liberal than we. Does it not occur to you as significant that it is provided that the British judge advocate general shall be a civilian barrister; and that it is provided the French judge advocate general shall also be a civilian barrister? Does it not mean something?

The English judge advocate general, until they created the office of secretary of state—that is, when the war department was governed by the war council, up until the latter seventies or the eighties—was a member of the Government, a member of the Cabinet, with a seat in Parliament. When the Parliament came to control there, as it did, against the Crown, that was the first thing they said, "The man in charge of the bureau of military justice will be responsible to us, and he will sit in this body as a member of the Government; and he will be a civilian and he will be a lawyer, a judge; and he will

be appointed for life; and he will be taken out from the command of the war council and even of the King.

Senator CHAMBERLAIN. Has it resulted in a modification of the extreme military sentences?

Mr. ANSELL. Yes; though I must say that England is not as modern as I think England ought to be and will be; because England has an investigation on, right now.

I have here an interesting article, which I shall not read into the record but which is interesting nevertheless, from Blackwood's Magazine of June, by a distinguished Scotch barrister who was a judge advocate with the forces in the field, and he shows that they made a great outcry there against their system, as they made it here during the war; and I know they did, for I was there. They made it more vociferously than we did here because we were more suppressed. I want to show you what this distinguished barrister said. It is a very ridiculous article, but less ridiculous than an article could be written about our system. For instance, he was sitting as an officer on a court-martial. The junior member of the court votes first. A law officer sits here instructing the court as a judge would the jury. He asks the junior member of the court, "How will you vote on this?" "I think I will give him a very heavy punishment." This went up to the various members of the court, and all of them said, "Yes; a heavy punishment." Then the law officer said, "Now, gentlemen, with all due respect to you, I do not regard this as a very severe offense. You have given him 15 years." "Well, what do you think he should have?" The law officer said, "Three days, it seems to me, would be sufficient." The President said, "You have heard what the law officer says. Since considering it further, what do you think?" The junior officer said, "Well, since I have heard the remarks of the judge advocate of the court, three days, I think, is quite sufficient." So, then, it went up through the court; three days went all through, and that was the sentence. Fifteen years—three days. That is very ludicrous. But let me call your attention to the last part of it. He says:

> This system of confirmation is very undesirable. No commanding general should be allowed to confirm.

He says it is actually vicious because it makes this court subject to the command of the commanding general [reading]:

> For the reasons which I have already given, it tends to destroy the independence of the tribunal, as well as leaving the final decision in the matter in the hands of officers who have no special, if any, legal experience; who have not seen or heard the witnesses, and who are seriously handicapped by their military training and who are not capable to mete out impartial and disinterested justice. Is it fair or consistent that a court of criminal appeal should have been set up in respect of convictions in criminal courts and not in the case of convictions by courts-martial?
>
> I suggest that every person convicted by court-martial (subject to the exigencies of moving warfare), should be entitled to apply for leave to appeal to a court of appeal presided over by a permanent legal judge appointed for the purpose, and conversant with military affairs, and that the present system of confirmation by military officers should be abolished.
>
> It is worthy of note that the committee which has been set up by the War Office to inquire into military law and the procedure of courts-martial, does not possess a single member who has had any real experience during the war as a member of field general court-martial. Let us hope, however, that

the committee will make an effort to find out what the real position is, and will not shrink from such drastic reforms as may be necessary to enable the members of courts-martial in the future, without fear and with independence of judgment, to administer the sacred duty entrusted to them.

I do not know how the committee will regard it, of course; but I know the English, it must be said, do things quite thoroughly at times in matters of this kind, and they do not stack committees; but let us look at the English system as compared with our own. Here is a great outcry against their system, and England's military code, I will assure you, is far more liberal and progressive than ours; but no general court-martial can sit in the British Empire without a law officer sitting by the side of the court, endowed with the functions of a judge, who instructs that court upon every point of law, sums up for them, and does everything exactly as a judge does here, sitting in a criminal trial with a jury.

Senator CHAMBERLAIN. And then he is not a military man?

Mr. ANSELL. Not as a rule. In all general courts-martial he is usually a barrister warranted out of the great body of English barristers for the purpose, and I will give you some reasons for that later on. It is true that Great Britain, with her capacity to do things, customarily and without accurate definition, has never said that that judge's instructions were absolutely controlling of the court; but if that judge advises the court one way, and the court should do the other, when that report gets to the Judge Advocate General of England, who is a civilian, and who himself has warranted that man to sit there representing not the commanding general, but himself, as the Judge Advocate General of England expressed it to me, "Of course they know what is going to happen. The whole thing is going to be disapproved." And in fact, the law officer with the court is the judge, with all the authority that a judge has with our courts and juries.

Now, a field general court-martial is the general court-martial which accompanies the army when it is actually fighting in the field for the trial of enlisted men—not officers. The law does not provide for this law officer with that court; but the Regulations have done so, and every field general court-martial for the trial of enlisted men for any offiense, however slight—they do not try them for the slight offences we do, however—has this law officer, and he is commissioned because his position is rather unstable, as you will see by reading this article, and as I saw it. They give him rank, though he is really a civilian and he is the law member of the court, and he has, of course, the power of the Judge Advocate General's office back of him; although there is no law, as I remember it, back of him. But we surely are not blind to the superiority of the British system, such as it is, over ours, when we see that at the top of the judicial hierarchy is a civilian, a barrister, answerable now to the Secretary of State for War, and never to any military commander. Never any report of the Judge Advocate of England goes to the Commander in Chief of the Army or to any military commander. I was there a considerable time, and saw that the army has accepted him as the final judge of law as applied in the Army. He does not have to write these long-winded arguments that we write. Rather briefly does he make his minutes on the case, and dispose of it. It

does not go to the Chief of Staff or to any military man, and the authority that is actually exercised over him by the Secretary of State for War is a formal one, because they have not yet gotten out of, and never will get out of, the theory, as I am advised, that Parliament has just put this chief administrater there as Secretary of State for War, and he has replaced the Judge Advocate General of England, who is sitting with Parliament, but nevertheless he has all responsibility still to Parliament. We know that Parliament does not hesitate to make a racket about any case of military injustice in England that is brought to its attention, and to call upon the Judge Advocate General for what he did in that case.

(At 12.45 o'clock p. m. the subcommittee adjourned until to-morrow, Saturday, August 30, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, AUGUST 30, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Senator LENROOT. I do not remember just what point you had reached at the last session, General, do you?

Mr. ANSELL. If the committee please, yesterday I had said that Great Britain had recognized the necessity of at least a partial civil control, in the last analysis, over courts-martial. I had shown that their law requires a law officer with the powers of a judge to sit with each general court-martial, though, as I said—and ought to have said, in fairness—those powers, like so many things British, were not well defined and fixed. Probably, de jure they are advisory; de facto, they are controlling.

That with each field general court-martial, which is their agency for enforcing discipline when they are in actual campaign, so far as enlisted men are concerned, as a rule, the law does not require this judge to sit with the court-martial; but by regulations it is required, and it has worked out to the absolute satisfaction of all, the only complaint being it should go farther and be fixed by statute.

I had shown that the head of the Judge Advocate General's Department, who is the chief of the bureau of military justice there, is a civilian, had at one time been a member of the Government, still has a close relationship both to Crown and Parliament, and, most significant of all, he is not subject to any military supervision whatever.

I had also adverted to the fact, previously, that there was far greater opportunity there for the civil courts of the Kingdom to review the judgments of courts-martial than here, the sole remedy here being by way of the writ of habeas corpus; except, of course, in a suit for trespass, which, as you know, seldom or never is re-

sorted to, for the very obvious reason, I suppose, that you had to prove that a member of the court has maliciously and flagrantly violated his duty in order to do injury to the accused. Certainly that would have to be proved before damage could be recovered. Such actions are not brought here.

In France it is significant likewise that, military as that people is, the judge advocate general of the army there is a civilian, and a most distinguished one. In my travels there I met no lawyer who impressed me more than he.

Senator CHAMBERLAIN. What is his title?

Mr. ANSELL. Undersecretary of State for Military Justice, with a seat in Parliament.

In the French Army in time of peace there is a very large appellate system. Many of their cases can go to the supreme court of France, the Court of Cassation, of Paris; and in time of peace there is a court of military appeals, as well; and in time of war the law provides for a court of appeals with each army, but, as I understood their practice, perhaps a court of appeals was not maintained at the headquarters of each army, but rather, administratively, at some central point, as at Paris, where it could take care of more than one jurisdiction.

Senator LENROOT. But is maintained?

Mr. ANSELL. But is maintained. That is the point. My recollection of it is that in time of war they may have, and do have usually, on their court of military appeals men who are commissioned in the army; that is, army men. Of course there the distinction between the professional soldier and the citizen soldier is not so marked as it is here. If there is one thing more impressive about the French Army than another, it is the unity observable in their military establishment, a unity which we do not have here, but which I hope that we may some day have.

Senator LENROOT. You mean it is more democratic throughout?

Mr. ANSELL. Yes. Senator, I went to France, of course, with the utmost sympathy and admiration for the French people, but not so much with the idea that the French were really a democratic people. Whatever may be said for any other institution, that institution which is usually in all nations least democratic was in the case of the French most democratic; that is, their army. I said in my report, and I repeat, that whenever we shall change, let us not change toward the British or what might be called the northern nations' view of maintaining discipline, because I think probably this system whereby discipline is maintained by the great gulf between enlisted man and officer by erecting the officer as a sacresanct thing far above him belongs rather to the northern races—to ourselves, to the British, and to others. Let us, if we can, incline to the French system, where, without loss of dignity and without any infringement of proper prerogatives, the relationship between officer and enlisted man is a remarkable one, a most helpful one, and causes, I think, a Frenchman to love his army as every citizen ought to love an army that gives him protection.

I am not going to compare the French Army with the British or our own. We have qualities, Mr. Chairman, that are, of course, remarkable, and they are remarkable in the Army also. But the rela-

tionship—the disciplinary relationship—between the officers and men really might be improved upon.

The French take the discipline of their men much to heart. Justice to the enlisted man is very much on their conscience, and the first thing that a colonel of a regiment does when he comes to his orderly room in the morning is to look over the delinquency book and to go into it with the greatest of care. A man may not be court-martialed there until a quasi-judicial officer does look over the charges, and does look over the evidence to see whether there is a prima facie case; and such officer is not under the control of military authority either. And after a man is tried, as I have indicated, he gets this review. It should be conceded that French courts-martial, like French civil courts, do not adhere to the technical rules of evidence, for instance, and other rules of procedure, as we do.

In Italy there is established the system of appeals, it seems to me, on a much more elaborate scale than in any other country. It seemed to me too elaborate, indeed.

I discovered in Paris a book which I regarded as very valuable. It was a report made by a Norwegian judge advocate, sent by his Government to investigate the systems of military justice obtaining in all the European countries; and later he extended that to our own country and some of the South American countries. It is the only comprehensive study, so far as I know, that has ever been made of such a thing. It is old, however. But after I got back home I found there was one copy of that book in this country, and I got it from Harvard University. I have let another officer have it temporarily, and have not been able to get it back, but I wanted to assure the committee that I have read the report of that officer, and that report reveals clearly that this system of military appeals is established throughout Europe, and that the system of having a specially qualified law officer sitting with each general court-martial is established throughout Europe. That officer comments on the fact that Spain, Prussia, Russia, England, and the United States are the ones who do not have it. There, I believe, is some sort of review in Prussia—was at that time—that I am not familiar with at all. But even in Spain there is a more thorough review by the judge advocate general than there is here; and most especially does he comment on the fact that the British system and the American system make no provision for an authoritative review whatever. So that this talk about a reviewing body being a new thing, detrimental to discipline, is disproved by the fact that it is an established institution in Europe, where armies, of course, are far more significant things in government and closer to the people than they are here.

Senator CHAMBERLAIN. May I ask you if, in your visit to France, you compared the maximum penalties imposed in the French army with the maximum penalties imposed in the American Army?

Mr. ANSELL. Yes, Senator; and the French punishments are comparatively very light, indeed.

Senator LENROOT. Could you secure for us for this record a copy or a translation of the French law?

Mr. ANSELL. A translation? I could do it myself, if I could get a little time.

Senator CHAMBERLAIN. I think we could ask the legislative board for that.

Mr. ANSELL. I will try and get it for you if I can.

Senator LENROOT. All right; and will you also secure for us a copy of the British law?

Mr. ANSELL. Yes. Our War Department has not yet advanced as far as the British had advanced at the beginning of this war. During the war the British have grown quite liberal. I wish to call attention to the fact that Great Britain is in process of advancing some more now. But then, above all, why should we limit ourselves, with our citizenship of the very highest grade and our liberal institutions, to the systems of Great Britain and of Europe?

The bill that is before you I do not think need be gone through in detail, and, in any event, I have spent so much time in discussion that I can not go into it in detail, but I think we can sum it up in this way: If the committee should be, for instance, in favor of having a government by legal principle rather than trusting so much to this power of military command, they could only disagree with the bill in mere matters of detail.

If, on the other hand, they agree with the War Department and the Kernan report, for instance, that courts-martial are the agencies of military command, then really you could not agree with anything—you could not agree with the fundamental principles—of that bill, and I hope that I have made that clear.

One theory is that courts-martial are governed by military command throughout.

The other theory is that they are governed by fixed principles of law and the statutes enacted by Congress, throughout.

Now, if you believe in the first principle, why, I do not know that anybody could find any great fault with our system. I could not. If military command is to be permitted to exercise all this control, I know our men are good men, and they want to do what is right, and though they do their best, we may expect the results that we have. I disagree with the results, and I attribute them to the system that we have.

Senator LENROOT. Are there not two fundamental propositions involved? Is there not one other than you have mentioned? First, there is the unlimited control of military command, within the law; secondly, the broad discretion vested in the law, in military command?

Mr. ANSELL. Yes; I think that is true. I intended to include them both. I do not say that that is so in the sense that they have not authority for what they do under the Articles of War. It seems to me that they can do almost anything.

Senator LENROOT. Is not that a proposition quite separate from their having unlimited control of military command, within the law; in other words, unlimited discretion as to punishment?

Mr. ANSELL. Yes; they have unlimited discretion as to punishment.

Senator CHAMBERLAIN. They practically make the law as to punishment.

Mr. ANSELL. Yes; of course that is true. Congress has delegated the power.

Senator LENROOT. Yes.

Mr. ANSELL. And it seems to me never before has a legislative body delegated any such power. It is true that in this bill there are of

course means—methods—advanced that are open to disagreement. We can always disagree as to means and methods, but the contending principles I think we have got a fairly good idea of now. For instance, in this bill that I have drafted, one of the things, I believe—I speak with great frankness—that shocks the Regular Army officer, and maybe officers of the new Army, more than any other one thing, is the fact that the bill provides for the detail of a number of enlisted men on general courts-martial—three out of eight, for instance. Well now, the very moment you mention that to a Regular Army officer he at once replies, "You have taken out of the hands of the officer the power of the enforcement of discipline and handed it over to the enlisted man." Of course he is going right back, there, to his fundamental theory that officers are the governing element and must have their way. But under this bill it must be remembered, and I call the attention of the committee to that particularly, the court is really a jury finding the facts, and the officer of the law sitting with that court is the judge. I, myself, do not believe that there is a thing to the argument that you can not intrust one of the enlisted men of our Army with a proper determination of facts; and I will go further than that and say that even if they were to determine the law, were to be judges of both law and fact, from my judgment of the enlisted men of the Army as they now are, and from my knowledge of our citizenship, I will not say that the discipline of the Army is going to be destroyed by permitting enlisted men to sit on those courts and do justice under their oaths. I do not believe that, no matter what anybody else says.

Senator CHAMBERLAIN. It is just like a jury drawn from the body of the community.

Mr. ANSELL. Yes; and it is a very high-grade one. We may call the jury a cross-section of citizenship. We get some inferior men; but surely it has got to be said that there never has been an army in any country in the world that compared with the Army that we have to-day, for intelligence and probity and everything that goes to make up character in a man that will impel him to perform his duty.

Senator LENROOT. Right there, because that is a very material point in this whole matter: You have described at great length the feeling generally existing, and the condition of caste between the officers and the men. Now, is it your opinion that when charges are made by an officer against an enlisted man, generally speaking, it would require no stronger evidence to convict with enlisted men sitting as members of the court than with a jury in civil life trying a man for a like offense?

Mr. ANSELL. That it would require no stronger evidence to convict an enlisted man?

Senator LENROOT. Yes. That is, would an enlisted man be as free to convict a fellow enlisted man upon charges made by an officer, as a jury in civil life would be to convict a defendant charged with a like offense?

Mr. ANSELL. Mr. Chairman, I believe that our enlisted men, situated as they are, would, as nearly as they could, do absolute justice, and I do not believe that they would permit the fact that an officer had preferred charges against an enlisted man to create a sort of rebellious attitude, a feeling against convicting that man.

Senator LENROOT. That is the point. Of course, I was assuming that they would try to do absolute justice; but the point would be whether there would be any prejudice.

Mr. ANSELL. Of course, you would find a man here and there; but I think that we can always say this, with the knowledge of any system or hierarchy, that the lower the man is in the hierarchy the greater respect and deference he actually has for the men above him. We can not get rid of that. The abuse of the caste system, I think, is apt to be from the higher man downward rather than from the lower man upward; and if you take a lower man and put him on a higher plane, I think he will do his duty regardless of his condition in other respects. That is, for the time being an enlisted man, pro hac vice, becomes an administrator of the law, does he not?

Senator LENROOT. Taking it during this war, would you say that the enlisted man did have that high respect for his officers, generally?

Mr. ANSELL. For his officers as persons, why, yes; but there were so many officers that did not do well, that did not treat them well, that did not have the fullest respect of their men, I think not. The system creates distrust.

On the other hand, if a set of charges came before a court in which there was a small sprinkling of enlisted men—they are to be chosen, of course, by the man who convenes the court, who is an officer—I should think that if those enlisted men were affected at all, as they might be, it would, nevertheless, be in the direction of that great equity which is necessary to doing all justice.

Senator CHAMBERLAIN. It would not decrease the morale, because the enlisted man would then feel that he had a man on the court who could see his viewpoint.

Mr. ANSELL. I feel strongly that it has great advantages, and that it would not be abused except as all administration is once in a while abused. But here is a man who feels that he is a part of the Army, he is trusted as a part of the Army; he has got a part of its authority upon him. Under such circumstances enlisted men would feel that their station had been very much elevated, and that they were eligible to be chosen for this high duty at any time; and the accused would feel, as you said, that he had a fair man on that court in the sense that such member of the court knew his difficulties.

Senator LENROOT. Before you get away from that I would like to ask you, at the other extreme, whether in your opinion, because a court is made up wholly of officers and the charges have been preferred by an officer, there is any tendency of the court to sustain a fellow officer?

Mr. ANSELL. I answer yes, sir; there is such a tendency. I have heard this. I have sat on just as many courts-martial as any man in the Army, and if any man has ever had a full experience in the administration of military justice it must be myself. You have this all the time. Here sits the officer, member of the court, and here is a set of charges against an enlisted man. He looks on that set of charges and what does he see? He sees, "Preferred by an officer." Then he sees an indorsement on that set of charges by the post commander, the organizational commander, to the effect, "I have investigated these charges and I believe they can be sustained. I do

not believe they can be dealt with properly other than by court-martial." That is signed, usually, by a colonel. Then he sees a second indorsement referring these charges to the court-martial, which, in effect, means the same thing, that the major general believes that these charges ought to be tried; that is, he believes the man is guilty. That is signed "major general."

Now, here come the charges. Frequently, after you have gotten in the evidence it is perfectly patent to all that the evidence is very flimsy; but I have heard this statement made, I believe literally, a thousand times, "Well, you know, there is something to this case or it would never have gotten here to us. It has come up through all these authorities." You hear officers of the Army say, "Well, if a man's charges are referred to a court for trial, you may bet your bottom dollar he is guilty."

Senator LENROOT. You think that is true to a greater extent than in civil life, where in spite of the presumption of innocence the jurymen are very apt to think that if a man has been indicted by a grand jury there is something to it?

Mr. ANSELL. Sometimes I think such may be the juryman's vague and general first impression, but when he gets into the trial, with lawyers and the judge, too—as they must, of course—required to assume innocence until guilt is proved, no matter what they may think as mere men when they get into the box, by reason of the grand jury having functioned, before they get through with the thing I think they are universally given a mental slant toward the accused.

Senator LENROOT. I think that is true. And you do not think that is true in courts-martial?

Mr. ANSELL. I think it is just the opposite there.

Senator CHAMBERLAIN. A man comes before the court with a presumption of guilt against him, for the reason that the superior officer has said it ought to be investigated?

Mr. ANSELL. I am sorry to say, Senator, that is the truth. If you were really to change the law now in courts-martial and say that a man should be presumed guilty until he has proved himself innocent, I doubt very much if the results would be changed.

I do not mean to say that these officers sitting on courts deliberately go out to convict men, although I think we have got these traditions—these professional preachments—so well grounded in us that it is difficult for us to do justice strictly in accordance with law.

Take the case of a very splendid young man tried for an offense out in the Middle West. A brigadier general was the commanding officer and prosecuting witness. He was called by the judge advocate to testify, and a very bright young lawyer from New York—a second lieutenant—defended the enlisted man, who was a sergeant—I think a candidate for a commission. Here is what happened during the trial: The brigadier general testified against the youngster, and the second lieutenant began to cross-examine to test the credibility by the usual proper questions.

Senator CHAMBERLAIN. The credibility of the brigadier general?

Mr. ANSELL. Yes; the legal credibility I am referring to, of course. There was some evidence that the brigadier general did have it in for this man, because there were two men involved in the

same transaction, and he let one of them off and insisted on court-martialing the accused. Now, obviously there was a chance to go into the commanding officer's attitude toward the accused and toward the case generally, and this young counsel undertook to do it, and the record will show that he did it most respectfully; but when he came to about the second question the brigadier general said to him, "What, sir, do you mean by asking me these questions?" Perhaps a bit unfortunately the youngster resorted to legal language and said, "I am trying to test your credibility"; whereupon the brigadier general thought that was a reflection upon his veracity and integrity, and said, "I will not permit you to ask me any such questions that reflect upon my credibility." But the youngster insisted that he had such a right; and the brigadier general jumped up, excited, and said to the counsel, "If you insist on asking any question that is designed to reflect upon my veracity and capacity and disposition to tell the truth in this case, I will put in charges immediately and have you haled before this court."

Well, as usual in such rumpuses as that, the court was closed. You see, there was an objection made by the witness to making answer. When the court was closed everybody went out, and when they were called in to hear the decision of the court the court had decided that the brigadier general was right.

Senator CHAMBERLAIN. That is a case of record?

Mr. ANSELL. That is a case of record. I could name you the brigadier general. He is a very good man, but he just did not understand. Now that is shocking to us as lawyers. I will assure you that is not shocking to Army men. It is not shocking. I have been counsel for men too many times not to know that. I have a very distinct recollection of myself having defended a signal sergeant to acquittal—I think he was a signal sergeant—and I made a pretty vigorous and sometimes technical defense—certainly, what Army men would call a technical defense, but, nevertheless, a proper defense—and friends of mine on the court would come to me at recess and say to me, "Why don't you stop this? You know your man is guilty. You are getting yourself in dutch with this court;" and all of that kind of thing. Now, they did not mean to do wrong.

Senator CHAMBERLAIN. Practically prejudging the case?

Mr. ANSELL. Oh, yes. If a judge had told you that in a civil forum you know what would have happened. But it just shows you.

I will give you another example. A lieutenant, a quartermaster, was put to making a trap for an enlisted man out in the western department, to catch him, to see if he was not stealing some goods out of a storehouse, and he set the trap and he said that he caught the man; which I very much doubt. He preferred charges against the man. He was, of course, the prosecuting witness; and then he was made judge advocate of the court; and then he was assigned by the commanding officer as counsel for the accused, and he functioned in all capacities, prosecuting witness, judge advocate, and counsel for the accused!

When that case got to me, I said very briefly that this man had not been fairly tried, and it went back to the commanding general of this particular department, and he, as though hurt, said "The Acting Judge Advocate General is actually criticizing our system";

which of course I was, if it was under our system permissible for that man to be all that he was. In other words, your present articles of war make your judge advocate the prosecutor, and also to a great extent the counsel for the accused. If there is any one thing that I hope the committee may very carefully consider, it is that we have a judge advocate. Notice the title, "judge advocate." He is the advocate for the court, and prosecutor. He is the judge for the court. He is their legal adviser. He is also counsel for the accused when the accused has no counsel, and if the accused has counsel, he is directed to see that the interests of the accused do not suffer. Now, that sounds as though it was all for the benefit of the accused. I will assure you that it is not. We ought to abolish the judge advocate as a prosecutor and make him a real judge before that court, according to the general system of Europe, and have a special prosecutor for the Government.

Now, these cases that I have used for illustration, they are not isolated cases. They are not.

Senator LENROOT. General, if this plan were adopted, to what extent, in your judgment, would it be necessary to increase the force in the Judge Advocate General's office, with the present-sized Army?

Mr. ANSELL. With the present-sized Army, I do not think we would have to increase it at all, Mr. Chairman. You see, we would have less review up here. I would have you to get that point. We wait now until all these errors have accumulated from the bottom to the top, and then we do our best to correct; and look at the reviewing force! One hundred and eight men we have had here; and we must have a very large number now. Of course I am not connected with the department now, but I doubt if it has decreased very much. One hundred and eight lawyers, with the vast number of clerks, going all the time. They are not all engaged on this work, but a large proportion of them are engaged on it.

Senator LENROOT. What was the number of the personnel prior to the war?

Mr. ANSELL. We had 13 officers under the national defense act, and then when we expanded under the national defense act when war was first declared—you remember that filled up—we got 29 or 30, and that is our law department.

Senator LENROOT. Altogether?

Mr. ANSELL. Yes; and then when the big Army came on we ran up to 450. But Col. Weeks, as executive officer, and I worked out a scheme last October which was designed to put one law officer with each court and prevent error, if we could, right at the source; and we believed that by sending many of our reviewing officers here and putting them on courts-martial and preventing error at the source, we could get along with fewer men, and I am convinced we can get along with fewer men.

But there is another element that would work toward getting along with fewer men. We have got to do something to decrease the number of trials. It must be obvious to everybody that we have too many trials by court-martial. Now, a man may do something, but every time that a man does something in violation of the law he should not be haled before a court.

Take the methods of investigation. I say if you require, as this bill does require, the most thorough investigation before a man shall be

court-martialed, and then you require the law officer, who is already on the staff of the convening authority, to go into the evidence and say that the evidence is sufficient to constitute a prima facie case, and then go into the charges and determine their legal sufficiency, I say this, Mr. Chairman, based upon my experience, and I notice that Gen. Wood agrees with me in this—and I really believe that up until the time we got into this controversy nine out of ten Army officers would have agreed with me; probably not now, because we have all gotten into a sort of controversial mood or excited—that you can reduce by more than 50 per cent the number of trials in the Army, which reduction in and of itself will tend greatly to the benefit of discipline by requiring these thorough investigations and legal tests before we arraign these men before courts-martial.

Senator LENROOT. Did I understand you to say that you thought after we got to a peace basis, 30 men in that office would be sufficient to carry out the duties?

Mr. ANSELL. I never thought that 30 were sufficient, because we relied upon getting judge advocates then by detailing men from the line.

Senator LENROOT. Yes, I understand. That is what I am getting at.

Mr. ANSELL. Oh, no. But I say this, that for the same number of men we had before the war, I mean with the same sized Army and the same number of men that we used on legal work—they were not all judge advocates—I believe we can do this same task. But it would be necessary to decrease the number of courts-martial as we would decrease them under this bill.

Senator LENROOT. The number that would be required would depend very largely upon the policy that we would hereafter pursue with reference to the consolidation of Army posts, would it not?

Mr. ANSELL. Yes. Of course the court-martial system does largely depend upon that; but it is not indissolubly connected with it. There is no reason why a court-martial should be sitting at each post. I think it is bad to take some 13 officers, with the stenographers, clerks, the attachés, and all that, and have them sitting in each Army post. Of course if an Army post had a division there, that would be an economical legal unit; but if I were a major general commanding a department, I would not have all these courts-martial sitting in all these posts. It is not necessary. I believe, just as much as I am sitting here, that an itinerant court would have been one of the most valuable things, and certainly on the battle front. Take the men to be tried; they might be partially sick, or wounded. With a good Judge Advocate, a law officer, a prosecutor, if you had let him go from place to place and let them try these men there, I believe that would have been a good thing. But, of course, under the present system, every little commander has his court-martial.

Senator CHAMBERLAIN. If he is the commander of a garrison he has his court?

Mr. ANSELL. Oh, yes.

Senator LENROOT. Your bill does contemplate that?

Mr. ANSELL. The bill permits the President himself to convene courts-martial and give them any jurisdiction with respect to territory that he pleases. But if we did ever once get this system of law-controlled courts, with the commanding general largely cut out of it,

of course there would not be, Mr. Chairman, the same necessity to resort to a court-martial at every little place.

Senator CHAMBERLAIN. That is, you mean a general court-martial?

Mr. ANSELL. A general court-martial.

Senator CHAMBERLAIN. If we had one general court-martial.

Mr. ANSELL. Yes, sir.

Senator CHAMBERLAIN. We have the Eastern Department and the Western Department——

Mr. ANSELL. I was up there as judge advocate at the Eastern Department, and we had scores of courts going at every one of the little stations, taking up the time of the officers from training their troops. It is ridiculous, but it is according to the old army traditions. We have not moved a peg.

Now, the Confederacy departed from this system immediately after the opening of the Civil War. They had what, we must confess, was a rather better military system than the Union Army. They broke away from this system almost from the beginning.

Senator CHAMBERLAIN. They realized the character of their citizenship down there. They would not have stood for it, I think.

Mr. ANSELL. Of course I think that is perfectly true. We all understand the differences between the two armies.

Senator CHAMBERLAIN. At the first of the war?

Mr. ANSELL. Yes. It is a very important matter.

Senator CHAMBERLAIN. I will put this question to you: There are four departments, the Eastern, the Western, the Central——

Mr. ANSELL. I think there are more now. We have the Northeastern and the Southeastern Departments.

Senator CHAMBERLAIN. There were only four departments. Now, with one general court, why could not that court function in each of these departments, and would it not become more efficient?

Mr. ANSELL. It would work out beautifully, I have no doubt in the world.

Mr. CHAMBERLAIN. Would it cause delays and long imprisonment of men?

Mr. ANSELL. No, sir.

Senator CHAMBERLAIN. They now keep a man confined sometimes four or five months before he gets a trial.

Mr. ANSELL. After all, when you make an officer of the Army realize that he is governed by a legal system, you are going to get a good result. Officers of the Army are not lawless men. When a court sits, they are going to do their duty.

Senator CHAMBERLAIN. Civil courts do that very thing; they go from one district to another and try cases.

Mr. ANSELL. Yes. I wanted to call attention to one phase of the placing of enlisted men on that court, because you will hear more of that later. It is that which has led to the suggestion in the Kernan report, as you may have observed, that this proposition is one of bolshevism. I would like to sum up with respect to this matter and say that its main provisions are that a commanding general can not court-martial a man at will. These two things must have been done; his law officer must have said, "The investigation that has been made has produced evidence that justifies a trial"; that is, prima facie proof; and, too, the law officer must have said that the charges

as drafted are legally sufficient to allege an offense against the Articles of War.

Now, then, after that the commanding general may or may not, as he pleases, court-martial the man.

Second, an officer may not prefer a charge against a man simply upon the general obligation of his office, but he has got to do so under the special obligation of an oath, on proper information. That will greatly reduce the number of charges.

Then, when we come to the trial, the man is entitled to his challenges, both for cause and peremptory challenges, and in the usual cases to challenges to the array. But, of course, in the case of challenges to the array the commanding general has the entire Army under his command to create a new panel with.

When we come to trial, the principal thing about the trial is that there is a judge and there is a jury, in fact.

Lastly, the commanding general does not confirm the proceedings, but they come to this court of appeals; and there is a court of appeals.

Now, as to the details, I presume gentlemen can dispute about them. I know they can.

I wanted to invite the attention of the committee to the Kernan report. I have studied the report with some considerable thoroughness, though not the actual amendments that they have suggested to the Articles of War; but it is obvious from the character of the report that the amendments that they suggest are but slight changes of the existing system. Observe that their great text, Mr. Chairman, is that this proposition here in the Chamberlain bill, or the bill that I drafted, or the propositions that you have heard me advocating here, will result in the transfer of discipline to the hands of lawyers. "The transfer of discipline"; that is the way it is put.

Now, let us just examine that. Let us see where a lawyer comes in. A lawyer can do no more than say that there is a prima facie case here; that as a matter of law the charges are legally sufficient. Where does discipline come in there? Are not those questions inherently questions of law? Are the charges good, and is the evidence sufficient to justify trial in accordance with the lawyer's well-known conception of what evidence is sufficient? He has got to know the elements of the evidence and the kind of testimony that it takes to prove it. Is that not a question of law?

Now, let us see what the opposite to that means; and it reveals the whole situation. The opposite side is this, that a man ought to be tried if the commanding general so wills it, even though the charges are not, as a matter of law, legally sufficient—that is true; that is their contention—and that a man ought to be tried if the commanding general so wills it, notwithstanding the fact that the investigation has not revealed sufficient evidence to justify the prosecution.

The statement that this bill or this proposition transfers discipline to the hands of lawyers is not true; it does no more than transfer pure questions of law to the hands of lawyers.

Now, when we come to the trial, I am going to quote the British barrister that I once referred to, away back there in 1849, Warren, and I am going to quote this Scotch barrister, writing in Blackwoods, and then I am going to appeal to our common sense. When we take from 5 to 13 of these unskilled tryers, these military men, who certainly have not acquired any capacity for judicial determination by

reason of the fact that they wear shoulder straps, and make them judges of both law and fact, may we not expect all sorts of errors of law? Would you trust 5 to 13 unskilled Army officers to determine questions of law any more quickly that you would trust 5 to 13 pure lawyers, and nothing else, to come down here and make the plans of the Army for an invasion of Germany or Mexico, or some other strategical military proposition? I would not. And it is not logical and it is not common sense; and we have never done it in any other institution of our Government. What is there about an Army officer——

Senator LENROOT. May I ask you here, so that I can follow you a little more intelligently: Do I understand that the only jurisdiction that you propose to confer upon this court of appeals is to review for errors of law?

Mr. ANSELL. To review for errors of law. I think that is the jurisdiction that is conferred upon all courts of error. They are not to retry the facts. The facts, once determined, I think should be permitted to rest, when they are legally determined under instructions by a judge, just as facts are determined in lower courts of the United States.

Senator LENROOT. In your bill, after reciting the review for the correction of errors, in article 52, the language is as follows:

> Said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; and such power of review shall include the power—
>
> (*a*) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of a lessor included offense.

Mr. ANSELL. Yes.

Senator LENROOT (continuing reading):

> (*b*) To disapprove the whole or any part of a sentence.
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> * * * * * * *
>
> And said court of military appeals shall have like jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committee and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence.

Now, it would seem to me that that empowers this court of military appeals to pass upon the facts as disclosed by the record as well as the law.

Mr. ANSELL. Not prospectively, because the last clause that you have read there was giving it a retrospective jurisdiction, to try to correct what had been done.

Senator LENROOT. That is true as to that, but in the first paragraph I read you say such powers shall include the power to disapprove a finding of guilty.

Mr. ANSELL. Yes; where it is a matter of law, and that is the only case where you could.

Senator LENROOT. I do not think you say so. It seems to me that language would permit the military court of appeals to substitute its judgment for the judgment of the court-martial upon the facts.

Mr. ANSELL. Of course, we are following there rather the existing law governing the convening authority, and it may be that in deference to that language I may have gone afield. I have not read the bill recently. I am inclined to think you will find it so upon thorough study that if the court should find—let us say that the man was charged with murder and convicted of murder—if the court should find that the evidence as a matter of fact was sufficient only to sustain a charge of manslaughter—that is, the malice was not proved—then they would be permitted to substitute the finding of manslaughter for that of murder as a matter of law.

Senator LENROOT. Yes; that would be a matter of law.

Mr. ANSELL. Yes; or if in any case the evidence failed to establish a particular element of offense, the absence of which specific element would reduce it from one grade to another, then the court would be justified in reducing it to that grade.

Senator LENROOT. I want to thoroughly understand you there. If the bill does not confine the jurisdiction of the court to the review for errors of law, it is your view that it should be so confined?

Mr. ANSELL. It is.

Senator LENROOT. And that it should not permit the court of appeals to substitute its judgment upon the facts for the judgment of a court-martial?

Mr. ANSELL. Only when the judgment upon the facts becomes a question of law.

Senator LENROOT. Oh, yes; I understand that; when the facts——

Mr. ANSELL. Are not reasonably sufficient to sustain any judgment.

Senator LENROOT. Certainly.

Mr. ANSELL. On any particular element of its finding.

Senator LENROOT. Then, one other question: If the sentence imposed by the court-martial was within the jurisdiction of the court-martial to impose, upon a proper finding of guilt, it is not your intention to permit the court of appeals to revise that sentence because it may think it excessive, although within the jurisdiction of the court?

Mr. ANSELL. Not at all, sir. I would not favor a retrial of the facts, nor would I favor permitting this court to substitute its judgment as to what the punishment upon a proper finding of guilty of an offense ought to be.

Senator LENROOT. That is what I wanted to understand.

Mr. ANSELL. In other words, I would do no more than to confer upon this appellate court the usual power that an appellate court has to correct for errors of law, except that we get a sort of modification in military procedure when we have so many offenses that are composed of included elements, as in civil life we have the various degrees of murder and manslaughter, and in the military procedure you have desertion and the lesser included offense of absence without leave, and so on. We take larceny; it may not be larceny, but it may be prejudicial conduct—trespass. The intent to steal may not be there. We have many offenses of that sort that are rather peculiar to the Military Establishment. Now, I insist, Mr. Chairman, that the statement made in the Kernan report that the effect and the purpose of the proposition that is advanced by that bill is to transfer discipline to the hands of the lawyers is

not correct. It does no more than transfer the determination of pure questions of law to the lawyers; pure questions of law, and nothing else.

Senator LENROOT. That was the point I had in mind in my questions, General.

Mr. ANSELL. Yes; I quite appreciate that. I believe that was so in the minds of myself and of every other officer who participated in the drafting of that bill. We consulted jurisdictions of courts, and the English systems, and all of that, and we have the language there; but I again say, having declared what our purpose is and the intended effect, what we want to do is to create a court of appeals here that will correct for errors of law; and we do want to give to this judge, who sits with the trial court, the power to control that jury on questions of pure law; and that is the only way, I think, that the discipline of the Army can be made a discipline regulated by law. The discipline of the Army now is not regulated by law, because the disciplinarians are judges of both the law and the facts, and they have no standard in the code. Their argument is an argument ad hominem. They say that the line officers should be entrusted with this great power of discipline. They take this abstract and rather resultant term, discipline—of course discipline ought surely to be a result of the application of law of some kind—they take that abstract term and say that should be left for the fighting man. Of course, the Constitution left it to Congress to prescribe the rules of discipline, and those rules are law. Let discipline be left to the fighting man, but let it be discipline governed by law.

Now, is the line officer, the fighting man, any more competent to determine these legal questions? Of course, they divide the Army into two classes, the fighting man and the legal man. But in such armies as we are going to have, are we justified in making that hard and fast distinction between the law man and the so-called fighting man? I will assure you that I saw the law man in the battle line, in quite dangerous positions, and I saw many fighting men as safe from the zone of operations as we are, sitting right here. Let us look at this argument straight. Gen. Pershing himself, commanding general of the A. E. F., was in no more danger than you are here, except when, occasionally, he did go to the battle line to inspect some organization. The headquarters of the A. E. F. never saw an air raid. It was not in the danger zone half as much as Paris was. It was absolutely free from it, as, in fact, it ought to have been; and the very general who is chairman of the committee that made this report, Gen. Kernan, was sitting away back at Tours, 150 or 200 miles from the nearest gun, and he never heard or saw a gun.

Now, are we not paying too much attention to mere labels? We had 200,000 officers in this Army. Of the old Regular officers there were somewhere between 8,000 and 10,000, and we will presume that some two or three thousand of them had heard a bullet, and that is about all. Then we took the other 190,000 from civil life and we divided them up into line and staff; and one lawyer belongs to the line and another belongs to the staff. Now, Mr. Chairman, I am not going to concede that merely because you label this new-made officer a "line officer," he becomes, ipso facto, qualified to pass upon all these questions of discipline so-called, unregulated, or unadvised,

or uninformed, or anything else. It does not get anybody anywhere. But what this report is really predicated on is the sharp distinctions between the professional and the nonprofessional officer, I think. They are talking about the old-time army, where the man who served with troops was supposed to be this rough-and-ready soldier who was ready to fire at any minute, who served with his troops all the time, and who knew nothing but his troops. Well, I say I think one of our great mistakes is that we adopt and maintain in time of peace a system that always falls down in time of war because it was not made for war. Our Army systems are not made for war, that is certain. Every time we have a war they have to change the whole scheme of things, and if we are going back to this system that they seem to think was fine for the Regular Army—I do not, but they seem to think so—this old-type sort of mercenary establishment, the old school, then when we come to war again I will assure you that the Senate and the House will try to remodel the thing after war has begun.

Senator CHAMBERLAIN. Has this archaic system of the Army had much to do with the prevention of young civilians enlisting in the Army?

Mr. ANSELL. I have no doubt of that. I believe I have always been a little closer in touch with civil thought, for one reason or another, than the ordinary orthodox Regular Army officer. I am orthodox enough. The time will come when your boy and mine are going to war. I think about it a great deal. I want mine to go to war, and they are going; but I shall feel very much better satisfied with any system of military instruction that you are going to have if I know that when these youngsters of mine or yours come to camp for instruction or for battle training they are going to be met rather sympathetically, and by a set of men who know that they are citizens, that they are not this professional type of soldier. If one should go absent without leave for two hours, I do not want him sent to the penitentiary or to a disciplinary barracks for 25 years.

Senator CHAMBERLAIN. I know that the civilian point of view has been obtained from observations at near-by garrisons. A young civilian goes there, or the father or mother of a civilian goes there, and finds your soldier doing menial duty, waiting upon an officer, holding a horse at the door, standing around until the officer is ready to go, and the general impression is that the soldier is acting as a servant, and they go away from there and report that to the civilian population. Have you not found that so?

Senator LENROOT. Absolutely.

Mr. ANSELL. While I was at West Point there was a very decided effort made there—I can not say that it succeeded, because I can not recall—to bar the enlisted man, when accompanied by a woman—that is, a soldier when walking with his girl or a married soldier with his wife—from the front walks, and to make them go through the alleys. I served right here at Washington Barracks as a mere boy when this order was issued. During the parade, the daily ceremony, everybody from Washington could come there, everybody, and could stand on the front walks and observe the parade, but the soldiers had to confine themselves to back alleys, etc. Now, that is not going to do. I will tell you this, West Point is one of the great-

est institutions in this world, it is second to none as a military institution, but it has its very serious faults. It inculcates these wrong views, I think, in our officers. We West Point men do establish the system, the standards, of our Army. There are only about 30 per cent of us of the old Regular Army, but for reasons that may be well appreciated, we establish the standard of the Army. The others conform.

Now, I can recall how this thing struck me as a cadet. Here was an enlisted man, well-dressed—because they have to be well-dressed there—soldierly, walking a sentry post up there, as you have seen. They guard the institution on the river front. I remember, when I was a fourth classman, asking an upper classman for some direction, and he said, "Go ask that bum." Seeing that I did not know what he meant, he said, "That bum soldier over there"—the enlisted man walking the post. It was quite common, I found out afterwards, for the young gentlemen at the Military Academy in training to become officers to refer to the enlisted men as "bums." I understand that it is claimed that the word is a derivative of "bombardier," and they were bombardiers who formerly guarded the post; but I can only say that too frequently the suggestion was of the lower order of things. Now, there ought not to be that kind of spirit. Of course, we are not talking about social equality and that sort of thing. That is not the point. Of course not. But we want a considerateness on the part of the officer for the enlisted man and a complete realization that an enlisted man is doing, at a far greater risk and disadvantage, just what the officer is doing; he is serving as a citizen and performing a military duty as a citizen, and we ought to look out for him. As I say, the whole fault with the Kernan report is that it does not visualize the fact that our armies are and must be armies of citizens.

Now look at this report, gentlemen. It bears careful perusal. It is well written, succinctly stated. But do you notice that they say it was necessary to have all these courts-martial and all these long punishments because our men were green men and it was necessary to whip them into shape as soldiers in just a few months? Of course, it was necessary to make the best soldiers out of them possible in a few months. But does not the whole report proceed upon the predicate that we got discipline through terrorism? Of course it does. And you do not get discipline, in any rightful sense of that term, through terrorism. Whatever discipline we got, I will assure you, into the Army of the United States during this war, was discipline that was based upon a high regard for citizenship. The quality of the American Army, its fighting quality, was an incident of the appreciation of its citizenship. The Army of the United States in France had a spirit that was second to the spirit of no army that this world has ever seen.

Now, you can not make anybody believe that that spirit was put into those men in the few months' time they were in training camp. It was not put there by terrorization. It was an antecedent, based upon moral considerations and appreciations; it was not pumped into them in a few months in the training camp.

Senator CHAMBERLAIN. Do you remember the story of the little sergeant major from the Argonne, who said that a man told a false-

hood if he said that he was not afraid when he went over the top; and he said, "Whenever I felt afraid of getting afraid, I thought of the folks at home"?

Mr. ANSELL. Yes, Senator. I am not going to confess that the thing that makes me stand up in front of a bullet is the fact that somebody has terrorized me, Senator. That is not so. It is a different quality from that.

I will lay it down as a fundamental proposition, and I think everybody here will agree with me, that you do not get discipline through fear. Of course you have got to punish men, but to set out to get discipline by trying every man who has violated the regulations, and giving him a maximum punishment, will never do. The higher the appreciation the soldier has for his citizenship, the closer he sticks to his duty. Our successful soldier will ever be actuated by patriotism rather than the fear of his officer. When we come to rely upon terrorism to win battles, then we shall have dropped to the point where we have got, in fact, an army of cowards, who have never won anything yet.

Just see how far these Kernan gentlemen will go, Mr. Chairman. They say that disobedience of orders is disobedience of orders regardless of the character of the order, the time, the place, or the circumstances of its commission. Now, is that reasonable? Are we going to legislate upon any such proposition as that? Is Congress going to permit the Army to be governed upon any such lawless, senseless principle as that? We have these cases. A young soldier guarding a park of artillery down in southwest Texas, exhausted, and having just come out of the hospital, still sick, sat down on post, as he ought not to have done, and fell asleep. The nearest German—so far as I know, the nearest enemy—was 4,000 miles away, with the Atlantic Ocean between. To be sure, it was necessary to guard those guns. It would probably be far better done by watchmen, but we can train soldiers that way. Now, to sentence that man to death, Mr. Chairman, simply upon this hard and fast principle that sleeping on post is sleeping on post, no matter where it is, I say is inconsistent with our natural sense of justice and what military necessities require.

They say that this boy who would not give up his cigarette must be most severely punished, because disobedience of orders like that will grow like canker or gangrene throughout the military establishment. Now, that sounds all right; but it is predicated upon the idea that we have got a set of people who are set like tinder, ready to catch fire from every bad breeze that blows in an army—and you know that we have not! Men do not want to disobey orders. Take that same man up against a German, after he has been given some instruction as a soldier, and if you went and told that man to charge the German, or to shoot at a German, or to advance on a machine-gun nest, and then he deliberately and knowingly and intentionally refused to do it, why, to say that that case is such as that case was up here in the New Jersey camp is quite absurd.

They speak contemptuously of a soldier, however new he may be in the Army, following the natural human impulse and inclination, or human sentiments. They say, and they are quoting the War Department for this, "Why, are you going to let a man go home to see

his sick mother, or a dying brother, and let him stay two or three days, and then not sentence him to death when he comes back? If so, the Army will disintegrate, and the instinct will be far greater, when you get in front of the Germans, not to charge a German trench." In other words, let a soldier follow the ordinary human impulse or sentiment in the least degree, you must not take that sentiment or impulse into account in the least degree as an extenuating circumstance. Sentiment is apt to be good; it should not be crushed out; it should simply be directed.

I do not think that our Army can ever take its proper place in the affections of the people if you are going to have a set of Army officers who are strict adherents to the theory that if I am impelled to go home to see my dying mother, and those are the facts, conceded, after I get back I should be shot, and that the great call of the human heart is not to be considered as an extenuating circumstance. That is too hard and fast. I have already told you that this report largely consists of a legal argument to the effect that you gentlemen—I mean the Congress of the United States—can not create a court of appeals. Now, consider the clause of the Constitution itself, and I do not think that the question admits of any dispute or argument. You have just as much right to create a superior military court as you have the summary court. You have just as much right to create this military court of appeals as you have the general court-martial. And certainly everybody has known from the beginning, and the Supreme Court of the United States has said time and time again, that courts-martial of the United States are purely the creatures of Congress, as you make them, whatever you make them. You may have one kind of court or ten kinds of court; you may vest final jurisdiction in the summary court or the special court or the general court, or you can vest final jurisdiction in an appellate court. Really, that is not worth arguing, although seven pages of this report is taken up with that proposition.

They say that you must not divorce discipline from the hands of the commanding general. I have never insisted that you should. I have only insisted that the disciplinary measures that are to be handled by a commanding general should be regulated by the law of the land.

Now, that whole report is right in theory with that celebrated editorial that appears in the Congressional Record of February 15 last, I think it was, taken from the Chicago Tribune, read into the Record by the present distinguished chairman of the House Committee on Military Affairs, evidently expressive of his views, at the request of the Judge Advocate General of the Army of the United States. The editorial is very brief, indeed, but it speaks a volume. It is the text of this Kernan report; it is the text of the War Department attitude. I say that this committee's report proceeds exactly along the line of this editorial, which I believe was expressive of the views of the gentlemen in the other House, and which I want to read here, because it is brief. [Reading:]

ARMY DISCIPLINE.

"For I am a man under authority, having under myself soldiers; and I say to this one. Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it." (St. Matthew, vii, 9.)

When a soldier goes absent without leave, deserts his post of duty to see a dying father, he does so because his own personal desires are stronger than his sense of responsibility to his country. It may be a hard thing to give up seeing a dying father, but it is a harder thing to give up running away in the face of the enemy.

That is what military justice is about. The sole preoccupation of an Army, wherever it is, is to train its men and keep them trained to obey the will of the commander under the most trying possible circumstances, and serve the will of the nation. If disobedience had been tolerated in the United States, our Army in Europe would not have captured the St. Mihiel salient nor fought six weeks in the Argonne.

The reason that the National Guard made good in this war and failed in our previous wars was that from the time it was inducted into the Federal service it was subjected to Regular Army discipline. In previous wars it kept its own "discipline."

An Army, to be successful in the field, must from the moment it begins to train at home have absolute control of its discipline. The commanding general is everything. He must bear the three keys. He must have final control. He must be the judiciary, the legislature, and the executive. If he were not, he would not have an army. He would have a collection of armed individuals.

It so happens—and I looked it up—that the text of this editorial is the statement made by the centurion when he came to Christ at Capernaum and apologetically asked Christ to save his child, saying, "I represent the power of the whole Roman Empire, and yet over these moral and spiritual things I have no control, and you have so much." That was the Roman theory, to say to the soldier, "Go, and he goeth," and to another, "Come, and he cometh;" and the centurion had absolute control. We found the Roman theory in the German Army; hard and fast iron discipline. And yet that German Army was fairly pitted—more than fairly pitted—against the liberal armies of the world, especially our own, when our Army was not the best equipped army—when it was not the best led army from the standpoint of professional soldiers; but we saw that kind of discipline pitted against this higher appreciation and conception that an American soldier has of his duty as a soldier, and we saw the result.

We overcame the German troops in front of us, not because we had had this long system of Regular Army training and this hard and fast discipline, but because of these other qualities that I have referred to; and we succeeded, to an extent, in spite of the system of discipline that we had and not because of it. We succeeded, in a word, because of the American spirit that those men took there with them. It was because of the spirit and not because of this hard and fast senseless discipline that we won against the Romano-German methods.

The gentlemen again in their report referred to the fact that the new Army officer is responsible. Responsible for what. I do not know, because the report is an approval of the result of the administration. But as I said the other morning, conceding harsh punishments, the statement is not so; and even if it were so, we ought not to have a system that permits a new officer to abuse his force. It should be controlled by law rather than by the untrained judgment and unrestrained power of this new man.

But I said that the fact was that the convening authorities were not untrained officers; they had the authority; and they ought not to pass the buck to any new officer.

The Kernan board say that they have actually heard from 255 officers, and that rather more than half of those officers approved of

the system, and that the old officers in the service in large percentage approve of it, and that the other officers go from absolute, flat disapproval to a mild approval or disapproval. Of course the gentlemen of the Regular Establishment who have been trained to this system do approve in large percentage, but this is a fact, and is one that speaks loudly: You take an officer at his retirement time, or an officer after he has retired—a Regular officer—and see what he says about it. You will find him quite a liberal-minded man. He has got back into civil life; he is no longer in the hierarchy and subject to it; he has taken a calm survey of his life's work. If they have 255 letters from officers of the Army at large, I have got seven times that many letters from officers of the Army at large and very nearly that many letters from officers of the Regular Army on the retired list and who are about to go on the retired list, saying that something ought to be done about this system. The board say that it is noticeable that the gentlemen who have been on the battlefront, out of these 255 officers, advocate the present system because they have seen how necessary it was to have this German hard and fast system applied to our troops. If that is so, if they saw on the battlefield how necessary it was, they must have seen it through observing the derelictions of our men. Now, we did not have that kind of wholesale dereliction on the battlefield. I went over to Europe and commanding generals there argued with me that they had to have more power to shoot men, and I said to one of them: "It seems to me that I must infer from your insistence that for the first time we have an army with a very considerable number of cowards in it." "No, no; nothing of that kind." "Where, then, is the necessity for this thing?" Then they began to tell me about our allies, how our allies took men and stood them up and shot them before breakfast. And I investigated our allies' administration in that respect, and it did not bear out that statement at all. When I came back from Europe, I said to the Secretary of War that an enlisted man of our Army has poorer protection than the enlisted man in any army with which we were asociated. It is true. A man could not be executed in the French Army by a commander in the field in this ruthless way. It was passed upon by the supreme authorities of the land.

I have already adverted to the fact that the report concludes, following Col. Wigmore's letter, as you remember, that if you loosen up on this system of discipline, as you call it, you are bound to have bolshevism. That is the bugaboo now. There will never be a bit of reform or a bit of progressive legislation proposed but that the people who insist on being static will label it bolshevism.

Senator CHAMBERLAIN. The only indication of bolshevism in the American Army that I have seen comes from the mouths of the men who have been unjustly punished in Europe, and they are very bitter at the treatment they received.

Mr. ANSELL. Of course, if it is as reactionary as I have said it is, and there ever should be bolshevism, I think logically we could attribute the bolshevistic spirit to the oppressive treatment. Now, the idea of Mr. Wigmore coming along, and in the spirit which this report adopts, saying that that is the way they have in bolshevist

armies, and that this will lead to bolshevism. Does anybody believe that bolshevism, or whatever else it is indicating lawlessness in Russia, is due to too much liberalism and too much democracy, to too high a regard upon the part of the officers of their Army for the enlisted man? Is bolshevism, this great upheaval, or whatever it is, traceable to an overdose of liberalism or is it, indeed, traceable to the fact that it is a break up of the old reactionary system that they have had there?

It is not a fair argument to come here and argue against the bill that if you require discipline to be regulated according to law, the consequence, must be bolshevism. It is one of those arguments ad hominem, and a foolish one at that.

I got a letter yesterday from a New York lawyer. It was in reply to a postal card I had sent out asking the American Bar Association would they please be careful, in passing upon the report of that bar association committee, so that the American bar might not be said to espouse the retention of this system, and this New York lawyer wrote a letter. He said, "Oh, I will admit that lawyers have a great influence; but it may not be in the direction you want it in. We have got bolshevism on every hand, and the whole country is lawless, and we have got to come out and show people, and if necessary we have got to hang them. There is going to be a terrible time, it is certain. That is the line of reform we want in this country, and more and more needed."

Well, that is his view of it. When I was discussing point No. 1 the other morning, I had started on showing this committee the spirit with which that revision of 1916 was undertaken. I had put in one exhibit, but I was switched off, as I have been very frequently—switched off of my own accord—to another subject, before I put in another exhibit, which I would like to do now. I think it is very brief. It is just some statements made by the Judge Advocate General and the Secretary of War before the committee, to show conclusively that they rejected absolutely the liberalization of this system at this time, as they still do.

I desire to thank this committee for their extreme patience in hearing me, and their extreme courtesy at all times. I have had a full and fair hearing, and I want to thank you for your interest and attention.

Senator LENROOT. We are very much obliged to you.

Senator CHAMBERLAIN. May I suggest the names of some other witnesses whom we would like to hear?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. There is a gentleman here from Detroit, who served as an enlisted man through the war, and had some experience of court-martials. Can we hear him on Monday?

Senator LENROOT. Are you going away, Mr. Thomas?

Mr. THOMAS. I have been very anxious to go. I have been waiting over, Senator, in order to make my statement.

Senator LENROOT. On Tuesday, then, we will hear you.

Senator CHAMBERLAIN. There is also Col. Chantland, of the Department of Justice. Will you hear him?

Mr. ANSELL. Mr. Chantland is away, and will not be back for over a week.

Senator LENROOT. We will hear you, then, Mr. Thomas, on Tuesday at 10 o'clock.

Senator CHAMBERLAIN. Mr. Thomas, I would say, did not come here to testify. He was here in Washington on some business, and I met him and was talking to him. I thought the committee would be interested to hear him.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned until Tuesday, September 2, 1919, at 10.30 a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, SEPTEMBER 2, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot and Chamberlain.

Senator LENROOT. Last Saturday morning, I, as acting chairman of this subcommittee, sent a note to Secretary Baker stating that these hearings were going on, and that I would be glad, if he desired, to have a representative of the department present at the hearings, and that the committee would be glad to hear such persons as he might suggest, and at his convenience we will be glad to have him appear before the committee. I had from him this morning a letter in reply, which I will present for insertion in the record at this point.

(The letter referred to is here printed in the record in full as follows:)

WAR DEPARTMENT,
Washington, August 30, 1919.

MY DEAR SENATOR LENROOT: I have just received your courteous note of this morning informing me of the hearings before the subcommittee appointed to consider the Chamberlain bill proposing to revise the court-martial law.

I should be very grateful if the clerk of the subcommittee could be instructed to supply me with copies of the testimony as rapidly as possible, so that my associates and I can have the benefit of the suggestions made. At the convenience of the committee I, of course, desire to have Gen. Crowder, Gen. Kreger, and Gen. Kernan appear as witnesses, and I should be glad also to personally appear at the convenience of the committee, though, perhaps my appearance had better come in the latter part of the hearings rather than in the earlier part of them, so that any matters which the committee has before it affecting orders issued by me will be fully disclosed and can be properly discussed. My own attention to the court-martial attention, of course, has been supervisory rather than executive, and on the general question of modifications proposed the suggestions of those who have been operating the present system will have to be relied upon for detailed discussion.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

STATEMENT OF MR. W. B. THOMAS.

Senator WARREN. I understand that we have as a witness before the committee this morning Mr. Thomas. Will you give your full name to the stenographer, Mr. Thomas?

Senator CHAMBERLAIN. May I make this statement for the record? Mr. Thomas was incidentally introduced to me some days ago, and I ascertained that he had participated more or less in court-martial trials in France as an enlisted man, and I asked him if he would come before the committee while he was here to give his views upon the whole subject, from the viewpoint of an enlisted man and from the viewpoint of one who had participated in trials by court-martial, and he is here in pursuance of that suggestion.

Senator WARREN. What organization were you connected with, Mr. Thomas?

Mr. THOMAS. I was a private in Company F of the Sixteenth Engineers, railway, that being one of the first 10 regiments that was organized in the Reserves after the United States declared war, organized for the purpose of proceeding immediately to France for various engineering construction work, and organized of picked men who would be of the kind that could go without a great deal of preliminary training; men of sufficient poise and character to take part in the work that was required of them without having to be trained for a long time.

I would like to state that the enlisted personnel of the regiment was a very unusual one; it was of very high class.

Senator CHAMBERLAIN. Will you tell the committee who you are and what your business was and where you were located, and how you happened to go there?

Senator WARREN. I was just about to make that inquiry; because in those engineer regiments they were looking for those who were experienced in various lines.

Mr. THOMAS. Yes; picked men. I am a lawyer by profession, of about 25 years' experience, and of average standing, and of average ability, I presume, and I had a very fair practice.

Senator CHAMBERLAIN. Whereabouts?

Mr. THOMAS. At Minneapolis. I practice in the county and live in Minneapolis.

During the Spanish-American War I resigned a commission in the militia and enlisted as a private in the Third United States Artillery, Regulars. I resigned my commission in the militia at that time because the militia then were very inefficient.

I served for about six or seven months as a private during the Spanish War in the Third Artillery, Regulars, and then was given a commission in the Thirty-fifth Infantry, and served with them in the Philippines, resigning from the Army in 1901. On the outbreak of this war there were many reasons which the committee would not be interested in, the details of which I need not go into, why it was very advisable for me to go into the Army. The conditions in Minnesota were such that I felt it clearly my duty to do everything in my power. I was over the age for a commission, as the law then stood, but I was within the age to enlist in the engineer force, and I enlisted.

We went to France; left some time in July, 1917, and arrived in France about the middle of August—about the 20th of August, 1917—and I was there until this spring.

Shortly after we had gotten there numerous charges began to be brought against men for all sorts of offenses, and within a little

while it got out among the enlisted men that I was an attorney in civil life, so that I became very popular as counsel for the accused in court-martial cases. The present Articles of War make no distinction between an officer and an enlisted man in acting as counsel for an accused, and while the officers attempted in every way to prevent my acting, I stood my ground constantly on my right, under the Articles of War, until an occurrence which I will relate later, and insisted on acting for all the men who demanded that I do so.

When I give my views, gentlemen, I am quite sure that I am voicing the opinions of the enlisted personnel of the American Expeditionary Forces; I lived with the boys two years. The life in the Army is much more intimate than even in an affectionate family. The boys live together and know every move that everyone makes. There could be no closer intimacy than is in the barracks of a company under the conditions that we had in France.

One case, which I did not try myself, but which was put into my hands after a conviction with the view that perhaps something might be done, and which was put in my hands not by the man himself but by his friends in his company who were outraged at the injustice that had been done, was the case of a man named O'Hara.

Right here I desire to state, parenthetically, that just before leaving for the United States I was sent to the hospital in France with tonsilitis, and the doctors suspected that it might be diptheria, which was then rampant there, and I was put in isolation and everything taken away from me that I had, including all my papers, and I never got them back. All of the papers that I had accumulated as counsel for courts-martial were lost then, and I have to testify entirely from memory.

This man O'Hara was stationed at the Engineer replacement camp at Angers as a casual. There were fourteen or fifteen thousand men at Angers in casual camps, and the system was, when replacements were needed in any company or regiment in the Engineer Corps, a demand was made on the replacement camp for so many men, who were then selected and sent out to fill up the vacancies. Men were going through there at the rate of 2,000 or 3,000 a day, going and coming, and they were all strangers to each other. It was not the same as where men were in their own companies and all knew each other. The men were all strangers, and no man was interested in anybody but himself.

This man O'Hara, with about 70 others, was sent out with a lieutenant as replacement to a regiment. They marched down to the depot in Angres in heavy marching order, with all their things on their backs, at 3 o'clock in the morning. After marching around there for a while looking for a train, the lieutenant took them into the waiting room and told them to unsling their packs and wait there. This waiting room was in the immediate vicinity of the eating room in the station, and after the lieutenant had gone out the men asked the sergeant who was left in charge, "How about getting breakfast?" He said, "Certainly; any of you that want breakfast go in and get breakfast." Some of them did. This man O'Hara and one other went in and sat at a table overlooking the tracks, where they kept on watch, and ordered breakfast. They were there not over 20

minutes, and when they came out their outfit was gone, and they rushed down the track and found that the outfit had gone on a French train, not on the train they were expected to go on, but a French train that the lieutenant found had some empty cars on it, and the lieutenant had come back on the run and told them to come on and go, and they had been gone six or seven minutes when these two men came out of the restaurant.

This man O'Hara immediately went across the street and reported to the provost marshal, the proper procedure for a man in his condition. He was given three years and a dishonorable discharge and, as far as I know is now serving his three years. He was when I left France; he was in prison.

Senator LENROOT. Were the facts that you state proven?

Mr. THOMAS. I am speaking now of the record. I am speaking not from what somebody else might have stated, but from what the record showed, and the whole facts shown. He was charged not with missing a train, but with disobedience, the disobedience consisting in not remaining in the immediate vicinity. Of course, any lawyer would understand that he was not guilty of disobedience at all, but that is what he was charged with.

Senator WARREN. Tell us something about the trial. What was he charged with, and who constituted the court?

Mr. THOMAS. That, sir, I do not know. In that particular case the record was given to me to examine, but I did not represent the man on his trial. The record was given to me to see if something could not be done on appeal, and I did write a communication or two about it, but got no satisfaction.

Senator WARREN. You looked the case over to see if the man was guilty?

Mr. THOMAS. Yes, sir; and I personally was not acquainted with the court, and I could not give you the names of the members of the court.

Senator WARREN. You could not give us the names of the court?

Mr. THOMAS. No, sir; the only name I remember is that of O'Hara, of the One hundred and sixteenth Engineers.

Senator CHAMBERLAIN. That would locate him.

Mr. THOMAS. Yes. The case must be of record. It was a general court.

Senator WARREN. You do not know whether he is serving his sentence now or not?

Mr. THOMAS. He was when I left France, early this spring. He was in the prison camp at Gievres.

Another case, which was a little thing, but which probably showed the attitude as well as anything I know of, was a case——

Senator WARREN. Just a moment; I am not, I might say in this connection, speaking for any division of opinion about Regulars or drafted men or militia, but still, sometimes it is well to follow those matters. As to these officers of that court, if you know, to what did they belong?

Mr. THOMAS. I do not know, sir. In regard to this particular court, I do not remember the name of a single officer that was on the court. The case had not been tried in the vicinity in which I was

stationed. It was tried at Angers when I was up on the English front, and I paid no attention to that. I only paid attention, so far as a record was concerned that was given me, to the facts and not to the personnel of that court, or any names.

Senator WARREN. This record you received came from the man himself or from friends of his?

Mr. THOMAS. This was the record of the court, and he sent it to friends of his, who sent it to me. I think his friends got it from his counsel—the man who represented him on the trial.

Senator WARREN. I was going to say that the complaint is, usually, that they can not get those records.

Mr. THOMAS. There was great difficulty in getting them, in certain cases.

Senator WARREN. I wanted to ask how it came to you, so as to cover that point.

Mr. THOMAS. His friends got it from the man who represented him on the trial as counsel.

Senator WARREN. I happened to try to find, myself, about an officer, and was not able, in my position, to get at the record.

Mr. THOMAS. Yes; that was the general complaint over there.

One case that showed the drift over there perhaps as well as anything was the case of a lieutenant, whose name unfortunately I have forgotten, but I can give you the name of the judge advocate who prosecuted him, and that is the important matter in this regard. This lieutenant was an expert telephone man from one of the little cities in the Middle West, I think Crawfordsville, Ind., and was taken because of his expert knowledge, and was sent over there immediately. He was sent over there as a casual officer, without any training, a first lieutenant, and he reported at Tours and was told that he would be assigned to his outfit in a short time, and in the meantime to wait around Tours. Tours was then the headquarters of the Service of Supply Department. I may state that by character he is a rough-and-ready, hail-fellow-well-met man, used to construction work, used to bossing men on the job, and pleasant to everybody. Everybody he met was "Sandy" or "Shorty" or "Bill" or "Curly" or some name of that sort. That evening he went into a café in Tours and saw an enlisted man sitting at a table drinking a bottle of wine, so he clapped the enlisted man on the back and sat down with him, perfectly delighted to meet some decent company. They sat there and had a bottle of wine or so until the café closed, at 9 o'clock, and then two girls came through the room as it was closing and spoke to the enlisted man, whom they knew, and who spoke to them in French, and then the enlisted man turned to the lieutenant and said, "If you want something more to drink, these girls say we can get it around at their rooms," so the lieutenant and the enlisted man went around to the rooms and got some more to drink. The evidence was clear that there was no improper conduct otherwise. Simply they were not through spending the evening yet, and they went around there because the café was closed—in one of the largest hotels in Tours.

The lieutenant was arrested. He had been seen with this enlisted man. *There is the suggestion.* A certain Maj. Elmore, of the Judge Advocate General's Department, was the prosecutor.

In his address to the court he said—and he represented the Judge Advocate General's Department, of course, in saying it:

> If this man had done what he did alone or in company with other officers, he would have been guilty of no offense, and you could well pass it by. Having done what he did in the company of an enlisted man, I insist that dishonorable dismissal from the Army will not be sufficient for him, but that a sentence of imprisonment at hard labor must be added.

And they gave him three years.

Senator CHAMBERLAIN. And a dishonorable discharge?

Mr. THOMAS. Yes; and a dishonorable discharge.

Senator CHAMBERLAIN. Is that a part of the record?

Mr. THOMAS. Yes; and that address is in the record. There were other cases.

Senator CHAMBERLAIN. Who was this Maj. Elmore? Let us locate him.

Mr. THOMAS. Except that he was Maj. Elmore of the Judge Advocate General's Department, I do not know. Gen. Ansell knows him. I mentioned this incident to Gen. Ansell the other day, and he said, "Oh, yes"——

Senator CHAMBERLAIN. How can we locate the case? Do you know the unit to which he belonged?

Mr. THOMAS. No; he was a casual officer and had no unit. If his name was mentioned to me, so as to bring it to my mind, I would know it. I have racked my brain to try to remember it, but I can not do so.

Senator WARREN. We would prefer that you would deal with cases that you have been personally connected with.

Mr. THOMAS. Yes.

Senator WARREN. Did you have that record?

Mr. THOMAS. Yes; from the same person who gave me the O'Hara record.

Senator WARREN. Did you appear in it at all, Mr. Thomas?

Mr. THOMAS. Only after the trial, as his representative to get a mitigation, if possible, of punishment.

Senator WARREN. Before whom?

Mr. THOMAS. That was all done in writing. In that particular case the communications were addressed to Gen. Harboard. I never heard from it.

Senator CHAMBERLAIN. Signed by you?

Mr. THOMAS. Yes. I never heard from it. In our own outfit, which not only meant our own regiment——

Senator WARREN. Before you get to that, tell us about that case, if you know.

Mr. THOMAS. The lieutenant is serving his time, also, at Gievres.

In our own outfit I was selected first as counsel. In our own regiment the first case that I had was a general court-martial, and there again the name has slipped me, although I remember the men very well. This was a court-martial of a man who had gotten into an altercation with an officer, which was nine-tenths the officer's fault. The officer had led him on and harrassed him, and so forth. That was the first case in which I appeared, and I tried the case just as an attorney in civil life would try a case, making as much as I could of the facts, no matter whom they hurt. In that case,

the sentence, I think, was a very reasonable one. The man was sentenced to six months imprisonment and $5 fine, per month, for that period.

Thereafter—and this is the point I want to make as an instance of one of the openings that are now possible, under the present system—thereafter it was impossible in our regiment to get a general court-martial. In general courts-martial a complete record is kept of all the proceedings, the testimony, motions, and so forth—everything that is done. In a special court no record was kept at all except the charges and the findings of the court. After that one case, we never had a general court-martial case.

Senator CHAMBERLAIN. Why was that?

Mr. THOMAS. I am, of course, now giving my opinion, but in several instances, as counsel for the accused, I demanded general court hearings, and the case was referred to a special court, and in all of those cases, I think without exception, they would pile up the charges in the special court; as, for instance, a man would be absent without leave 24 hours, and they would put one charge in the specifications against him for being absent without leave under the article that prohibits that. Then they would put in another charge in the specifications against him for failing to report for his work, that being covered by another article of war. Then they would put another charge against him, in one instance for disobedience, there having been a general order out that all men must report back when their passes were out. Then the special court would give him six months on each one of those charges and specifications, and make no record of it.

Senator CHAMBERLAIN. How long a term of imprisonment could a special court give?

Mr. THOMAS. Six months.

Senator CHAMBERLAIN. Then they would make the punishments cumulative?

Mr. THOMAS. They would make them cumulative. Whether they came under general order from general headquarters, those sentences were all served, not according——

Senator CHAMBERLAIN. Were they enforced, as a rule?

Mr. THOMAS. Yes, sir. Now, I am guessing now, but I appeared as counsel in at least 50 and, I think, 100 cases after that general court in which I appeared.

Senator CHAMBERLAIN. You have not given the names of the men you represented.

Mr. THOMAS. No, sir. I can remember most of their names.

Senator CHAMBERLAIN. Do you remember the name of the first party?

Mr. THOMAS. Reynolds, of Company C, One hundred and sixteenth Engineers. Every one of those men was charged with seven or eight charges and specifications for one act.

Senator CHAMBERLAIN. The Judge Advocate General's Office may want to locate the case.

Mr. THOMAS. All that I can do, Senator, is to give you the names, and in my regiment I think I can give you also the company in each case. I can give you the man's name and the company.

Senator CHAMBERLAIN. Will you try to furnish the stenographer with the names of these parties you represented?

Mr. THOMAS. Yes.

Senator CHAMBERLAIN. You can do that, and let him print the names and the units to which they belonged?

Mr. THOMAS. Yes, sir.

Senator WARREN. Who was the colonel of your regiment?

Mr. THOMAS. Burgess, for a time, and during the time I speak of Col. Fowler was in command. Burgess was on detached service somewhere. As I say, a record was kept of general court-martial cases but not of special courts. The trials were all by special courts, of which no record is made.

Senator CHAMBERLAIN. No shorthand report?

Mr. THOMAS. No shorthand report, but they would reach the same amount of punishment by charging a man under four or five different Articles of War for the same offense and give him six months on each one; as, for instance, in one instance a man who was absent without leave for 24 hours was charged with being absent without leave and also charged with failing to appear for duty at his proper place under another article with several specifications on it, and in one instance was charged with disobedience, there having been a general order that men would not be allowed to leave camp without proper permits. They would turn that into disobedience of orders. Then they would give him six months on each one of those charges and make them cumulative. After that first case, until I left duty with the regiment I never had, nor could we get, although it was several times demanded, a general court-martial hearing.

Speaking generally, the special courts were extremely arbitrary and autocratic. A man had practically no rights before them at all.

Senator WARREN. Will you give us your opinion as to why that change was made, Mr. Thomas?

Mr. THOMAS. Yes; it was generally believed, it was the universal belief, and I think borne out by all the facts, that the men in control, in authority, did not want records of the cases made; did not want the facts taken down or preserved, so that anyone could ever find out what they were.

Senator WARREN. You continued to appear in these cases?

Mr. THOMAS. Yes, sir; I continued to appear until along in August, 1918; and as preliminary to what I have to say now, I would like to put myself in evidence as Exhibit A.

We were up on the English front for five or six months in the spring and early summer of 1918, and came back from the English front to Nevers. About the 1st of July I was in the city of Nevers, our camp being out of the city about 2 miles. I was properly in the city, free from any regulation, at the Red Cross, and was taken with a violent chill, followed by high fever, which afterwards turned out to be a violent case of flu, which was new there, and they did not know as much about it as they found out afterwards.

A lady in the Red Cross put me in a bunk at the Red Cross and the soldier boys looked after me, and the next morning I was even more ill; could not raise my head. The Red Cross lady telephoned to the hospital in the city of Nevers, at the base hospital there, and they sent me for three weeks to the hospital, and then sent me out to the

regiment with an order that I was to do no manual labor of any kind and was not to be put to any exposure.

Senator WARREN. You were not subject to drill?

Mr. THOMAS. No, sir; I was to do no manual labor and was not to be subjected to exposure. I was sent from the hospital before I was ready to go because they were so crowded. They needed room for new cases.

Just prior to that the boys of my company, and also I will say, of the other companies of the regiment, had asked me to look into and demand an accounting of the company funds. It was the general supposition, amply supported by the circumstances and such facts as the men were acquainted with, that our company funds had been dissipated by the captain, for their own pleasure.

Senator CHAMBERLAIN. Was the captain the keeper of the funds?

Mr. THOMAS. The captain was the keeper of the funds. In attempting to get an accounting of these company funds we had no success at all, and it was insisted that some showing be made as to whether it was——

Senator CHAMBERLAIN. You were doing that as the representative of the men?

Mr. THOMAS. As their representative, and at the request of the men. We had nearly starved to death when we knew that we had several thousand francs in the company fund that we had no use of at all. On the English front we had been on a very poor English ration when there was plenty of food to be had, but we could get no money out of the captain to buy it.

On my return from the hospital, which was just at the time when we were asking for this accounting, and also at the time when I was busy all the time attending court-martial cases, and doing nothing else, and we were trying three or four a day, when I came back with this order to do no manual work I was immediately put into the kitchen as the permanent kitchen police, that being usually considered as a form of company punishment, and the hardest work that can be required of a man—put there permanently to scrub pans and peel potatoes, working from before breakfast until after dark; did it without complaint; practically did not do it, because I was busy all the time trying these court-martial cases; and anyway, under orders appointing counsel, they had to give me time to do that.

That went on for about six weeks, I still insisting on some action in the matter of the company funds.

Senator CHAMBERLAIN. To whom were you making that insistence?

Mr. THOMAS. To the captain.

Senator CHAMBERLAIN. To the man who was keeping the funds back?

Mr. THOMAS. Yes; and orally had had a talk or two with the regimental commander.

Six weeks after I came back from the hospital we were still trying these cases. We had two special courts going all the time. We had two special courts going at two villages about a couple of miles from each other, and I was going backward and forward all the time from one to the other.

One evening after finishing our trial work, at half past 10 or 11 o'clock at night, the lieutenant who was acting as judge advocate of

one of the courts said that he would like to see me, and I went over, and he read me charges against myself for absence without leave during the time that I was in the hospital.

Senator CHAMBERLAIN. Who read this to you?

Mr. THOMAS. The lieutenant who was acting as judge advocate of one of the courts, Beselius. He told me that I would be tried the next morning at 11 o'clock.

Senator CHAMBERLAIN. Did you see the charge?

Mr. THOMAS. Yes; he read the charges to me.

Senator CHAMBERLAIN. For the time that you were in the hospital. entirely?

Mr. THOMAS. Yes; absent about three weeks, just the time that I had been in the hospital.

Senator CHAMBERLAIN. How long was this after you returned from the hospital?

Mr. THOMAS. About six weeks.

Senator CHAMBERLAIN. And after you had gotten active about the company funds?

Mr. THOMAS. Oh, yes, sir; yes, sir. I raised such a howl about it that Beselius said he would see if he could not get the case postponed for a day and give me a chance to go to Nevers and get the hospital record and the testimony of the lady at the Red Cross; and he did succeed in getting a day's continuance, and I went down to Nevers.

Senator CHAMBERLAIN. With leave?

Mr. THOMAS. Yes, sir; the next day. Well, I will say with leave. Not with a formal pass, but with a statement from Beselius that I was going in on court-martial business. I may state in that respect, Senator, there was either an order or it was permitted, so that a counsel in a court-martial had leave, within reason, to prepare his case without a formal pass. I went into Nevers, to the guardhouse in Nevers, and went back to the regiment under guard.

Senator CHAMBERLAIN. Without seeing the authorities?

Mr. THOMAS. Without any opportunity to get the witnesses. As soon as I got into Nevers I was arrested.

Senator CHAMBERLAIN. How far was that from your post?

Mr. THOMAS. About 2 miles.

Senator WARREN. That was not done by any members of your regiment?

Mr. THOMAS. No, sir; I was arrested by the military police; but there had been a 'phone message from my regiment to the guardhouse in Nevers. I do not know whom that came from.

I was arrested just as I was coming out of the Red Cross at Nevers, where I went to see this lady, who was not there, being away for the day. Next morning I was tried. Upon the formal motion, I could make no argument. I was tried anyway.

Senator CHAMBERLAIN. By a special court?

Mr. THOMAS. By a special court, without any record except the charges and the findings. I introduced the hospital record immediately on having the charges read, which I had had one of my friends in the company get before it could be destroyed. I introduced the hospital record, showing that I had been in the hospital all this time, and testified fully as to the facts. The only evidence against me was my first sergeant's evidence, that on that day I had gone into Nevers;

that evening I was taken sick, and from that evening I did not report to the company until I came back from the hospital.

Senator CHAMBERLAIN. Which was true?

Mr. THOMAS. Yes; which was true. He also testified that when I did come back I came back with a hospital order showing how long I had been there.

I will say that technically I was absent without leave during the time I had been sick at the Red Cross; from that evening until the next day technically I had been absent without leave.

Senator CHAMBERLAIN. But ill?

Mr. THOMAS. But ill; so ill that I could not hold my head up. However, they found me guilty of absence without leave for the whole time.

Senator CHAMBERLAIN. How long?

Mr. THOMAS. About three weeks.

Senator CHAMBERLAIN. For how long were you sentenced?

Mr. THOMAS. I was given four months at Gievers, without any fine. That four months is the minimum punishment for which a man was sent to a disciplinary barracks.

Senator CHAMBERLAIN. Now, will you give the unit to which you were attached at the time of the trial, and the names of the members of the court?

Mr. THOMAS. Company F of the Sixteenth Engineers was my company and regiment. The president of the court was Capt. Magoffin.

Senator CHAMBERLAIN. He was the keeper of the company funds?

Mr. THOMAS. No, sir; the president of the court was Capt. Magoffin of E Company of the regiment.

The other members of the court were First Lieut. Smith, of F Company; First Lieut. Challoner; and Second Lieut. Paddock. I think that comprised the court. There may have been a fifth member. If there was, it has slipped my mind. Beselius was the judge advocate.

I have been getting a little ahead of my story. At supper time of the day these charges were read to me—Oh, the charges were filed by Capt. Wenzell, of Company F.

Senator CHAMBERLAIN. He made the charges?

Mr. THOMAS. He made the charges, and he was particularly the man who, we were as morally sure as we could be of anything, had dissipated our company funds.

Senator WARREN. May I ask you there: You belonged to a company. Now, what about the medical men of that service? How many did you have in your regiment?

Mr. THOMAS. Sometimes two and sometimes three.

Senator WARREN. In the regiment?

Mr. THOMAS. Yes, sir.

Senator WARREN. Did they insist upon having no one go to the hospital unless they first sent them, or anything of that kind?

Mr. THOMAS. That was the general regulation. I do not know that that was insisted upon.

Senator WARREN. You said that technically you were guilty of absence without leave?

Mr. THOMAS. Yes, sir; technically I should have gone on my company's sick report, reported to the regimental surgeon, and then by

him ordered to the hospital. That would have been the regular way of getting into the hospital. In my case that had not been done. I had taken sick in Nevers—extremely sick—very suddenly, and had been sent to the hospital, not through the regular channels.

Senator WARREN. You felt that they took advantage of the technicality?

Mr. THOMAS. Certainly.

Senator WARREN. I think that I can see that point now.

Mr. THOMAS. I felt that they were bound to get rid of me anyway.

Senator WARREN. You think it was prejudice because of your defense of various of your comrades?

Mr. THOMAS. Certainly; I was just going to enlarge on that, Senator.

The instant that happened, at supper time that same day the charges were laid before me, Col. Fowler sent for me.

Senator CHAMBERLAIN. The regimental commander?

Mr. THOMAS. Yes; and he told me that he was not going to have me take any more of these court-martial cases.

Senator CHAMBERLAIN. Why?

Mr. THOMAS. He did not say. But then, it was reported that he said he was not going to have his officers subjected to cross-examination that way, and shown up.

Senator CHAMBERLAIN. By a private?

Mr. THOMAS. By a private. I said, "One way to keep them from being shown up is to have them"——

Senator CHAMBERLAIN. So far as you know there is nothing in the law to prevent a private from acting as counsel for an accused.

Mr. THOMAS. No, sir; that is true.

Senator CHAMBERLAIN. He is permitted to act, and so is a civilian, as I understand?

Mr. THOMAS. Yes, sir.

Senator CHAMBERLAIN. And they are permitted the same privileges on cross-examination that an officer would have?

Mr. THOMAS. Yes. Just the same as any counsel, in that case.

Senator WARREN. I want to get at the action that is differing from the law; wherein there is any difference.

Mr. THOMAS. The colonel told me I could take no more court-martial cases. That was at supper time of the same day that those charges were read to me, later. I told him if he made such an order as that it would be illegal, and a reversal by him of the laws passed for the government of the Army.

Senator WARREN. Now, you say that the sentence of four months imprisonment was the minimum punishment. What did you do during that four months?

Mr. THOMAS. I was at Gievers a part of the time. I was discharged before the four months were up.

Senator WARREN. Why did they discharge you before?

Mr. THOMAS. Well, I think partly because I was an old man, and I had a good prison record, and there was a general supposition at Gievers that it was an outrage to send me there.

Senator WARREN. I can easily understand that; but give us the difference between a disciplinary baracks and a guardhouse, for

instance. Of course I know what the differences were when I served, but I want to get at what it is now.

Mr. THOMAS. In a regimental guardhouse a man was among his own friends, and the men over him were his own friends.

Senator WARREN. But he was confined?

Mr. THOMAS. He was confined in the guardhouse. The point was raised there in my case whether, if I was in the guardhouse, they would not even then have to let me appear as counsel if I were demanded by anybody, and the supposition was—it was only a supposition—that they gave me enough to send me away from the regiment, so that I was put clear out of the way.

Senator WARREN. You were confined in the disciplinary barracks the same way as you would have been in the guardhouse?

Mr. THOMAS. Oh, certainly; the disciplinary barracks is very much stricter. It is practically a prison.

Senator WARREN. Yes.

Mr. THOMAS. As a matter of fact, with me it was not. I was given greater privileges at Gievers than anywhere else in France.

Senator CHAMBERLAIN. You had no complaint there?

Mr. THOMAS. No complaint at all. I was better treated, and was treated with more consideration, than I was in my own regiment.

Senator WARREN. You say that you were discharged before your time was up. What percentage of the men who go to the disciplinary barracks have to serve out their full time?

Mr. THOMAS. Practically all of them, Senator, over there, so far as I was able to see, in my experience. There were, I think between 600 and 700 men. There were two prisons at Gievers, but in the prison to which I was assigned I think there were between 600 and 700 men, and during the two months or so that I was at Gievers I think one man was not discharged but paroled. He was an expert chauffeur, and the colonel got him to drive his car.

Senator WARREN. I want to see if they differed in their procedure in the disciplinary barracks from what they do here.

Mr. THOMAS. They were not called disciplinary barracks over there. They were called prison camps, and there was no segregation. Men convicted of crime were prisoners just the same and associated with and worked with the prisoners who were convicted of strictly military offenses. There was no segregation of any kind. They had men there serving 99 years, and they had men there awaiting sentence of death.

Senator CHAMBERLAIN. You felt that you were railroaded there because they wanted to get rid of you as an active defender of enlisted men?

Mr. THOMAS. No question in the world about it.

Senator CHAMBERLAIN. What ever became of the charge of dissipation of the company funds?

Mr. THOMAS. That was the end of it. I might say that within the last few days I met our regimental quartermaster, who is still in the Army, at the Washington Hotel, and who, by the way, was, I think, our most popular officer. He was one of these rough and ready, hail-fellow-well-met men, and the boys called him "Raw Beef Weeks." His name was Weeks.

Senator CHAMBERLAIN. Col. Weeks?

Mr. THOMAS. No; Maj. Weeks, the Colonel's brother. Maj. Weeks was the most popular officer we had.

Senator CHAMBERLAIN. Is he now a colonel?

Mr. THOMAS. No, sir; he is a major.

Senator CHAMBERLAIN. Is he a Regular?

Mr. THOMAS. No, sir; he is a reserve.

Senator CHAMBERLAIN. Is he out now?

Mr. THOMAS. No, sir; he has gone to San Antonio.

Senator WARREN. He is a lieutenant colonel?

Mr. THOMAS. No, sir; he is a major.

Senator CHAMBERLAIN. I would like to go back to this company business. Who was the captain?

Mr. THOMAS. Wenzell.

Senator CHAMBERLAIN. Was anything ever done with him?

Mr. THOMAS. No, sir.

Senator CHAMBERLAIN. Was the fund ever accounted for?

Mr. THOMAS. Maj. Weeks told me at the Washington Hotel the other day—the only information I ever got of it—that it was a part of his duty to audit those funds when the regiment was demobilized, and that he told those captains they would have to get vouchers, and they did get vouchers of a sort; that in the rush of work he passed them, but he was very much surprised that they had passed when they got to Washington. However, he said so far as he knew no trouble was ever made about it.

I will state, however, on my own responsibility, that in April, and from then following until I went to Gievers in August, the company fund of F Company was either entirely dissipated or short.

Senator CHAMBERLAIN. That is another captain?

Mr. THOMAS. No; that is the captain of my company—Wenzell.

Senator CHAMBERLAIN. He kept both?

Mr. THOMAS. No; he had simply the funds of F Company.

Senator CHAMBERLAIN. Oh, yes.

Mr. THOMAS. Whatever his final accounting may have been, I am willing to state on my responsibility that the fund was not intact from April 18 to August 18.

Senator WARREN. How do you account for his passing the audit?

Mr. THOMAS. Oh, he might make it up, or he might turn in any sort of vouchers. That is no very great trouble. No very strenuous accounting was ever made of those funds.

Senator CHAMBERLAIN. Was Wenzell a regular officer?

Mr. THOMAS. No, sir; a reserve officer.

Senator CHAMBERLAIN. Is he out?

Mr. THOMAS. Yes.

Senator CHAMBERLAIN. Demobilized?

Mr. THOMAS. Yes.

Senator CHAMBERLAIN. Promoted?

Mr. THOMAS. Yes.

Senator CHAMBERLAIN. To what rank?

Mr. THOMAS. Major.

Senator CHAMBERLAIN. He was a captain in the line?

Mr. THOMAS. Yes; he was a captain, and was promoted to major about the 1st of September, 1918.

Senator WARREN. That name sounds familiar. Can you tell me where he went from?

Mr. THOMAS. Yes; from Detroit. He is a young man, himself, but his father and his uncle are consulting engineers in Detroit—Wenzell & Bro. or Wenzell & Co.

Senator CHAMBERLAIN. Has your record in the Army been good?

Mr. THOMAS. Yes, sir; with one exception. I had been operated on in the winter of 1917 for hemorrhoids.

Senator CHAMBERLAIN. In France?

Mr. THOMAS. In France; and I had been returned again because of the crowding of the hospital before I was healed up, and there, again, I was returned to the regiment with an order to do no work until I was perfectly healed. The regimental surgeon marked me "duty."

Senator CHAMBERLAIN. Marked you for duty?

Mr. THOMAS. For full duty immediately, which was very hard at that time. We were in camp in the rain and snow and sleet and mud and on low rations, and I was in very poor condition and was very sore—could not stoop over.

Senator WARREN. Speaking of rations, were you in the American forces all the way up, or in the forces that served with the British and French?

Mr. THOMAS. No, sir; we were by ourselves at Is-sur-cille. At that time the men had broken down badly from overwork, and the sick report was very large. I should suppose that 33 per cent of the men were on sick report every morning, and the doctors were quite generally marking everybody "duty," and they marked me along with the rest.

The second day after I got back I went down to the village and rented a room, after objecting to being marked "duty," and having been marked "duty," and I think I was four days, or something like that, there.

Senator CHAMBERLAIN. Absent without leave?

Mr. THOMAS. Absent without leave, sick; and I was fined $10 for that.

Senator CHAMBERLAIN. Not imprisoned?

Mr. THOMAS. Not imprisoned.

Senator CHAMBERLAIN. That was the only blemish on your record?

Mr. THOMAS. That was the only blemish on my record; and the circumstances were well understood. As I say, I think my punishment was $11, one-third of one month's pay.

Senator CHAMBERLAIN. Did you establish a reputation, during your employment as counsel for the soldiers, as being a busy-body and a trouble breeder?

Mr. THOMAS. No; just the reverse, Senator. I tried to be just the reverse, and I think I was. I think I had the reputation of being one of the most punctilious soldiers in the regiment, so far as courtesy towards officers went, and I had the reputation, I am quite sure, among the men, of being oil on the waters, rather than a disturbing element.

Senator CHAMBERLAIN. What is your complaint, if any, against the court-martial system, and what suggestion have you to make about it?

Mr. THOMAS. In the first place, speaking as a lawyer, we who are engaged in practice in civil life overlook the fact, or are very apt

to overlook the fact, that the administration of justice is something that requires a considerable amount of training. Even where we are trying cases before a poor judge or where we have a poor or inexperienced lawyer on the other side, they know a great deal about their profession. It is astounding, and one who has not had the experience would not believe, how utterly foolish and how utterly incompetent even intelligent men are who have had no experience in the administration of justice or in the trial of cases. If it were not so pathetic, it would be ridiculous. They have no conception whatever of the requisites necessary to fairly try a case or to render anything like a just decision.

The most outstanding fact is that all courts-martial, practically without exception, were treated as personal matters.

Senator CHAMBERLAIN. In the Army?

Mr. THOMAS. In the Army. The very fact that some officer put charges against a man was sufficient to have that man convicted.

Senator CHAMBERLAIN. By his fellow officers?

Mr. THOMAS. By his fellow officers. It was a personal matter for him, and the whole case reeked with personal prejudice, from start to finish. It made no difference what the evidence was, it made no difference what the law was, the question was that some officer had preferred charges against a man and wanted to see him cinched, and that the court was there for the purpose of cinching him.

Senator CHAMBERLAIN. Did they make a complete record of the evidence at the trial?

Mr. THOMAS. Only in general courts-martial.

Senator CHAMBERLAIN. Did they make a pretty good record there?

Mr. THOMAS. No; it was always difficult there, Senator; not on account of the fault of the court, but because it was very difficult to get a competent stenographer.

Senator CHAMBERLAIN. In the summary courts they made no record?

Mr. THOMAS. No, sir. One of the gravest sources of injustice and one which irritated the men the most and which probably enhanced the irritable feeling of the men as much as anything else was the numerous instances in which men were kept the full limit of 40 days in the guardhouse and then were tried by summary court and given very trival punishments.

Senator CHAMBERLAIN. That is, they were kept 40 days before trial?

Mr. THOMAS. Yes; before trial; and I was going to suggest that the bill S. 64 is deficient in that regard. It makes no provision; and I believe it would be a good thing and would lead to better discipline and more satisfaction all around with the system if the Articles of War themselves specified that all minor offenses—specifying what they should be, for instance, absence without leave for 36 hours, and other minor derelictions—shall be punished by a summary court and hearings shall be held within 48 hours.

Senator CHAMBERLAIN. And not keep men for days in prison?

Mr. THOMAS. As it now stands—and that is the old plan also—charges are filed, then investigated, and then the commanding officer orders what class of court shall try them, whether summary or special or general.

Senator CHAMBERLAIN. And in the meantime the man is in prison.

Mr. THOMAS. In the meantime the man is in the guardhouse all the time.

Senator CHAMBERLAIN. And after the trial, then he is often sent up for a few days only?

Mr. THOMAS. Yes; or only fined. There were many instances of men being in the guardhouse a month for some little bit of a trivial thing that they were fined $5 for.

Senator CHAMBERLAIN. That is pretty generally the case?

Mr. THOMAS. That is universally the case. Speaking now from recollection, I do not know of any case that was tried in less than 20 days. In the meantime the man is in the guardhouse.

Senator CHAMBERLAIN. Have you any suggestion to make with reference to the proper representation of the accused by counsel? Is the system that is now in vogue all right?

Mr. THOMAS. It is. It is a case of administration, Senator. The system now in vogue permits a man to be represented by counsel of his own choice, making no distinction as to an enlisted man and an officer. It brings the accused before a special or a general court, and he can choose his own counsel.

Senator CHAMBERLAIN. Is that carried out?

Mr. THOMAS. In my instance it was carried out until they railroaded me; but under the present system there are always those opportunities for railroading if they want to get rid of a man. It is a very, very difficult proposition. There is no question that an officer must have practically unlimited authority to be used in emergencies. There is no question that in the American Army, at least, it is only necessary to use that authority once in a hundred years. The truth of the matter is that in my judgment, at least, and in the judgment of most of those with whom I was thrown in contact, the officers were a hampering element and not a helping element.

Senator CHAMBERLAIN. In what respect?

Mr. THOMAS. Our regiment was a very efficient engineering unit, a unit; and very proficient, very efficient. The men were from the class who knew how to do almost anything. I was continually surprised at their efficiency in the field. No matter what was required, whether it was railroad construction, engineering, surveying—anything that was necessary—we had men that knew exactly how to do it. There was this Federal base which was one of the largest supply bases built by the United States in France, involving some 150 or 160 warehouses each some 150 by 60, with all the roads and trackage and water system and electric lights and everything necessary to make it complete, and as complete a system as a railroad terminal for a city of three or four hundred thousand people would be. That was practically all done from start to finish, from top to bottom, by the enlisted men, and in nine cases out of ten when the officer interfered with an order he mixed it up. The men who were expert at the various branches would hold meetings, and I never saw men so interested in their work as they were. The would hold meetings among themselves, informal conferences, and lay out the work among themselves, plan it, and do it themselves. The officers would simply walk up and down on the work occasionally, showing themselves.

Senator CHAMBERLAIN. They were not experts in the work?

Mr. THOMAS. Many of them did not know anything at all about it. There were rock cuts; there was tunneling work. In one instance an officer did interfere and blow up two men. One thousand pounds of black powder went off prematurely and blew a lot of fellows up.

The enlisted personnel were practical and efficient men at that work, and it was all done on their initiative from the surveying to the actual pick-and-shovel work.

Senator CHAMBERLAIN. Now, we are getting away from the line of the hearing. What other suggestions have you to make?

Mr. THOMAS. A suggestion as to double charges. I think there should be a provision in the bill prohibiting the filing of more than one charge against a man for only one act.

Senator CHAMBERLAIN. That is, not charging him with desertion and being away without leave and with disobedience of an order, all involving one act?

Mr. THOMAS. All involving the same act. That was one of the great sources of injustice, I think; but the two most outstanding, and the two to rankle in the men the most, were those two cases—the delay in the summary court hearing for a trivial offense, the long time spent in the guardhouse waiting, and the fact that a man for a comparatively slight single offense or act of omission would be charged under half a dozen different charges and receive a sentence of six months for each one.

Senator CHAMBERLAIN. Did you not find that the judge advocate who represented the prosecution and the court does, as a rule, know little, if anything, about the law?

Mr. THOMAS. Nothing whatever, sir. As I said before, it would have been ridiculous if it had not been so pathetic.

Senator CHAMBERLAIN. Do you think there ought to have been some man there as the legal adviser of the court, at the trial, who understood law?

Mr. THOMAS. Unquestionably. As I said before, the administration of even the simplest forms of justice is a highly technical matter that it requires trained men to administer.

Senator CHAMBERLAIN. That is the British system?

Mr. THOMAS. I may say that I voice the opinion of the enlisted personnel, I am sure, in stating that their preference would be for an expert outside court that had no connection whatever with the Army.

Senator CHAMBERLAIN. Did you know any cases where a verdict of acquittal was rendered and was then disapproved of by the commanding officer—and a retrial of the case ordered?

Mr. THOMAS. No, sir. I knew of many cases where disapproval by the reviewing authority was had. I knew of only one case where there was a reduction of sentence by the reviewing authority, and that was made by Gen. Patrick. A man in our regiment named Ronan had received a dishonorable discharge and had been sentenced to 15 years, and Gen. Patrick cut that down to 6 months, with a sharp reprimand; with a statement to the court stating that evidently no member of the court had any conception of rendering military justice and that it had shown personal prejudice all through the case. I may say that was the first general case we had.

Senator CHAMBERLAIN. Was this Gen. Patrick in charge of aviation?

Mr. THOMAS. Yes; he was in charge of aviation; and I may say that that was in the early days, and that that policy was reversed very shortly after that.

In every other instance that I saw except one, if any comment was made by the reviewing authority it was that the punishment was not sufficient.

Senator CHAMBERLAIN. They did not reverse it?

Mr. THOMAS. They did not reverse them. We had one boy in our regiment that was tried for disobedience, with every excuse for the disobedience. He was an ignorant sort of a boy and there was a general order that engineers should not be drilled, and he was ordered by the first sergeant to do extra drill as a punishment, after working hours in the evening, and he refused. The captain sent for him and ordered him to obey, and he still refused, relying on this general order, and he was tried and was given one year in Gievres without any fine. He was a harmless, pleasant boy, and the court very rightly took the view that he thought he was right. In that case the reviewing authorities reprimanded the court for their leniency.

Senator CHAMBERLAIN. For their leniency?

Mr. THOMAS. Yes; I know one other case in which the man ought not to have been tried at all, in which a sentence of dishonorable discharge and 20 years was cut down to 5 years and dishonorable discharge.

Senator WARREN. To revert for a moment to your statement that there should be a law that these cases should be tried within 48 hours, would you have any elasticity in case of engagements going on or because of movements of troops, where it would be almost impossible to get a court-martial? Do you think it is necessary to have any elasticity in that direction?

Mr. THOMAS. It is not necessary to have any summary courts when the American Army is not——

Senator WARREN. I meant about the 48-hour provision; whether that would be mandatory in all cases.

Mr. THOMAS. No, sir; it certainly ought not to be mandatory in action at the front. As a matter of fact, I never knew of any charges being preferred at the front. If a man committed any misconduct there, they waited until they got back to a rest area before the charges were filed. There are no guardhouses; there is no provision for guarding men or anything of that sort. The conditions would be so different.

Senator WARREN. As it is now, it is with the commanding officer how long they shall wait before trial, is it not? There is no law on it?

Mr. THOMAS. No, sir; the law provides that the man shall be served with the charges within 8 days after they are preferred.

Senator WARREN. I am speaking of the trial itself and his incarceration in the guardhouse.

Mr. THOMAS. Under the law he may be kept 40 days—10 days within which to serve the charges and 30 days thereafter.

Senator WARREN. Under the law, within how short a time can they perform those functions.

Mr. THOMAS. A man has three days after the charges are served on him, if he demands it, to prepare his trial.

Senator WARREN. Yes.

Mr. THOMAS. So that a man could be arrested to-day and tried on the fourth day if the charges were immediately served upon him.

Senator WARREN. Nothing would hinder it?

Mr. THOMAS. No, sir.

Senator WARREN. And if he did not ask for a delay there is nothing to hinder it at once?

Mr. THOMAS. Yes, sir; but, as a matter of fact, in practice it always works the other way. Courts are never ready to hear him until the last minute. The man is always anxious for his trial and can never get it until the last minute.

Senator WARREN. You proposed some legislation, and I wanted to get your idea about that. You would say that a man must be tried in 48 hours after he exhausted his time if he wished to exhaust it?

Mr. THOMAS. No, sir; you did not quite understand me, Senator. I said it would be a good plan in order to overcome the injustice of letting a man stay a long time in prison awaiting trial for trivial offenses, that the bill itself should specify what are minor offenses that shall be taken cognizance of by a summary court, and that whenever a man is guilty of one of those minor offenses he be tried by a summary court without investigation.

Senator WARREN. You speak about when he is guilty. That would only transpire after the trial.

Mr. THOMAS. When he is charged with being guilty, I should say, of one of these minor offenses he ought to be then tried by a summary court within 48 hours after his arrest.

Senator WARREN. How about the three days that he has? Would you cut those out?

Mr. THOMAS. He would not need those for a summary court. I have never known a man who ever demanded any delay. They are always ready for a trial if they can get one.

Senator WARREN. I agree with you about the desirability of quick action.

Mr. THOMAS. In the event that the case is serious enough to involve trial by a general or a special court-martial the judge advocate or the prosecution ought to be given time enough, and there are many cases in which the full 40 days would be necessary to prepare the case; in serious cases in which witnesses have moved around I can well see where it would take the full 40 days to prepare the prosecution's part of the case. But there is no reason why minor offenses should not be all tried in a summary court without investigation and why they should not have an immediate hearing on it.

Also, as I said on the other point, I think there should be a provision prohibiting charging a man under several specifications for one act or omission; that the prosecution should select what article they want to charge him under for any one particular act, and then be restricted to charging him under that act.

I have one other matter that I want to present to the committee. I was at the hospital at Savenay in France, and in the ward across the hall from me was a private, Paul B. Smith, in ward A 22, of Base Hospital No. 8. He was in Company C of the Twenty-seventh Engineers. He was wounded on August 21, 1918, at Chateau-Thierry, and practically all the flesh of his right leg from the knee to the

thigh was stripped off. In addition to that the tendons across his foot and ankle were torn by a piece of explosive shell so that his leg was worse than useless to him. He was getting around on crutches, but the leg simply dragged. He had been wounded in August. This was in January. He was up and dressed. They had a rule at the hospital that every man who had his clothes and got up should have his bed made and stand at attention at the foot of his bunk with his things all in order for morning inspection at 7.30 by the ward surgeon.

One morning this Smith, with the help of the other boys in the hospital, made his bed, as he did every morning, and the word was sent around for inspection, and after standing at attention for quite a while at the foot of his bunk Smith lay down on his bed, and within a half an hour or so the nurse orderly came running into the ward and warned everybody to stand at attention, that here came the inspecting officers, and that nurse saw Smith getting off his bed, and he said, "Smith, you make that bed up again right away. You have no business to lie down on it until after inspection." He said, "No; I can not make it up. My leg is hurting me very badly." They had quite an altercation, and that was going on when the surgeon came in. He asked what the trouble was, and the nurse told him. Without evidence, without any charges being filed or any proceeding of any kind, the following order was served on Smith:

HOSPITAL ORDER HC 8. } BASE HOSPITAL No. 8, *January 17, 1919.*

1. Pvt. Paul B. Smith, Ward A 22, Base Hospital No. 8, will be confined to the guardhouse for a period of seven days and assigned to hard labor, for refusing to work in his ward except on orders from the ward surgeon himself.

By order of Lieut. Col. Estille, C. O., Base Hospital No. 8.

[SEAL.] C. G. PAYSON,
First Lieutenant, Sanitary Corps, Adjutant.

(Lieut. Payson, Surgeon A 22, A. P. M., C. O. Hosp. Guard, Reg. file.)

Senator CHAMBERLAIN. Did you know the man?

Mr. THOMAS. I was there at the time and saw the whole thing.

Senator CHAMBERLAIN. Who signed that?

Mr. THOMAS. This is a copy which he wrote from my dictation and which I compared with the original order. This is one of the papers I got after I had lost my other papers.

Senator CHAMBERLAIN. How long was he kept there in the guardhouse?

Mr. THOMAS. He was kept there the full seven days. He has written on the back of this sheet of paper his own brief history. [Reading:]

Pvt. first class Paul B. Smith, Company C, 27th Engineers, was wounded in action at Chateau-Thierry front on August 21, 1918, high explosive shell penetrating right thigh inflicting a wound 9 inches long, another piece of shell entering right leg, causing ant. fibrol paralysis of the foot; can walk with crutches; refused to make the bed all over after making it once, when told to do so by a ward nurse, Miss Smith.

Pvt. Paul B. Smith, residence, Bisbee, Ariz., enlisted in San Francisco, Calif., April 5, 1918, arrived at the front July 17, 1918, and was put out of action August 21, 1918.

This man is about 35 years old.

Senator CHAMBERLAIN. He was tried by a court-martial?

Mr. THOMAS. No; he was tried by nothing.

Senator CHAMBERLAIN. Was there any authority for that?

Mr. THOMAS. Nothing in the world. It was the clearest case of false imprisonment. That is simply typical of the mental attitude.

Senator CHAMBERLAIN. Who is the lieutenant colonel?

Mr. THOMAS. Lieut. Col. Estille, commanding officer, Base Hospital 8. This is also signed by C. G. Payson, first lieutenant, Sanitary Corps, adjutant. Those are the officers whose names are on the order.

Senator CHAMBERLAIN. Did you see him in the hospital?

Mr. THOMAS. I saw him in the hospital, and saw him taken to the guardhouse. He came to me immediately after he got out for advice.

Senator CHAMBERLAIN. What became of the man?

Mr. THOMAS. I do not know. He was still in the hospital.

Senator WARREN. What was his condition when he came home?

Mr. THOMAS. It could never be improved.

Senator WARREN. What was the difference in his condition when he went into the guardhouse and when he came back?

Mr. THOMAS. Oh, he was practically as well, because the boys of the guard favored him every way they could—against orders, but of course they could get by with it.

Senator CHAMBERLAIN. What was the condition of his leg?

Mr. THOMAS. It was worse than if it had been cut off. It was simply dragging.

Senator CHAMBERLAIN. His condition was prevented from deterioriation by the men at the guardhouse?

Mr. THOMAS. Yes. He could do no more work—and he had not entirely recovered from the shock. He was still pale and wan.

In addition to the permanent crippling, he was still a sick man.

Senator WARREN. Is that all, Senator Chamberlain, that you want to ask him?

Senator CHAMBERLAIN. I have nothing further.

Senator WARREN. I have nothing.

Senator CHAMBERLAIN. Mr. Chairman, I would like to have one or two witnesses called. Unless the Secretary of War shall desire to have some called, there are only two or three other witnesses that I know of that I care to have the committee hear. May I give you their names?

Senator WARREN. Yes.

Senator CHAMBERLAIN. Col. E. M. Morgan, of Yale College, Maj. Roger Hull, of New York City, and Mr. J. B. W. Gardiner, of No. 18 East Forty-first Street, New York City.

I think those are the only witnesses I care to have examined until after the Secretary of War submits the names of such witnesses as he wants to appear.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned until to-morrow, Wednesday, September 3, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, SEPTEMBER 3, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 2 o'clock p. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Chamberlain.

Senator WARREN. I may say, before proceeding with this hearing, that the other member of the subcommittee, Mr. Lenroot, is engaged in the debate now going on in the Senate on the oil-land leasing bill, and asked us to proceed without him, saying that he would come in if he could later on. We have with us to-day Maj. Gen. O'Ryan, and we will hear him now.

STATEMENT OF MAJ. GEN. JOHN F. O'RYAN, COMMANDING THE NEW YORK NATIONAL GUARD DIVISION, FORMERLY THE TWENTY-SEVENTH DIVISION.

Senator WARREN. Gen. O'Ryan, we have before the Committee on Military Affairs of the Senate the so-called Chamberlain bill, which provides for an entire rearrangement of the Articles of War, and we wish to have you tell us, after your experience in France and your subsequent service as a member of a special War Department board, what you consider necessary in the way of a change in the Articles of War as they stand to-day, with reference, as you go along, to the bill now before the Senate.

Gen. O'RYAN. My views are contained in the report of the so-called Kernan Board, a copy of which report I think your committee has. This report really consists of two parts. The first part is a general discussion of the subject, while the second part takes up in detail, article after article, the so-called Articles of War.

Under each numbered article we have set forth the article of war as it exists at the present time and the article of war as we propose it, and under each of the articles so arranged we have set forth comment, giving the reasons for the changes proposed; or, where changes were not suggested, why we think the article should remain unamended.

The only thing I think I can add, in a general way, to the general statement which constitutes part 1 of the report, is a view of the entire subject based not only upon study, but more particularly upon observations of discipline, or rather observations affecting the subject of discipline, made during the war.

I think that by those who were distant from the atmosphere of battle, perhaps too much stress has been laid upon the importance of the procedure of military courts. The object of courts in an army, especially during time of war, is mainly to deter the mass of the soldiers from the commission of offenses which have brought some of the soldiers to trial. I think, to appreciate the importance of this subject, it is necessary to reflect upon the influences which determine the conduct of soldiers in battle. These influences are the hope of reward, the stimulation of emotions of patriotism, pride, gang spirit, dependability of character; but underneath all of those influences there must be the strong arm of compulsion to move an element which exists in every army. Fortunately, I think that the American Army had but a small percentage of men who might be classed as undependable in battle; but nevertheless every army possesses such an element, in the same way that every army possesses an element of men who are hardly human in relation to their bravery and recklessness. The mass of soldiers are the subjects of ready leading, either in one direction or the other, and the skill of the commander is largely determined by the manner in which he suppresses one element and exploits the influence of the other.

In this work of leadership it is necessary that the commander should have at his command a summary procedure to bring to sharp accountability those who willfully or negligently fail in their duty in times of critical importance. I say that this point, I think, is so important, and it is so peculiar to the conditions which affect an army in the field that it is one apt to be overlooked in time of peace.

Senator WARREN. Without wishing to interrupt, let me say that I should be glad if, before you finish, you would portray, in your own good way, the differences in time of peace and in time of war.

Gen. O'RYAN. In attempting to answer the Senator's question, it is with diffidence, I think, that any commander will speak of that element of his command which is constituted of the men who are organically undependable. Nevertheless, they exist in all armies, and we had them in the American Expeditionary Forces.

In considering the conduct of such men, I think that form of misdemeanor which affected the discipline and morale of the Army more than any other was the conduct which prompted the soldier to quit in action, to shirk his battle duties, or in anticipation of battle to leave his command, not for the purpose of deserting the Army but for the purpose of avoiding battle by going absent without leave. In other words, we found that a man who went absent without leave in anticipation of a battle was as much a demoralizing influence upon the Army as was the man who actually deserted.

Now, if the punishment of these men who went absent without leave were dependent upon a court bound by such procedure as is proposed in the new bill, the delinquents would, I think, in many cases go without punishment, for the reason that during the battle period it would be impracticable—physically impracticable—for those concerned in the convening and conduct of courts-martial to provide the court prescribed and to carry out the procedure proposed.

The one thing, I think, that affects an army in battle more than anything else is fatigue, loss of sleep, and the fewer unnecessary du-

ties there are imposed upon officers and men the more will the vigor and energy of the force be conserved. By that I mean that if officers during battle are to be required to constitute courts-martial for the purpose of trying men, the procedure should be as simple and as expeditious as practicable, so that they may be promptly relieved of duty and returned to their normal functions.

My recollection is that the proposed bill provides, in effect, that the court shall constitute a jury, while the staff judge advocate plays the rôle of judge.

It is also provided, I think, that enlisted men shall constitute a part of the membership of the court. In our report we have covered our views concerning this proposal, but in a general way I think that the objections to the proposed system are based upon the military man's knowledge of the need for summary action in disposing of cases based upon negligence and willfulness under battle conditions.

Senator WARREN. With relation to private soldiers, enlisted men, serving as members of courts in trials of enlisted men and noncommissioned officers, what is your judgment as to the views of the men themselves, as to whether it would be desired by the enlisted force, or whether they would prefer to have it the way it is at present, being tried by all commissioned officers?

Gen. O'RYAN. I think I can answer that; I know I can answer that positively in my own division. The men were satisfied with the system of courts-martial as practiced in the division, and I have a strong impression that the same view existed throughout the Guard divisions and the Regular Army divisions. In other words, that the men would not care for and do not seek the opportunity to serve on courts.

The phase of this subject that appealed to me most is this: Membership on a court implies that the officer detailed possesses experience, judgment, impartiality, and knowledge of the requirements and needs of the military service at the time. Now, under our democratic system it is the fact that in war our officers come from the ranks, and necessarily they are those in the ranks, or were those in the ranks, most fitted by education and other qualifications to become officers. Hence, if we put enlisted men on courts, we go into that class of the Army—knowingly go into it—where are to be found those least qualified in relation to these qualities to perform the functions of officers detailed to courts.

Then, I think, too, were enlisted men to be detailed as members of courts, it would be unfortunate in a disciplinary way. I think that their comrades would ask them how they and how the officers on the court voted, and I do not think that would be in the interest of discipline.

Senator WARREN. Would the likes and dislikes of the enlisted men, as they associate together, unduly influence, do you think, their judgment while serving on a court?

Gen. O'RYAN. Well, Senator, I think that would vary materially. In time of war, particularly, there is such a large percentage of enlisted men with a high sense of responsibility that as to those men I am quite sure they would not be influenced.

Senator WARREN. I am speaking, of course, of what is to come rather more than of what is past.

Gen. O'RYAN. Oh, yes.

Senator WARREN. That is to say, I am speaking of our Army as it will be constituted; and, as we hope that in time of peace we shall always be prepared for war, I am speaking of our Army, as it will be in peace.

Gen. O'RYAN. I think it can be fairly stated that the danger would be greater in relation to enlisted men than it would be in relation to officers. Their mean period of service is much shorter; their experience is less. Their characters are less developed as the result of less training, less years of life, less experience, and less education.

Senator WARREN. Has your division, for instance, experienced any difficulty, and if so how much difficulty, in procuring officers for service on courts-martial who are qualified? Has there been a large percentage or a small percentage of unfit officers charged with the duty of serving on courts-martial—who have been unduly severe, and so forth, or inefficient? Have you been compelled to take any large percentage from those coming in from civil life, among whom there have been officers by education and practice unfit for that service? What is your idea about that? Is there a large percentage or not, and is that cared for generally in the selection of courts?

Gen. O'RYAN. Court-martial work, I think, is considered by the average officer as disagreeable work. That is the first thing.

The next thing is that many officers consider it of less importance than the work that they happen to be doing, and based rather upon the second idea than the first, do many officers apply informally to the judge advocate to be taken off the list of officers available for court-martial work. Naturally, to some extent, these requests influence the judge advocate in making his recommendations to the chief of staff. I should say that a very small percentage of officers were unfit or undesirable for this service. When they were found to be unsuited, it was the practice for the trial judge advocate or for the president of the court to report the fact to the chief of staff and recommend that the officer in question be relieved.

Senator WARREN. You speak of the chief of staff. You mean the chief of staff of the division?

Gen. O'RYAN. Of the division; yes, sir.

Senator WARREN. Or of the brigade?

Gen. O'RYAN. Of the division. Now, getting right down to the details of the thing, my practice was this. I was concerned with securing for each court a president of the court whom I knew personally to be an officer of responsibility, who would supervise the administration of justice, who would permit no wasting of time, and who is known to be a good soldier. Occasionally our situation was such that I found it to be unwise to appoint as the president of a court the officer who was my first choice, and I thereupon took another. So I would say that all of the courts in our division were well administered, largely as the result of the good teamwork between two very efficient men, one the president of the court and the other the trial judge advocate.

Senator WARREN. General, I do not want to interrupt the even course of your testimony, but let me say this: There has been

a great deal of complaint that court-martial proceedings and findings have been very strict, and of course there have been some instances cited before the Committee on Military Afffairs as a whole, and elsewhere, that have seemed absolutely inhuman. I think that we should like to know from you what your observation has been, not only in your division but otherwise, and whether those instances are exceptions and whether they are extremely rare, or whether they are common occurrences; so as one may say, to get down to practical business. That, I think, is what the subcommittee and the general Committee of Military Affairs would like to know. They would like to know what of these reports we can accept as being of general application and as indicating the general attitude of Army officers on these courts, and whether, taking it by and large, the men of our Army as a whole have suffered tremendously—more than the exigencies of the case would require.

Of course, as to this matter of enlisted men serving on courts, which is a matter on which there is such strong division of opinion with people who are advocating change, I would also like, somewhere in your remarks, to have you state what your opinion is and what would be your advice about some final court, you might say outside the Army, a civil court, or if within the Army, appointed from civil life and appointed for that purpose and no other. You catch my idea, do you?

Gen. O'RYAN. Yes, sir; I think so. When our troops were mobilized and the general plan for the organization of the big Army was understood, I think that a great many officers were rather appalled by the prospect of having so many men without military training brought into the service; that is to say, they were appalled by the prospect of handling them, disciplining them, and training them, and I think that many of them, from what I have heard in conversation with them at the time and since, made up their minds that in relation to offenses committed by those men, after warning and after a reasonable degree of training, they would send them before a court that would punish them in a way that would terrorize them—I use the word, I think, advisedly—or not so much terrorize them as terrorize the rest of the men on duty at that camp; at the same time, however, recognizing the fact that these sentences would perhaps be modified by the division commanders, or where they were not, or where they were attempted to be carried out in full, would after a reasonable time had elapsed, or perhaps after the conclusion of the war, be in part or wholly remitted. I think that the officers who served on military courts, and the division commanders who reviewed the convictions which resulted in these long sentences, all understood that no mature men in or out of the Army would seriously expect these sentences to be carried out; but that the men who constituted the Army were young, many of them unsophisticated in regard to military matters at least, that they did not know very much, if anything, about military courts or military justice; that they had an idea that the Army in time of war punished practically as it pleased. When stern sentences were handed out, I think that they had a very beneficial effect in those cases where the sentence was not so extraordinarily severe as to give the impression that it was unjust or perhaps even inhuman.

Senator WARREN. You say, though, these cases all went to division commanders?

Gen. O'RYAN. Yes, sir; all cases within the division, of general courts-martial, had to be approved by the division commander.

Senator WARREN. All general courts-martial?

Gen. O'RYAN. Yes, sir. The point I am making is that I think the officers of all the divisions and commands in the Army who were parties to the imposition of these long sentences had no idea that they would be carried out completely. The object was to give an example of the severity of military courts and military discipline to the newcomers, for the purpose of exercising a strong deterrent influence upon them.

Senator WARREN. You mean by conveying the impression that such sentences might at any time be declared, and that any of them for similar offenses might be similarly punished at any time thereafter?

Gen. O'RYAN. Yes.

Senator WARREN. I noticed from an examination of your report that it touched slightly upon the matter of the difference between a court-martial and a civil court of justice in that in the civil court all the evidence and surrounding circumstances were considered and all the feeling in regard to the case was as to the particular offense of that particular occasion.

Gen. O'RYAN. Yes.

Senator WARREN. Whereas—and I think a member of your committee rather supported the idea—in court-martial cases and in war times there might be a difference, and sometimes almost an extreme difference, in the punishment inflicted for the same crime or misdemeanor, because of former indiscretions or former disobedience of the parties being tried. Perhaps you can tell us more about that. In other words, the character of the man and the character of his work that has been done before are in the minds of the court, as well as, in particular, that he is guilty of the offense in the charge.

Gen. O'RYAN. As to how much the character of the accused and his past performances affect the consideration by the court?

Senator WARREN. Yes. His character and his performances in the past.

Gen. O'RYAN. Yes. Now, I find it difficult, Senator, to answer that question, because throughout the war I, naturally, being a division commander, never served on a court. My functions were to review the findings of the courts. Applying that question to myself, I always, in reviewing the findings of a court, had before me the record of the soldier from the time he entered the service, and considered that.

Senator WARREN. You reviewed the entire record of the soldier?

Gen. O'RYAN. As well as the typewritten record, the stenographic notes, of the testimony.

We made, in our report, one point that I think is important. I think it was Gen. Ansell who called attention to the great dissimilarity of sentences for the same offense in our Army, his argument being, apparently, if for example you justify in one division a three months' sentence for an offense, then you can not justify a 30-year sentence for the identical offense in another division; one is right and the other is wrong. I think we pointed out—and I am still

of the same opinion—that that argument is not sound, and it illustrates the purpose of military courts. Their function is more to deter others in relation to problems that affect the particular division. For example, I can well conceive of justice being done in two cases in one of which a soldier in one division is sentenced to six months' confinement for an offense and in another division another soldier gets 10 years for the identical offense. I am of that opinion because I can conceive that in the first division mentioned the soldier has been guilty of an offense which constitutes, in relation to the discipline of that command, no problem whatever. For example, in that division the record may show that out of 25,000 men only one-half of 1 per cent have gone absent without leave during a long period of battle. The soldier charged with the commission of that offense puts in his plea. He has had a good record, and the court in determining his sentence is in that particular case uninfluenced by any problems affecting this division in relation to its discipline and morale. It is for the court a matter entirely of exact justice between the military law of the country and the individual soldier concerned, and so they take into consideration his former record, the character of the offense, the fact that operations have not been influenced by absences of personnel. They warn him and sentence him to six months' confinement.

In the other division, however, instead of one-half of 1 per cent only being absent without leave during a long battle period, we will assume that 7 per cent of the men were absent without leave. We will assume that in a previous battle 4 per cent were absent without leave and in a battle before that 3 per cent were absent without leave. In other words, the curse of abstenteeism has been growing in that division. After the last battle perhaps the division commander has warned every man in his division that examples would be made of the next offenders. Now, a man in this division comes up for trial, and although the cause of his absence is almost identical with that in the case of the other soldier of another division, yet this court may, in the execution of justice toward the soldier and toward the Army as well in that important time, sentence that man to 10 years' confinement for his very serious offense, leaving it to some higher authority at some subsequent time, if the interests of the Army make it desirable, to remit the whole or a part of that sentence.

I think that those examples illustrate conditions that exist in an army and do not exist so forcibly, at least, in relation to the administration of criminal law in civil life.

Senator WARREN. That explanation brings out further the matter that I alluded to that is in the report. Without this remission of sentences and the shortening of the time, what percentage, approximately, generally speaking, not of your division but so far as your observation goes—we will take matters in France in the Army that was there for action—what percentage have had any step in the way of shortening of time or remission of sentence? Just was it a large percentage or only trifling—I mean over there, before coming back to this side?

Gen. O'RYAN. I had a rather peculiar condition in my division. I early realized the inadequacy of our courts—that is, our existing courts—in relation to the offense of absenteeism during special use. I did not wait to have conditions develop which might be difficult to

cope with later. We handled these men by trying them summarily and sentencing them to very short terms, but these terms to be served by confinement with the organizations at hard labor, and the hard labor to be performed—and the division was notified of the character of that labor—in the front line, and in the way of working parties against the enemy. These men began to get killed and wounded, and the result was that it stopped absence without leave during battle periods.

Senator WARREN. You put them in to perform labor where they had to submit themselves to the same risk of danger from the enemy as if they were in the ranks?

Gen. O'RYAN. Yes, they did; and they had more risk, because they were kept at it after their own outfit was relieved.

Senator WARREN. Your division was a fully formed division before you left here—that is, from your own State—was it not?

Gen. O'RYAN. Yes, sir.

Senator WARREN. And it was what might be termed a National-Guard division entire?

Gen. O'RAN. Yes, sir.

Senator WARREN. Was there any great percentage added of drafted men?

Gen. O'RYAN. No, sir; we received no replacements until after the armistice, until after the fighting was over.

Senator WARREN. All of your maneuvers and battles were with the division formed here from the National Guard, and it continued as such with the National Guard officers, altogether, did it?

Gen. O'RYAN. No; we had one small draft of about several hundred men that we received just as we left for France. They were draft men received from Camp Upton, Long Island.

As to the officers, they were, in the main, officers who had been in the division—that is, in the New York division—for years; the field officers and most of the company officers. In relation to the lieutenants, higher authority transferred some lieutenants from other divisions, and in cases where lieutenants were promoted in our division we received some lieutenants from other divisions or from training camps.

Senator WARREN. Did you have, under the old law, any Regular Army officers sent to the division, to conform to the requirement of the laws—that is, the laws that we have had at times, and which I think exist now, do they not, Senator Chamberlain—that they must, in these National Guard organizations, have some officers of the Regular Army?

Senator CHAMBERLAIN. Yes; they are assigned for training.

Gen. O'RYAN. Do you mean the inspector-instructors that we have had in times of peace?

Senator WARREN. Yes; you had some of them, too.

Gen. O'RYAN. No; we had none after the mobilization in this war. We had no special instructors.

Senator WARREN. But you had had them before that?

Gen. O'RYAN. Yes; we had had Army officers on duty with us.

Senator WARREN. While this may not bear directly upon this question, yet we have so much said, and I might say so much evidence is undertaken to be presented, that I want to ask you as to whether

there are differences of control, or differences that make it desirable to change our laws because of the almost inherent differences that occur between the Regular Army and the National Guard and the drafted men—which, of course, all became the Army of the United States—as to matters of discipline?

Gen. O'RYAN. In reference to court-martial discipline?

Senator WARREN. Yes.

Gen. O'RYAN. No; I can think of nothing, really.

Senator WARREN. That is what I want to get now.

Gen. O'RYAN. There was no problem in our divsion. We had some Regular officers at times. I should say we had two or three. We had, perhaps, 100 Reserve Corps officers, and that number changed occasionally, there being sometimes more and sometimes less; but I do not believe the average officer in the division knew or cared whether a particular officer was regular or irregular or guard or Reserve Corps. There was no lack of harmony.

Senator WARREN. There were no differences?

Gen. O'RYAN. No. Harmony existed there.

Senator WARREN. After your observation of the other divisions—of course you may not want to speak of them, and so I will ask you generally——

Gen. O'RYAN. I can speak of the two American divisions that served throughout in the British area. That is, as to the Thirtieth American Division—in fact, I am quite sure of it from what I have heard—the same conditions existed in that division.

Senator WARREN. Who commanded that division?

Gen. O'RYAN. Gen. Lewis. Those two divisions were a part of the British Army from the time we got there until we left. We all wanted to be, of course, with the Americans in the American sector, but it fell to our lot to be sent there.

Senator WARREN. I suppose it was largely a matter of lot, was it not?

Gen. O'RYAN. Yes; I think it was so far as the American Army was concerned. We had 10 divisions up there, and Gen. Haig determined, as we hear it——

Senator WARREN. You had, of course, largely the advantage—your division did—of perfect formation at home, and a great amount of drill. I suppose you were considered as being more nearly ready for action.

Gen. O'RYAN. Yes; I think we heard authoritatively that Marshal Haig suggested that if eight divisions were to be taken away, they leave the Twenty-seventh and the Thirtieth Divisions, which was agreed to.

Senator WARREN. I can understand how that might be.

Gen. O'RYAN. We had just returned from the Mexican border, shortly before that, where we had been kept together as a division through a period of months.

Senator WARREN. Has anything occurred to you since the so-called Kernan report was made that would make you like to differ from or add to or take from that report—any point that was not considered then that you have had occasion to consider since, with reference to military justice?

Gen. O'RYAN. There was one thing. It really has nothing to do with the articles governing the system of military procedure. That relates to article 105. It relates to injuries to person or property. I might say, in relation to this report, that as the committee probably knows, the members of the board were unanimous in their views and recommendations, except as to two or three small details. In relation to this particular section I dissented from the majority opinion, and the comment in support of my dissent is set forth on page 37 of the report, and relates to article 105; but it has nothing to do with courts.

It relates to the appointment of boards to assess, upon officers and soldiers and organizations, damages claimed to have been committed by them and which affected the property or rights of citizens.

Senator WARREN. There are one or two cases which I do not have in mind, but one I remember that came back here that created a good deal of—well, I guess I can say scandal. As we got it from the newspapers, that seemed to carry a good deal of injustice to the men of the organization; and then again, it was claimed that there was injustice on the other side. Have there been numerous cases during the war of marauding or creating damages, sometimes unnecessarily?

Gen. O'RYAN. I think that the percentage was very small; but the Army was so large that a small percentage would aggregate——

Senator WARREN. An enormous amount of damages?

Gen. O'RYAN. Yes; I think so.

Senator WARREN. I take it from what you say, and from your report, that it is unnecessary to ask you, and yet I will ask you, if you do not consider it necessary that there should be legislation concerning these articles of war?

Gen. O'RYAN. Oh, yes, decidedly; and I think that the changes should be along the lines—naturally I think so—of those recommended by the board.

Senator CHAMBERLAIN. May I ask him some questions now?

Senator WARREN. Yes.

Senator CHAMBERLAIN. General, as commander of the division, of course you did not sit in any of these court-martial cases, but will you please state, now, what your functions were with reference to the several kinds of courts, whether summary courts or special courts or general courts-martial? What was your function as the commander of a division?

Gen. O'RYAN. My functions were to read the testimony adduced upon the trial of officers and men tried by general courts-martial, to review the findings and sentence, and concur or disagree, approve or disapprove, those findings, and to set forth the action at the end of the record of the trial and forward it to the office of the commander in chief.

Senator CHAMBERLAIN. That is, the commander of the expeditionary forces?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And through him these were forwarded here to Washington?

Gen. O'RYAN. I believe so.

Senator CHAMBERLAIN. What courts did you appoint?

Gen. O'RYAN. I appointed all the general courts for my division.

Senator CHAMBERLAIN. Regimental courts—did you appoint the general courts?

Gen. O'RYAN. I appointed all the general courts-martial of the division.

Senator CHAMBERLAIN. Did you appoint the special and the summary courts, too?

Gen. O'RYAN. No, sir.

Senator CHAMBERLAIN. So that there did not come to your attention the findings of either the summary courts or the special courts?

Gen. O'RYAN. Except that I kept track of them, more in the form of tables or statistics and explanatory reports made by my division judge advocate, who did keep such records.

Senator CHAMBERLAIN. You did appoint the judge advocate of the general court-martial?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And the judge advocate of the special court?

Gen. O'RYAN. Yes, sir; no, the appointing power did.

Senator CHAMBERLAIN. Who was the appointing power?

Gen. O'RYAN. Usually it was a brigade commander. It was the commanding officer of a separate organization; and, as the division was necessarily under a billeting system more or less scattered throughout the various villages, we would group several villages under the charge of a brigadier general and——

Senator CHAMBERLAIN. And he appointed the special courts?

Gen. O'RYAN. Yes; but not the general courts.

Senator CHAMBERLAIN. And the summary courts were appointed by him or some subordinate officer of his?

Gen. O'RYAN. Yes, sir. He usually decentralized the courts and permitted them to be appointed by the local officers.

Senator CHAMBERLAIN. Can you tell me how many sentences of general courts-martial you revised and went over and approved or disapproved?

Mr. O'RYAN. During what period?

Senator CHAMBERLAIN. During the period over there?

Gen. O'RYAN. The average, I should say, was four a week; 16 to 20 a month; perhaps 100 to 120 general court cases during the period we were abroad.

Senator CHAMBERLAIN. Did you go over them all?

Gen. O'RYAN. Personally, every one of them.

Senator CHAMBERLAIN. How many did you disapprove, where there was a conviction?

Gen. O'RYAN. Perhaps three to five.

Senator CHAMBERLAIN. And the balance were all approved?

Gen. O'RYAN. No, sir; the balance were frequently modified.

Senator CHAMBERLAIN. That is, you mean modifying the punishment?

Gen. O'RYAN. Modifying the punishment. I should say that perhaps one-third the punishments were modified, and of two-thirds approved. That is all from recollection.

Senator CHAMBERLAIN. Yes, certainly. I only want the general proposition.

How many cases of general courts-martial were there where there was a finding of not guilty, in which you set aside the finding and ordered a retrial?

Gen. O'RYAN. Well, if there was a finding of not guilty, I could not order a new trial, under the laws that exist now.

Senator CHAMBERLAIN. You did not reconvene the court?

Gen. O'RYAN. No, sir. Oh, I see what you mean. We do not call that ordering a new trial.

Senator CHAMBERLAIN. You order the court to reconvene?

Gen. O'RYAN. Yes; to reconvene.

Senator CHAMBERLAIN. It is, in effect, that?

Gen. O'RYAN. Yes, it is.

Senator CHAMBERLAIN. In how many cases did you order the court to reconvene where there had been sentences of not guilty, either by the specifications or the charges?

Gen. O'RYAN. In perhaps three or four cases.

Senator CHAMBERLAIN. And in those cases were convictions returned by the court?

Gen. O'RYAN. I think—I am not quite certain that—my recollection is that—in our division where that has been done, the percentage is about half and half. In other words, in about one-half of the cases so sent back, the court refuses to modify its action. I think that such cases are a little more than one-half. In a little than one-half of such cases, the court, on reconsidering, did modify its former findings.

Senator CHAMBERLAIN. What influenced your action in cases where you ordered the court to reconvene, where there had been a verdict of acquittal or a judgment of acquittal?

Gen. O'RYAN. I recall one case, for example, that happened at Camp Wadsworth, where an officer was accused of being drunk and creating a disturbance, and it resulted in his trial by a general court-martial. The finding of the court was that he was not guilty. I read the testimony. The testimony was conflicting, to some extent. Nevertheless, the great weight of evidence established the case, and I characterized the thing as a complete miscarriage of justice. I criticized, indirectly, the members of the court and sent it back and directed the court to reconvene and to reread the testimony and to reconsider the case. That was done and they sent it back with the same result, and I then confirmed the action of the court, stating, however, that it was not in accord with my own views. But I later found what actuated the court was this, that this officer had been in the service for a long number of years, that he had been a fairly efficient officer, that he had had some family trouble of some kind and acted in this outrageous way. They knew that we must make an example of any officer who acted that way, that he could not remain in the service, and it was stated by a member of the court that if the court would find this man not guilty so that he could, without that smirch on his reputation, return to his family, he would guarantee that this officer would resign. It was an arrangement that was entirely without any authority.

Senator CHAMBERLAIN. Did he resign?

Gen. O'RYAN. He did. He got out.

Senator WARREN. That is one of those cases in which the court took into consideration his prior actions and prior conduct, of course?

Gen. O'RYAN. Oh, yes; yes, sir.

Senator CHAMBERLAIN. Now, General, I want to get this down to the actual practice in the Army. Either the division commander or the commanding officer of a brigade, or even of a lower unit, appoints all of the courts?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Then does the commanding officer also appoint the judge advocate?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And he appoints, as a matter of fact, the man who is to defend, usually appointing the man who is suggested by the defendant himself?

Gen. O'RYAN. Yes; suggested by the defendant himself.

Senator CHAMBERLAIN. But that is entirely within the power of the commanding officer?

Gen. O'RYAN. To deny or to authorize.

Senator CHAMBERLAIN. Yes. Now, when a judgment is found against a defendant, whether an enlisted man or a commissioned officer, in the due course it reaches the Judge Advocate General of the Army, does it not, here?

Gen. O'RYAN. The record does; yes, sir.

Senator CHAMBERLAIN. Is there any power between the commanding officer where the judgment is rendered and the department here, where there is power to revise or modify the judgment of a court-martial, except the commanding officer?

Gen. O'RYAN. That is all.

Senator CHAMBERLAIN. When it gets here—and here is where the line of difference comes between those who insist upon maintaining the present system and those who desire the modified system—under section 1199 of the Revised Statutes this language is used. I will not read it all. You are familiar with it?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. However, I would like to have it go into the record. I will ask the stenographer to insert it and I will not read it.

(Sec. 1199 of the Revised Statutes, above referred to, is here printed in the record as follows:)

SEC. 1199. The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army. The power to revise the proceedings of courts-martial conferred upon the Judge Advocate General by this section shall be exercised only for the correction of errors of law which have injuriously affected the substantial rights of an accused, and shall include—

(a) Power to disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the record requires such finding;

(b) Power to disapprave the whole or any part of a sentence;

(c) Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any. If upon revision, under this section, all the findings and the sentences be disapproved because of error of law in the proceed-

ings, the convening or confirming authority may lawfully order a new trial by another court-martial.

Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment.

Senator CHAMBERLAIN. Under that provision which has just been inserted in the record the Judge Advocate General of the Army claims that under the power to receive and to revise there is no other power than an advisory power of the commanding officer.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Unless there is want of jurisdiction, or the court has been illegally constituted.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you agree with that?

Gen. O'RYAN. I agree with that as a proposition of law.

Senator CHAMBERLAIN. You agree to that construction of the statute?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Do you agree to the proposition that it is a wise construction of the statute?

Gen. O'RYAN. I think it is always wise to construe statutes in accordance with correct legal principles, and therefore I think it is a wise construction.

Senator CHAMBERLAIN. Surely.

Gen. O'RYAN. But I think that the result of that law, rather than the result of the interpretation, is unfortunate.

Senator CHAMBERLAIN. Well, now, that is what I am getting at. You think that is a proper construction of the law?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. It is the contention now of the Judge Advocate General of the Army and of a good many others that it is a proper construction.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. On the other hand, it is contended that under the power to revise the Judge Advocate General's office has to examine into the record and not only to advise the commanding officer but to reverse the judgment, if he sees fit, or to modify it.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you not think, if that construction could have been conscientiously placed upon the statute, it would have resulted in good?

Gen. O'RYAN. I think it would have resulted in good; yes.

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. But I think it would have resulted also in some conditions that would have been unfortunate in that it would vest in a staff officer of the War Department powers that are really judicial and executive; the powers, in other words, to be gleaned or to be gathered from the word "revise," if that is to be interpreted as meaning, as you have stated, to read the record, to reverse, to modify. Those are really powers that are judicial, but in executing them they become executive.

a great deal of complaint that court-martial proceedings and findings have been very strict, and of course there have been some instances cited before the Committee on Military Afffairs as a whole, and elsewhere, that have seemed absolutely inhuman. I think that we should like to know from you what your observation has been, not only in your division but otherwise, and whether those instances are exceptions and whether they are extremely rare, or whether they are common occurrences: so as one may say, to get down to practical business. That, I think, is what the subcommittee and the general Committee of Military Affairs would like to know. They would like to know what of these reports we can accept as being of general application and as indicating the general attitude of Army officers on these courts, and whether, taking it by and large, the men of our Army as a whole have suffered tremendously—more than the exigencies of the case would require.

Of course, as to this matter of enlisted men serving on courts, which is a matter on which there is such strong division of opinion with people who are advocating change, I would also like, somewhere in your remarks, to have you state what your opinion is and what would be your advice about some final court, you might say outside the Army, a civil court, or if within the Army, appointed from civil life and appointed for that purpose and no other. You catch my idea, do you?

Gen. O'RYAN. Yes, sir; I think so. When our troops were mobilized and the general plan for the organization of the big Army was understood, I think that a great many officers were rather appalled by the prospect of having so many men without military training brought into the service; that is to say, they were appalled by the prospect of handling them, disciplining them, and training them, and I think that many of them, from what I have heard in conversation with them at the time and since, made up their minds that in relation to offenses committed by those men, after warning and after a reasonable degree of training, they would send them before a court that would punish them in a way that would terrorize them—I use the word, I think, advisedly—or not so much terrorize them as terrorize the rest of the men on duty at that camp: at the same time, however, recognizing the fact that these sentences would perhaps be modified by the division commanders, or where they were not, or where they were attempted to be carried out in full, would after a reasonable time had elapsed, or perhaps after the conclusion of the war, be in part or wholly remitted. I think that the officers who served on military courts, and the division commanders who reviewed the convictions which resulted in these long sentences, all understood that no mature men in or out of the Army would seriously expect these sentences to be carried out; but that the men who constituted the Army were young, many of them unsophisticated in regard to military matters at least, that they did not know very much, if anything, about military courts or military justice; that they had an idea that the Army in time of war punished practically as it pleased. When stern sentences were handed out, I think that they had a very beneficial effect in those cases where the sentence was not so extraordinarily severe as to give the impression that it was unjust or perhaps even inhuman.

cism is based upon the extreme severity of the sentence, not upon the fact that the soldier was unjustly convicted.

In the cases you mention, perhaps the conviction itself was unjust, wholly aside from the severe sentences imposed.

Senator CHAMBERLAIN. But these sentences were all approved by the commanding officer; they were approved by the judge advocate, they were approved by the Chief of Staff; so that if the military rule had been strictly complied with, they would have been shot.

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Now, the President intervened by an act of clemency and remitted the penalty of death, but still that did not relieve them.

Gen. O'RYAN. Yes. I share your view about that, and I did on this board, and I think you will find in the report that the others were of the same opinion, and as the result of that, we seek, by what we have proposed in this report, to vest in the judge advocate, in terms that can not be questioned, this authority—of course it is in the name of the President—to do these things. I think if you will refer to the section, you will find it there.

Senator CHAMBERLAIN. Yes; I am glad to hear you say that, General. Now, the Judge Advocate General of the Army proposed an amendment to the Articles of War in January, 1918, before our committee, which vested that power in the President. That is substantially what you propose to do.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. But in the last analysis that power which is proposed to be vested in the President rests in military authorities below the President.

Gen. O'RYAN. As a result of routine practice?

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Because the President can not review these cases.

Gen. O'RYAN. He can not, personally.

Senator CHAMBERLAIN. No; so that in the last analysis the President is governed by his military adviser, who is the Chief of Staff. So that, in the last analysis, the Chief of Staff is the man who acts. In the very nature of things, the President can not do it. Is not that true?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, let us get back to the Articles of War. But before I reach that: Do you not think that there ought to be somebody somewhere along the line, from the time of the trial until the final lodgment of the case here in Washington, who can represent the legal aspect of it in an advisory capacity to the different courts?

Gen. O'RYAN. Yes; I think there should be in relation to sentences that sufficiently affect the material rights of the accused. But, while I am making that statement, I have in mind the division commander in the mud and the rain, with his men, getting a little bit tired of war, a percentage of them showing a willingness to follow the line of least resistance; I have in mind that commander, seeing the necessity of driving their noses against the grindstone and making a little example here and there in addition to all the other stimulating things

he is doing: I see the necessity of that officer being able to protect these men and try them. [illegible]

Senator CHAMBERLAIN. For you would vary it from the proceeding to law?

Gen. O'RYAN. [illegible] I would [illegible] the proceeding to whatever law is provided. But I [illegible] with [illegible] the prospect of having every [illegible] cases before they are finally decided, going in a straight [illegible] stages to Washington have to have some board review them.

Senator CHAMBERLAIN. I agree with you [illegible] that, but that would not prevent the judge advocate saying to a court-martial, "Gentlemen, you are proceeding without any law. You have no authority to do this." Do you not think there should be some man with power to give that advice, right in the field, if necessary?

Gen. O'RYAN. I think we have that person in the trained law adviser of each division; that is, the staff judge advocate, who is a major or a colonel, who is away from the scenes that I have described or referred to, and whose specialty is law.

Senator CHAMBERLAIN. Yes, General; but he has no power to act in the matter.

Gen. O'RYAN. He has no executory power. His power is that of an adviser. But might I interject here a thought that I think has a great bearing upon this matter, and that is, I find in discussing this subject with those who disagree, that there exists an attitude of mind in regard to a military man, that conceives that the officer is by virtue of his office in some way a man whom it is undesirable to vest with this character of authority in relation to his own men; that the men would seem to need protection from the officer. Now, I can tell you frankly I have a great regard for the men and their rights. I really have seen very little justification for that attitude. I think that any man fit to command a division appreciates even in a selfish way, aside from any other motive, that his success will be very largely dependent upon his men and their ability and their feeling toward him. If he is unjust toward them, they will not do things for him that he demands that they shall do, and some of the things he must do for them is to see that justice is done them in relation to discipline, and that they are fed and clothed. There is no man more concerned with these things than the division commander.

Senator CHAMBERLAIN. As a rule, I think that is probably true; but if it is possible that there should be individual exceptions, it is unfortunate.

Gen. O'RYAN. It is, very.

Senator CHAMBERLAIN. So that there ought to be some power lodged somewhere in cases where there are individual hardships or wrongs, if you please, to review and to inspect the record that is made, with the view of correcting it.

Gen. O'RYAN. In respect to that last point, Senator, I might say that I approached the service on this board with quite an open mind, and we looked into the statistics, which are not at my tongue's end now; but I was more concerned in finding out, not whether Pvt. Smith was almost shot, in an army of three and one-half million men, but what percentage of the vast number of court-martial cases had resulted in injustice; and my belief is, from the statistics given, that

the percentage is very, very small. I believe it is less than in civil life.

Senator CHAMBERLAIN. That may be true, but in civil life there is a final tribunal where errors can be corrected. There is none in the court-martial system.

Now, pardon me—for the record—although it is insisted by Gen. Crowder and by the Secretary of War, and has been insisted by some of the military men of the Judge Advocate General's office, that the system is all right, yet there have been 322,000 cases of summary trials, and over 20,000 cases of general courts-martial, with an aggregate sentence in the latter of 28,000 years. If this system was correct, if it was fundamentally right, and wrongs could not be perpetrated under it, there would have been no need to have reduced these sentences; and yet out of 28,000 years in the aggregate, in 4,000 general court-martial cases they have remitted all but about 6,700 years. There is something wrong somewhere where there is a remission of such a great number of years in sentences.

Gen. O'RYAN. I think there is a point that explains that, to some extent. When our Army was formed there existed, as I explained before, this sentiment of "in terrorem." There did exist that sentiment. That explains, in part, the infliction of these really absurd sentences.

The next point is this, that a great number of divisions were created. Prior to the commencement of this war I think there were in the United States of America but perhaps three divisions in the Regular Army and the Guard together. In other words, there were but three divisions where division courts-martial—general courts—had ever operated.

Then the only other people who had had any experience in general courts-martial were the department commanders, because they were vested with court-martial jurisdiction; and of course that included the Philippines. I think that at McPherson and Leavenworth they have general court-martial jurisdiction. But the number of Army officers with experience in reviewing general-court cases was comparatively small; and in most cases they were the senior officers of the Army, many of whom were considered too old to take command of divisions in this war. The result was that a great number of officers from the Regular Army were made division commanders, and practically none of them had had any experience as reviewing officers in relation to general courts-martial. They were, by virtue of that lack of experience, principally concerned with organization, training, and getting their property, and I can well imagine that when the judge advocate handed them the results of general court-martial proceedings, they adopted an attitude quite different from what they would have adopted if they had had long experience prior to that time in the administration of justice. Otherwise, I think that many of the really absurd sentences should have been modified and reduced right there by the division commanders.

Senator CHAMBERLAIN. But they were not.

Gen. O'RYAN. But they were not.

Senator CHAMBERLAIN. And they could not be, according to the Judge Advocate General's ruling here, for want of jurisdiction.

Gen. O'RYAN. Except by Executive clemency.

Senator CHAMBERLAIN. Yes; except by Executive clemency. And you know, General, you take a young man in a criminal court—and I have had a good deal of experience in prosecuting—and he is convicted, and if the court sets aside the verdict for lack of proof, he goes free. If the conviction was allowed to stand, he was convicted just the same, and he had to have clemency exercised in his behalf by the Government.

Now, in the Army where these young men have been convicted and sentences have been rendered against them, they are criminals just the same in the eyes of the law.

Gen. O'RYAN. I am in accord with you about the insufficiency of justice which merely relieves the man of the necessity of serving in a prison somewhere, and leaves upon him the stigma of conviction.

Senator CHAMBERLAIN. I think if you and I were to sit down to consider this, we would not differ about the administration of justice. You had the civilian touch when you went in, and you were the only man that went in who had that. You had the civilian touch, and you knew it better than the average military man; so that you have resorted, according to your own statement, to punishing your men within your own organization. I think it was a splendid thing to do.

Gen. O'RYAN. Of course, that did not apply to all cases. It applied to many of them.

Senator CHAMBERLAIN. It had a wholesome effect.

Gen. O'RYAN. Yes; it had a wholesome effect because it was a terrible punishment.

Senator CHAMBERLAIN. It had a good effect in regard to discipline?

Gen. O'RYAN. It stopped the offense. We had no stragglers or shirkers. The punishment was pretty severe.

Senator CHAMBERLAIN. Yes. These Articles of War of ours were the articles that were in vogue in Great Britain in 1794?

Gen. O'RYAN. In a general way.

Senator CHAMBERLAIN. Well, as a matter of fact, the British articles of 1794 were adopted by the Continental Congress.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Practically without change, except to put in the word "Congress" where the word "King" occurred?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Those Articles of War have been changed very little, fundamentally, up to the present time. The British code has been changed to conform to more modern conditions, has it not?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And yet our country has clung to the old British system?

Gen. O'RYAN. Yes; that is true.

Senator CHAMBERLAIN. Now, Mr. Chairman, may I insert something in the record here?

Senator WARREN. Before you do that, will you follow your line of examination by getting the opinion of Gen. O'Ryan upon the efficiency of the British system as now in practice, and perhaps the French and the Italian?

Senator CHAMBERLAIN. I will in a moment, if you will let me offer this.

Senator WARREN. Certainly.

Senator CHAMBERLAIN. I want to get this in. Under the administration of military justice in Great Britain the judge advocate general is different from the Judge Advocate General here. I suppose you are familiar with the British system?

Gen. O'RYAN. I am only familiar with it in an indirect way. We lived in the British section, but we were, as you know, pretty well occupied, and I really do not claim to have studied the British system. My information and knowledge of it is based upon casual conversation very largely.

Senator CHAMBERLAIN. The judge advocate general is entirely separated, as I recall it now, from the army. He is the legal adviser?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. And the judge advocates of the army, with the army, are legal advisers and see that the courts adhere to the recognized rules of evidence. Now, that has all been done in England. They have gotten away from the old court-martial system of 1794. Originally in England the judge advocate's duties were in England as they are now in America, assimilated to those of the prosecutor. That is what the judge advocate is in America?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. The judge advocate general in England was relieved of his duty as prosecutor in 1829, and in 1829 he became a quasi judicial officer, occupying the position of a legal adviser to the court, and they had to obey his observations as to the law. Did you observe its enforcement in the British Army?

Gen. O'RYAN. I never attended a court-martial in the British Army. I know that the discipline in the British Army was of a very high order; no question about it.

Senator CHAMBERLAIN. It was quite different from ours. I hope you will look that up, because you may possibly modify your views somewhat as contained in the Kernan report, because you will find that the judge occupies an entirely different position in the British Army.

Gen. O'RYAN. But have we not, Senator—I know it is not proper to ask the court questions——

Senator CHAMBERLAIN. Oh, yes; certainly.

Gen. O'RYAN. I mean by that, have we not, in what we recommend in relation to section 1199, of the Revised Statutes, or the corresponding articles, vested in the Judge Advocate General of the Army functions that will correct these shortcomings?

Senator CHAMBERLAIN. It will improve the condition over what it is now, but it does not go far enough, because the Judge Advocate General and his department, whether in the field or here, is still a prosecuting institution. Under the British system he is not the prosecutor nor the judge advocate in the field.

Gen. O'RYAN. The system includes, among its functions, one of prosecution. But I think that a proper conception of the Judge Advocate General's department which will result from an amendment based upon that report, is really that the department will have three functions. One class of officers will be prosecuting attorneys. Another group will be consulters and advisers. They constitute the group assigned to the divisions. Then there is a judicial group

back in Washington, or with the expeditionary force, which receives and revises the records of trials, and in the name of the President takes action thereon.

Senator CHAMBERLAIN. No; but without power now.

Gen. O'RYAN. Yes; I am speaking now——

Senator CHAMBERLAIN. About your proposal?

Gen. O'RYAN. Yes; the proposal.

Senator CHAMBERLAIN. Mr. Chairman, may I put in the record this matter in regard to the British system? I may say that it is prepared by the legislative reference bureau of the Library of Congress.

Senator WARREN. Let that be inserted.

(The matter referred to is here printed in full in the record, as follows:)

ADMINISTRATION OF MILITARY JUSTICE IN GREAT BRITAIN.

THE JUDGE ADVOCATE GENERAL'S DEPARTMENT.

The office and duties of the judge advocate general in England are described by the Encyclopedia Britannica as follows:

"The judge advocate general is an officer appointed in England to assist the Crown with advice in matters relating to military law, and more particularly as to courts-martial. In the army the administration of justice as pertaining to discipline is carried out in accordance with the provisions of military law, and it is the function of the judge advocate general to insure that these disciplinary powers are exercised in strict conformity with that law. Down to 1793 the judge advocate general acted as secretary and legal adviser to the board of general officers, but on the reconstruction of the office of commander in chief in that year he ceased to perform secretarial duties, but remained chief legal adviser. He retained his seat in Parliament and in 1806 he was made a member of the government and a privy councillor. The office ceased to be political in 1892, on the recommendation of the select committee of 1888 on army estimates, and was conferred on Sir F. Jeune (afterwards Lord St. Helier). There was no salary attached to the office when held by Lord St. Helier, and the duties were for the most part performed by deputy. On his death in 1905, Thomas Milvain, K. C., was appointed, and the terms and conditions of the post were rearranged as follows: (1) A salary of £2.000 a year; (2) the holder to devote his whole time to the duties of the post; (3) the retention of the post until the age of 70, subject to continued efficiency, but with claim of gratuity or pension on retirement. The holder was to be subordinate to the secretary of state for war, without direct access to the sovereign. The appointment is conferred by letters patent, which define the exact functions attaching to the office, which practically are the reviewing of the proceedings of all field general, general, and direct courts-martial held in the United Kingdom, and advising the sovereign as to the confirmation of the finding and sentence. The deputy judge advocate is a salaried officer in the department of the judge advocate general and acts under his letters patent. A separate judge advocate general's department is maintained in India, where at one time deputy judge advocates were attached to every important command. All general courts-martial held in the United Kingdom are sent to the judge advocate general, to be by him submitted to the sovereign for confirmation; and all districts courts-martial, after having been confirmed and promulgated ,are sent to his office for examination and custody. The judge advocate general and his deputy, being judges in the last resort of the validity of the proceedings of courts-martial, take no part in their conduct; but the deputy judge advocates frame and revise charges and attend at courts-martial, swear the court, advise both sides on law, look after the interest of the prisoner, and record the proceedings. In the English Navy there is an official whose functions are somewhat similar to those of the judge advocate general. He is called counsel and judge advocate of the fleet."

ings, the convening or confirming authority may lawfully order a new trial by another court-martial.

Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment.

Senator CHAMBERLAIN. Under that provision which has just been inserted in the record the Judge Advocate General of the Army claims that under the power to receive and to revise there is no other power than an advisory power of the commanding officer.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Unless there is want of jurisdiction, or the court has been illegally constituted.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you agree with that?

Gen. O'RYAN. I agree with that as a proposition of law.

Senator CHAMBERLAIN. You agree to that construction of the statute?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Do you agree to the proposition that it is a wise construction of the statute?

Gen. O'RYAN. I think it is always wise to construe statutes in accordance with correct legal principles, and therefore I think it is a wise construction.

Senator CHAMBERLAIN. Surely.

Gen. O'RYAN. But I think that the result of that law, rather than the result of the interpretation, is unfortunate.

Senator CHAMBERLAIN. Well, now, that is what I am getting at. You think that is a proper construction of the law?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. It is the contention now of the Judge Advocate General of the Army and of a good many others that it is a proper construction.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. On the other hand, it is contended that under the power to revise the Judge Advocate General's office has to examine into the record and not only to advise the commanding officer but to reverse the judgment, if he sees fit, or to modify it.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you not think, if that construction could have been conscientiously placed upon the statute, it would have resulted in good?

Gen. O'RYAN. I think it would have resulted in good; yes.

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. But I think it would have resulted also in some conditions that would have been unfortunate in that it would vest in a staff officer of the War Department powers that are really judicial and executive; the powers, in other words, to be gleaned or to be gathered from the word "revise," if that is to be interpreted as meaning, as you have stated, to read the record, to reverse, to modify. Those are really powers that are judicial, but in executing them they become executive.

Senator CHAMBERLAIN. Yes; but the judge advocate general himself is a military man.

Gen. O'RYAN. He is a military man in the sense that he holds a military commission.

Senator CHAMBERLAIN. And within the Military Establishment.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. So that it would not be a decision of the case by a nonmilitary tribunal.

Gen. O'RYAN. No, sir; that is correct.

Senator CHAMBERLAIN. Now, you rather speak of this system of severe sentences as a system *in terrorem;* that is, a man is punished severely not so much possibly because his act calls for severe punishment, but in order to discipline the mass?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Under the construction of the statute for which I contend, that the power to revise gives the power to reverse or modify, the Judge Advocate General might have, within the law, revised and modified this sentence and removed the stigma of conviction, might he not?

Gen. O'RYAN. Under that construction; yes, sir.

Senator CHAMBERLAIN. Now, as it is, you take a young man convicted, whether he is a commissioned officer or an enlisted man he is severely punished, not because of the viciousness of the particular crime but to set an example. The judgment of conviction against him by a general court-martial is a punishment that can not be set aside. There is no way to get rid of the stigma of conviction except by the exercise of clemency.

Gen. O'RYAN. Unless the case is one where the court lacked jurisdiction or where its sentence was contrary to law.

Senator CHAMBERLAIN. Yes; of course, then, that removes the stigma. But in the greater number of cases there is only one tribunal to relieve, and that is the President.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And that does not remove the stigma. That is simply mercy.

Gen. O'RYAN. But in these *in terrorem* cases, that would not result, because it is not the conviction that is set aside, but the severe sentence that is modified.

Senator CHAMBERLAIN. Are you not mistaken about that? We will take four cases that have been referred to in the press and by some witnesses, where four boys over in France were convicted under very extraordinary circumstances, two of them for sleeping on post, and the two others for disobedience of a command, and all four were sentenced to be shot. The record in those cases indicated that those boys had not had a fair trial. Probably two of them plead guilty; but there was no way in the world, under the construction of the Judge Advocate General, to revise, or to reverse, or to modify, or to change, or to set aside that conviction. Now, those boys were outlawed, under the strict military rule. The only way to reach that was through the clemency of the President. That does not remove the stigma of conviction.

Gen. O'RYAN. Yes; I see your point. What I intended to say was that in the vast majority of these cases that are criticized, the criti-

cism is based upon the extreme severity of the sentence, not upon the fact that the soldier was unjustly convicted.

In the cases you mention, perhaps the conviction itself was unjust, wholly aside from the severe sentences imposed.

Senator CHAMBERLAIN. But these sentences were all approved by the commanding officer; they were approved by the judge advocate, they were approved by the Chief of Staff; so that if the military rule had been strictly complied with, they would have been shot.

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Now, the President intervened by an act of clemency and remitted the penalty of death, but still that did not relieve them.

Gen. O'RYAN. Yes. I share your view about that, and I did on this board, and I think you will find in the report that the others were of the same opinion, and as the result of that, we seek, by what we have proposed in this report, to vest in the judge advocate, in terms that can not be questioned, this authority—of course it is in the name of the President—to do these things. I think if you will refer to the section, you will find it there.

Senator CHAMBERLAIN. Yes; I am glad to hear you say that, General. Now, the Judge Advocate General of the Army proposed an amendment to the Articles of War in January, 1918, before our committee, which vested that power in the President. That is substantially what you propose to do.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. But in the last analysis that power which is proposed to be vested in the President rests in military authorities below the President.

Gen. O'RYAN. As a result of routine practice?

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Because the President can not review these cases.

Gen. O'RYAN. He can not, personally.

Senator CHAMBERLAIN. No; so that in the last analysis the President is governed by his military adviser, who is the Chief of Staff. So that, in the last analysis, the Chief of Staff is the man who acts. In the very nature of things, the President can not do it. Is not that true?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, let us get back to the Articles of War. But before I reach that: Do you not think that there ought to be somebody somewhere along the line, from the time of the trial until the final lodgment of the case here in Washington, who can represent the legal aspect of it in an advisory capacity to the different courts?

Gen. O'RYAN. Yes; I think there should be in relation to sentences that sufficiently affect the material rights of the accused. But, while I am making that statement, I have in mind the division commander in the mud and the rain, with his men, getting a little bit tired of war, a percentage of them showing a willingness to follow the line of least resistance; I have in mind that commander, seeing the necessity of driving their noses against the grindstone and making a little example here and there in addition to all the other stimulating things

he is doing; I see the necessity of that officer being able to take these men and try them, and administer these punishments.

Senator CHAMBERLAIN. But you would want it done according to law?

Gen. O'RYAN. Oh, yes; certainly, I want it done according to whatever law is provided. But I can not help but view with alarm the prospect of having every one of those cases, before they are finally decided, going back through various stages to Washington here, to have some board review them.

Senator CHAMBERLAIN. I agree with you as to that, but that would not prevent the judge advocate saying to a court-martial, "Gentlemen, you are proceeding without any law. You have no authority to do this." Do you not think there should be some man with power to give that advice, right in the field, if necessary?

Gen. O'RYAN. I think we have that person in the trained law adviser of each division; that is, the staff judge advocate, who is a major or a colonel, who is away from the scenes that I have described or referred to, and whose specialty is law.

Senator CHAMBERLAIN. Yes, General; but he has no power to act in the matter.

Gen. O'RYAN. He has no executory power. His power is that of an adviser. But might I interject here a thought that I think has a great bearing upon this matter, and that is, I find in discussing this subject with those who disagree, that there exists an attitude of mind in regard to a military man, that conceives that the officer is by virtue of his office in some way a man whom it is undesirable to vest with this character of authority in relation to his own men; that the men would seem to need protection from the officer. Now, I can tell you frankly I have a great regard for the men and their rights. I really have seen very little justification for that attitude. I think that any man fit to command a division appreciates even in a selfish way, aside from any other motive, that his success will be very largely dependent upon his men and their ability and their feeling toward him. If he is unjust toward them, they will not do things for him that he demands that they shall do, and some of the things he must do for them is to see that justice is done them in relation to discipline, and that they are fed and clothed. There is no man more concerned with these things than the division commander.

Senator CHAMBERLAIN. As a rule, I think that is probably true; but if it is possible that there should be individual exceptions, it is unfortunate.

Gen. O'RYAN. It is, very.

Senator CHAMBERLAIN. So that there ought to be some power lodged somewhere in cases where there are individual hardships or wrongs, if you please, to review and to inspect the record that is made, with the view of correcting it.

Gen. O'RYAN. In respect to that last point, Senator, I might say that I approached the service on this board with quite an open mind, and we looked into the statistics, which are not at my tongue's end now; but I was more concerned in finding out, not whether Pvt. Smith was almost shot, in an army of three and one-half million men, but what percentage of the vast number of court-martial cases had resulted in injustice; and my belief is, from the statistics given, that

Senator CHAMBERLAIN. It may be—I will assume it for the purposes of the illustration—that there was an insufficiency of evidence in the first case, or that rules of evidence have been violated, and yet the same irregularities would come into the other three cases.

Gen. O'RYAN. Very probably; but that would not inevitably follow.

Senator CHAMBERLAIN. Yes; but it would very naturally follow; do you not think?

Gen. O'RYAN. Very naturally, especially if the same judge advocate and the same president of the court tried all cases.

Senator CHAMBERLAIN. Now, speaking of your report, I have read it with some interest, but not as critically as I hope to be able to read it. The amendments proposed by the Kernan report make no really fundamental changes, do they?

Gen. O'RYAN. I think from what you have said, Senator, that you think the vital point—and I have thought that the vital point—of the whole system is to provide somewhere a body of trained men whose authority under the law would be adequate to correct errors of law and all injustices in relation to courts-martial.

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. Now, in providing that, we considered this: Shall we make this court or body an appellate tribunal composed of lawyers to be appointed by the President? Shall we constitute it of officers detailed specially to constitute that court and to remain permanently on duty as members of that court, free from any superior authority? Or shall we provide that that body shall consist of officers in a department already existing, who shall act in an advisory capacity and in a recommendatory way? We concluded, first, to consider the matter from the constitutional point of view, and you perhaps remember that in the opening part of our report we discussed that question. I know that some members of the court were of the opinion that it might be unconstitutional for Congress to attempt to take from the President, in his rôle of Commander in Chief, the power to carry out the discipline of the Army through the agency of the courts.

We decided to merely raise that point for what it might be worth and to consider the matter aside from any constitutional point of view. We came to the conclusion that by amending the existing law we could vest in the Judge Advocate General's Department the authority to do—in the name of the President as Commander in Chief—those things which the Senator has mentioned and which are certainly desirable to have done in order to insure justice to officers and men who are tried. I think we have accomplished that, if that is the real meat of this needed reform.

Senator CHAMBERLAIN. That is one of the most serious things, General.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, I am frank to say that I was amazed at the constitutional argument of your committee. For instance, you in effect hold that the functions which the King exercised as the Commander in Chief of the Army prior to 1794 descended to the President of the United States; in other words, that as Commander in Chief of the Army before the Constitution was adopted he inherited certain fundamental powers.

Gen. O'RYAN. I do not join in that part of the argument, if that argument was made.

Senator CHAMBERLAIN. That is made.

Gen. O'RYAN. Yes?

Senator CHAMBERLAIN. I am going to call your attention to it just because I think it is fundamentally wrong, General. I am discussing it from a lawyer's standpoint.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Now, if that be true, the powers which the President inherited over our Army as the successor of a King in the Colonies, at least after the adoption of the Constitution, could be taken away by Congress, because the Constitution gives to Congress all power to make rules and regulations for the government of the Army, does it not?

Gen. O'RYAN. Yes, sir.

Senator CHAMBERLAIN. Now, let me ask you if that does not follow from what your report contains? Mr. Chairman, I will not read it all, but may I ask to have this inserted in the record?

Senator WARREN. Certainly.

Senator CHAMBERLAIN. I will read from page 6 of this report, and I will mark the part which I want to be inserted in the record, and I have misconstrued the findings of your committee unless what I have just stated is correct. [Reading:]

The rules governing armies had their beginnings not in legislative bodies but in commanders, whether called kings or chiefs or generals, and in early times those who formulated the rules carried them out. With the evolution of governments the right of prescribing the most important or fundamental rules has lodged in legislative bodies, but the execution of those rules, their practical administration, has heretofore been left to commanders and their assistants down through the hierarchy of command to the very bottom. Courts-martial have always been agencies for creating and maintaining the discipline of armies, and in earlier times, and certainly until the adoption of our Constitution, were provided and administered by commanders as of inherent right. The King of England had and exercised this inherent right. The Continental Congress took over some of the duties of government in the rebellious colonies, but Washington, as Commander in Chief, appointed courts-martial as of right inherent in that office, without the express authority of that Congress. So that when our Constitution was adopted and the powers of the Federal Government were distributed among three great departments, and the President was made by the organic law Commander in Chief, the power to appoint courts-martial by virtue of that office was well understood. The power to make rules for the government of the land forces was at the same time confided to Congress. The earlier Articles of War continued or created under that grant of power did not expressly confer upon the President the right or authority to appoint courts-martial, but actually he exercised the power, and the validity of that action is well established. It appears, therefore, that before our Constitution was established a Commander in Chief was inherently competent to appoint courts-martial as incident to his office; that under the Constitution this right has been exercised and upheld, and, further, that the rules made for the Army by Congress have extended to subordinate commanders (who are, in fact, assistants to the President in his special capacity as Commander in Chief) the right to appoint and to make use of this agency.

The pending Chamberlain bill proposes to take out of the hands of those to whom command is confided, from the President down, the effective use of courts-martial as instruments to enforce discipline. It does this by providing a civilian court of military appeals and by injecting into the principal courts-martial a new functionary with powers so extensive and of such a kind as to constitute him the administrator of discipline, though he is not himself of the hierarchy of command. The net result in the more important cases would

be to transfer the power to discipline our armies from the Commander in Chief, the President, and from his assistant commanders to civilian hands pure and simply, i. e., the court of military appeals, or to the quasi civilian legal hands of the judge advocates provided for general and special court-martial. In view of the history of the court-martial as an adjunct of armies and as an instrument the use of which inheres in the office of the Commander in Chief under our system of government, is it not possible that the proposition to take from the President in large measure the effective use of this instrument, as well as to take away from his proper assistants in the task of command a like use of the same instrument may be unconstitutional? It is not in effect an attempt to withdraw from command an essential part of that which belongs to it historically and in sound reason? Is it not open to be questioned as an attempt by law to emasculate the legitimate and heretofore undisputed authority of the President as Commander in Chief?

Senator CHAMBERLAIN. The logical conclusion to be drawn from that to me is that Congress has no power to do that.

Gen. O'RYAN. That was what was intended to be conveyed by the raising of that point. But I see nothing in what the Senator has read, or quoted, that indicates that the board thought that the President derives any of his powers from a King of England.

Senator WARREN. He has his powers under the Constitution.

Gen. O'RYAN. Yes; and in part he derives them from the customs of war, which may be termed the military common law. I do not recall anything that would indicate otherwise in the report.

Senator CHAMBERLAIN. It is, practically, that it is an inherent power.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. And the power that we have comes from the English articles of war of 1794, which vested this power in the King.

Gen. O'RYAN. Yes. The Constitution makes the President the Commander in Chief of the Army and the Navy, and the question then arises in relation to the performance of the President's functons, What are the functions of the Commander in Chief? They are not stated in the Constitution. We must go back of the Constitution to determine what the functions of the Commander in Chief are. They can only be determined by reference to the customs of war. What are those rights that are inherent in the office of commander in chief of an army?

Senator CHAMBERLAIN. I would say there are none, except as Congress gives them.

Gen. O'RYAN. Well, I was going to say the converse of that—that they are whatever the customs of war give, except as Congress may curtail them under its powers.

Senator CHAMBERLAIN. Well, possibly that is a correct statement of it, too.

Gen. O'RYAN. Then, of course, going on from there—well, assuming all that, has not Congress the power, in the exercise of its legislative power, to curtail the powers of the President as Commander in Chief.

Senator CHAMBERLAIN. I think there is no question about that power, under the general powers of the Constitution, which authorize the Congress to adopt rules and regulations.

Gen. O'RYAN. Rules and regulations?

Senator CHAMBERLAIN. Yes.

Gen. O'RYAN. The question is whether rules and regulations for the government of the Army would include a court of this character to govern, in the last analysis, the discipline of the Army.

Senator CHAMBERLAIN. Do you entertain the opinion that Congress can not curtail those powers?

Gen. O'RYAN. No; I refuse to do more than to put that in the interrogatory form.

Senator CHAMBERLAIN. You would not give that as your opinion?

Gen. O'RYAN. No; nor would I say that I might not reach that opinion. I merely stated it would take too long to consider that, and we preferred to get down to what we wanted to do.

Senator CHAMBERLAIN. Yes; I am glad you did that.

Gen. O'RYAN. We turned to the practical solution, which was to vest the authority to review, basically, in the President.

Senator CHAMBERLAIN. Getting back to this question—if I am not tiring you, General——

Gen. O'RYAN. No, indeed.

Senator CHAMBERLAIN (continuing). Getting back to the question of enlisted men serving on courts; you know that the Army we had in France was a slice taken out of the civil life.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. It is representative of the whole country.

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Take a man on trial in a civil court; the jury that tries him is taken from the body of the same class of citizens from which the Army was taken?

Gen. O'RYAN. Yes.

Senator CHAMBERLAIN. Do you not think that men taken from the Army would be just as competent to sit in judgment upon a charge against a young man as would a jury under ordinary circumstances taken from the same body of citizens?

Gen. O'RYAN. Frankly, I do not, Senator. Whatever may be said in relation to the previous question, I have a firm conviction that that thing is wholly impracticable and undesirable in the Army.

Now, let me say this: The slice that comes out of our civil life in the United States undergoes a tremendous change before it goes into battle. I think it is one of the most interesting things about the development of an army to note the change that takes place in the personnel. There are men in the Army who are blacksmiths, mechanics, laborers, clerks, artists; everything. Nevertheless, in the Army they become in a measure children, due to the manner of the life they are leading. It is all regulated for them. They get their meals at regulated times; they eat what is put before them; they have no choice. They go to bed at a certain time. They never know what they are going to do in the next 24 hours. They may be marched to the front or marched to the rear, or they may go for a rest, go on leave on pleasure bent somewhere. That manner of life has a tremendous psychological influence upon those men. I know men in my own division who in civil life were men of affairs, although they were private soldiers, men who for one reason or another did not care for commissions, but that served as private soldiers throughout the war. They all underwent the same process of psychological change after they had been in the Army for a while; and I think

to that extent, just as they became as children are, so their efficiency to serve as jurors would be adversely affected, due to the narrow life that they must necessarily lead.

Senator CHAMBERLAIN. Would not that same argument apply to all of the officers below the commanding officer of a regiment, say, or the commanding officer of a division? The lieutenants do not know one day what they are going to do the next.

Gen. O'RYAN. No; but, as you know, there is a big difference in the character of the work performed by a soldier—necessarily so—in an army, and the character of work that is performed by those who supervise and control and direct. I think, as a matter of fact, that it would be desirable to have as members of a court only those officers who are mature and experienced. But that is not always practicable. There are not enough of those men present or available to completely compose courts. But I think that putting the enlisted men on the courts would be undesirable. Besides, I have never heard any soldiers express the desire or the view that such practice would be desirable from the standpoint of their own interests.

Senator CHAMBERLAIN. Mr. Chairman, I believe that is all that I care to ask the general.

Senator WARREN. Does anything else occur to you that you would like to add to your testimony, General?

Gen O'RYAN. No, sir; I think not.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned, subject to the call of the chairman.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, SEPTEMBER 23, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS.
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, at 3 o'clock p. m., in the room of the Committee on Appropriations in the Capitol, Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

STATEMENT OF MAJ. GEN. C. P. SUMMERALL, UNITED STATES ARMY.

Senator WARREN. Gen. Summerall, this subcommittee has before it a bill the object of which is to provide for a revision of the Articles of War and the system of military justice, making a number of changes therein. We have before us the law as it stands, and so far we have the report of one committee which, on the part of the War Department, has been looking the subject over.

We would like to have you state what changes, in your estimation, should be made in the present law, and we would like to hear from you as to the application of the present law abroad as it has come under your control to some extent, and as it has come under your observation.

Gen. SUMMERALL. The present Articles of War were sent to me as well as to other officers, for study, while I was a battalion commander. I was in very close touch with the administration of discipline at that time, and went over them very carefully before they were presented to Congress.

During the war I have had occasion to administer discipline, altogether with combat troops, first a brigade, then a division, and then an army corps.

As far as it came to my observation or experience, the principles of the present Articles of War presented no difficulties and raised no objections in my mind. The only inconvenience experienced was that of applying them to general courts-martial in the case of a combat division that was intensely engaged, or was relieved from the line only for the short period required for replacements, and reentry into the line. We did find considerable trouble in assembling officers for general courts-martial during these short withdrawals, and it required especial energy and effort to dispose of such cases as had accumulated. As far as I know, however, all cases were cleared up during these periods of rest, and I do not recollect any cases where men suffered long periods of confinement without trial or where any unusual hardship was worked upon them in the application of the present Articles of War.

Senator WARREN. Have you noticed the differences between the proposed legislation and the present law?

Gen. SUMMERALL. Yes, sir; I have had the present articles read and followed the new articles, so as to compare them.

Senator WARREN. Perhaps you might give us your opinion as to the adoption of some of those.

Gen. SUMMERALL. There are presented to me certain essential differences in the proposed articles from the existing articles. The first in order is the composition of a court in which it is provided that soldiers are competent to sit on courts-martial. I do not believe such a provision is wise, or that it would produce the results which perhaps are sought. I believe the sentiment is general with officers to secure fair treatment and considerate treatment to our men. In my own experience, there is every desire to minimize the punishment of men, to secure justice, to preserve their confidence in discipline, and to maintain high standards of morale, self-respect, and contentment in a command.

In the first place, I do not think that our enlisted men would be qualified by training or by their duties to sit as members of a court-martial. I doubt if the effect on them or on their associates would be such as to increase the confidence that they would have in a court, or increase their happiness in the command. Like any untried thing, it would be an experiment, and it is my opinion that it would not be a successful experiment.

Senator WARREN. What is your opinion as to the desire of the men themselves, if the matter was put before them whether they should have that duty?

Gen. SUMMERALL. I think a certain class would desire it, but it is my opinion that a great many would be opposed to it. Discipline is something that is peculiar to the military service, but it is the very foundation of the military service, and I am of the opinion that we should be very conservative in making radical departures from a system which has been vindicated in many varieties of circumstances. The change might succeed, but I doubt it.

Senator WARREN. There are two propositions, as I understand it—not in that bill, it is true, but yet in that bill in one sense, and in the minds of some people in another.

In the bill itself it is provided that a certain proportion of the members of a court on the trial of enlisted men shall be privates, and in the trial of officers that a certain number of members of the court shall be noncommissioned officers. I understand that others have the idea that in all trials of enlisted men the court should be like a jury in a civil court; that all should be enlisted men. What is your opinion of those two angles of the case?

Gen. SUMMERALL. I think it would be fatal to discipline to have a court composed entirely of enlisted men.

Senator CHAMBERLAIN. This bill does not propose that, Senator, you know.

Senator WARREN. Yes, I understand that; but that has been proposed by others. This bill proposes that in the trial of enlisted men a certain number of members of the court shall be enlisted men; and the General has already stated, or at least I so understand him, that of the two alternatives he would prefer a court composed partly of enlisted men rather than one composed altogether of enlisted men.

Your opinion is, General, that a court should not be composed wholly of enlisted men?

Gen. SUMMERALL. It would be fatal to discipline.

Senator WARREN. To have any portion of it so composed?

Gen. SUMMERALL. I would not say to have any portion of it so composed; but to have a court composed altogether of enlisted men would be fatal to discipline. To have a court composed partly of enlisted men would be less injurious. The proportion here recommended might not have any effect upon the procedure at all.

Senator WARREN. How large do you feel that the proportion of enlisted men could be safely made? Or should such a change be made at all?

Gen. SUMMERALL. I do not think it would do any good, sir. I prefer the present Articles of War to those proposed, with respect to the composition and appointment of courts-martial.

Senator CHAMBERLAIN. What article is that?

Gen. SUMMERALL. I refer to articles 4, 5, 6, 7, 8, 9, 10, and 11.

The next radical change is as to the judge advocate, in article 12. As I understand the proposal, it virtually converts the court into a jury and the judge advocate into a presiding judge. The judge advocate may or may not be an officer; but, at any rate, he would probably not be an officer responsible for the discipline of the command. I believe the soldiers receive more sympathy and more leniency from officers who are associated with them than from officers who are not so associated. I believe that a court-martial will arrive at a decision which is better for the service than will the most expert judge. I believe it is a good deal safer to intrust a case to a court-martial as at present constituted, and a good deal surer for the preservation of discipline and contentment in a command, than it is to transfer the administration of justice in the Army to single individuals in each case, however well informed they may be in the law.

I believe the result would be a greater number of convictions than are secured by a court-martial, with no appreciable difference in the application of the law to other cases.

If the administration of military discipline is taken away from the officers who are responsible for the training and the employment in combat of the troops, I believe it will have an adverse effect upon the morale and upon the discipline of the Army.

I do not consider that the administration of justice is parallel to the treatment of the sick and wounded, for example.

There is no doubt that we need more law in our courts, but I believe this is a difficulty which can be overcome by giving more attention to the study of law, or to supplying more liberally officers to act as judge advocates of courts-martial as now constituted.

Senator CHAMBERLAIN. You notice that that section does not undertake to take away from the military authorities the discipline, but simply deprives the judge advocate of the function of either a prosecutor or a defender, and leaves him simply as an adviser to the military court. He does not become a member of the court. He has nothing to do except to advise.

Gen. SUMMERALL. As I understand it, he organizes the court, rules upon all questions of law including challenges and questions touching the competency and impartiality of the court, advises the court and the convening authority, and so on.

Senator CHAMBERLAIN. That is along the lines of the British system, where the judge advocate is really a representative of the judge advocate general of the realm.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. He sits as a legal adviser of the trial court, and the court is appointed by the commanding officer, just as before: and if you will notice, it provides that the judge advocate shall not be a member of the court, but shall sit with the court

all the time that it is in open session, and shall fairly, impartially, and in a judicial manner perform the following duties and such others not inconsistent herewith as may be described by the President in virtue of article 41.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. Then it prescribes his duties under several subdivisions.

Gen. SUMMERALL. They are the ones that I referred to, where it seemed to me he virtually became a presiding judge.

Senator CHAMBERLAIN. Do you see any objection to a judge advocate sitting with the court, not being a member of the court, but advising the court rather than acting as a prosecutor or a defender. simply to see that the law and rules of evidence are complied with in the admission of testimony?

Gen. SUMMERALL. Those duties should be performed. I see no reason for making him an additional adviser, if the judge advocate of the court is competent, or if he became himself our present judge advocate.

In that connection I would add also that I would deplore very greatly the detail of an officer as prosecutor. I think the term itself. and what it implies, would be very objectionable in the military service.

Senator CHAMBERLAIN. Is not that what the judge advocate is now?

Gen. SUMMERALL. He is required to conduct the case, and to see that justice is done the accused. He brings out all the evidence. As a matter of fact, the first part of his duty is to bring out and develop the prosecution; but he is there to endeavor to see that the whole case is presented, and that justice is done.

Senator CHAMBERLAIN. Then why is a man ever appointed to defend a man who is on trial?

Gen. SUMMERALL. It is a concession to the defense. I do not consider that it should be necessary, if the judge advocate is really performing his duties, to have a counsel for the defense; but it is a consideration which is properly and habitually extended to the accused.

Senator CHAMBERLAIN. In accordance with the theory, under the old English system, the prosecuting attorney protected the interests of the defendant as well as the interests of the government. But he gradually drifted into the catagory of the man who prosecuted.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. Then the judge advocate, in all these prosecutions of the Army, really became an advocate for the cause of the Government.

Gen. SUMMERALL. He is to be an advocate for the cause of the Government, but he would also look out for the interests of the

accused. That is his duty. Where there is counsel for the accused, that would naturally go to the counsel.

Senator CHAMBERLAIN. Does he, as a matter of fact, protect the interests of the defendant in a criminal case? Is he not rather a prosecutor than one who acts as an impartial judge between the Government and the prisoner?

Gen. SUMMERALL. I can not say that he is, Mr. Senator. I have been a judge advocate a great many times; and I have been on courts a great deal. Where there is a counsel, that counsel is expected to do everything he can to present the case of the accused, and the judge advocate protects the case of the Government.

Where there is no counsel, the judge advocate should present the case of the accused with the same sincerity and thoroughness as he presents the case of the Government. As a matter of fact, in nearly all cases the accused has a counsel who does that for him, and it is better that he should do it in that way. I think it is desirable for the accused to have a counsel; but I do not like the idea of an officer being appointed to prosecute a soldier or a person in the military service.

Senator CHAMBERLAIN. That is the real objection that I have to the present system of administering the law by the judge advocate. He becomes really a partisan for the Government; not intentionally, perhaps, but in the very human side of it.

Gen. SUMMERALL. I have no doubt that he does at times.

Senator CHAMBERLAIN. Yes; the records that I have show that in every case; that he really has drifted into the position that the district attorney in a civil tribunal occupies, looking more particularly after the interests of the side that the Government is espousing.

Senator WARREN. General, you were asked by Senator Chamberlain as to the British military system. If, when you have finished your other remarks, you feel like doing so, I should like to have you compare with our own the real effect in action of the British courts in combat regions; tell us how nearly they agree, and which you consider the more effective. Of course I understand that you do not want to give any evidence that would seem to attack the British system in any way; but we should like to have your opinion, before you get through.

Gen. SUMMERALL. I will answer, right here, that I am not familiar with the British administration of justice, but I gathered from conversations that we are very much milder in the administration of military justice in the field than was the British Army.

Senator WARREN. In that connection, there have been complaints that have come before the committee, quite in detail and in considerable number, against the severity of sentences of our military courts. Now, you represent more directly than anyone who has been before this committee the combat section of the Army, and if you have become acquainted with the way that courts have been conducted in this country preparatory to going to the other side, and how that conduct may compare with the conduct of courts over there, we shall be glad to hear from you on that angle of the case.

Gen. SUMMERALL. I feel sure that there never was any reason to complain of severity of sentences in the combat units with which I had to deal. On the contrary, the entire sympathy of officers is with their soldiers in combat troops. The evildoer is punished, but

the whole sentiment is merely to vindicate discipline and preserve standards which will insure success in combat, and it has not been infrequent for an officer to express great regret that he was compelled to prefer charges.

The sentences of the courts coming before me were comparatively light; and yet I believe they maintained a high order of discipline.

Senator CHAMBERLAIN. How did they get to you? You commanded a division?

Gen. SUMMERALL. I commanded a division and a corps. In the corps I convened the courts for the corps troops. In the division I convened the general courts for the division.

Senator CHAMBERLAIN. Were you connected with the Judge Advocate General's Department?

Gen. SUMMERALL. No, sir; I had a judge advocate.

Senator CHAMBERLAIN. Did the sentences that were imposed by the special courts and by all the courts-martial come to your attention?

Gen. SUMMERALL. Only those that I convened.

Senator CHAMBERLAIN. Did they come back to you?

Gen. SUMMERALL. They came to me, personally.

Senator CHAMBERLAIN. All of them?

Gen. SUMMERALL. Those that I convened, the division courts, and the corps courts.

Senator CHAMBERLAIN. The division courts and the corps courts?

Gen. SUMMERALL. Yes.

Senator WARREN. General, I think that the wish of this subcommittee is to get every scrap of opinion that you men who have been over there have to express on these matters, and while I have led you astray, somewhat, I hope you will give us any suggestions that you have, even if we do not ask the appropriate questions to bring them out.

Gen. SUMMERALL. Senator Chamberlain has just asked me with regard to these cases that came to me. You, of course, are familiar with the convening authority's procedure in a court-martial case. Every division and every corps had a judge advocate who was a professional lawyer. Both of mine were practicing lawyers in civil life, and I considered them as very expert. They reviewed the cases and presented them to me, pointing out errors for correction, or anything that required my special attention. I did give them my personal attention, and was generally guided, as I think most officers are, by the views and opinions of these men who have superior legal knowledge.

Senator CHAMBERLAIN. None of the summary court cases came to you?

Gen. SUMMERALL. Yes; my own summary court cases.

Senator CHAMBERLAIN. And did the regimental court cases come to you?

Gen. SUMMERALL. No, sir.

Senator CHAMBERLAIN. Did the brigade court cases come to you?

Gen. SUMMERALL. No, sir; each one went to its own headquarters.

Senator CHAMBERLAIN. So that there really came to you only the cases which were tried by divisional courts-martial and corps courts-martial?

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. What classes of cases did that involve?

Gen. SUMMERALL. Absence without leave during action, once; an officer giving liquor to a soldier and making him drunk, and while he was drunk wrecking a car, hurting individuals, and completely destroying a very valuable automobile. Those are two that I recall. There were cases involving offenses like that.

Senator CHAMBERLAIN. On the part of officers?

Gen. SUMMERALL. On the part of officers and soldiers. I recall only one officer being tried. The cases were generally those of soldiers.

Senator CHAMBERLAIN. Can you state how many cases you reviewed while you were a divisional commander?

Gen. SUMMERALL. I can not. The cases, taking both divisional and corps, would make a very small number.

Senator CHAMBERLAIN. As compared with regimental and lower commanders, the number would be very small?

Gen. SUMMERALL. Yes. As a brigade commander I had a number of summary court-martial cases to act upon; and then there were some summary courts of the division and corps headquarters, too. But the total number was never very large, because we did not have any large number of trials.

Senator CHAMBERLAIN. Could you approximate the number of cases that came to you for approval or disapproval as division commander or as corps commander?

Gen. SUMMERALL. No, sir; I could not.

Senator CHAMBERLAIN. Your functions there would be to approve or disapprove, as the officer who appointed the court?

Gen. SUMMERALL. Yes; or to do any of the other things that the reviewing authority has the power to do, under the law.

Senator CHAMBERLAIN. Can you give any idea how many sentences you disapproved, and your recommendations in those cases?

Gen. SUMMERALL. No; but it would be very few; not over two or three, perhaps.

Senator CHAMBERLAIN. Do you remember ever sending a case back after a party had been acquitted by a general court-martial, and directing a reconvening of the court?

Gen. SUMMERALL. I do not think I ever did that, sir.

Senator CHAMBERLAIN. I am glad to know that, General. I think that is the most un-American part of the whole system.

Gen. SUMMERALL. Yes; I think so.

Senator CHAMBERLAIN. And it subsequently led the President, I think, to issue a general order to forbid that course—convicting a man after he had been acquitted by a court.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. The number of cases was very much larger which came up to a regimental commander?

Gen. SUMMERALL. Undoubtedly.

Senator CHAMBERLAIN. And the captain of a company appointed a court too, did he not?

Gen. SUMMERALL. I think not, sir. I do not think we ever had any companies isolated enough for that. They were always with the regiments.

Senator CHAMBERLAIN. So that was probably the lowest appointing commander?

Gen. SUMMERALL. The regimental commander was probably the lowest appointing commander.

Senator CHAMBERLAIN. Have you any idea how many sentences went up to the regimental commanders in your division for approval or disapproval?

Gen. SUMMERALL. No; I would not know that, sir.

Senator CHAMBERLAIN. You could not, therefore, tell how many cases were approved or how many disapproved?

Gen. SUMMERALL. No. sir.

Senator CHAMBERLAIN. You, of course from the very nature of your duties, could not examine into any other cases than those which came to you from divisional courts or corps courts?

Gen. SUMMERALL. No, sir.

Senator WARREN. You were in command of a brigade for a time. Was your experience there of any importance to consider with the other?

Gen. SUMMERALL. Only for the summary court, appointed by the brigade commander. As brigade, division, and corps commander I had summary courts for minor offenses, and very light punishments.

Senator CHAMBERLAIN. Shall I ask him a few questions, Mr. Chairman, or am I interrupting you?

Senator WARREN. No; not at all. There is no need that there should be continuity on either side, I think. We do not embarrass you by breaking in occasionally, General?

Gen. SUMMERALL. No, sir.

Senator CHAMBERLAIN. I would not like to interfere with any course that you have mapped out.

Under the construction placed upon the act, or rather under the law, section 1199 of the Revised Statutes of the United States——

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN (continuing). The Judge Advocate General has no power other than to review a case that comes to him, and to send it back to the commanding officer with advice only. Assuming that the court had jurisdiction to try the case and that the proceedings were regular, the Judge Advocate General says that he has no power to reverse, modify, or review a sentence. Do you not think that there should be, somewhere, this power of examining a case and reversing or modifying it?

Gen. SUMMERALL. Yes; I think that would be a very good thing. I think it should be vested in the Military Establishment, somewhere —in the higher authority.

Senator CHAMBERLAIN. There seems to be a consensus of opinion everywhere that there ought to be somewhere this reviewing authority and this power to reverse or to modify or to change a sentence. Even the American Bar Association committee, the majority of that committee, recommend something of that kind; but they recommend the suggestion which the Judge Advocate General has made, that that final reviewing authority should be in the Commander in Chief. The minority committee of the American Bar Association recommend rather along the line of the British system. The Kernan report recommends some reviewing authority, but the Judge Advocate General has held that he had no such reviewing or revisory authority. You think that it ought to exist?

Gen. SUMMERALL. Oh, yes, sir; I do.

Senator CHAMBERLAIN. The great difference between Gen. Ansell and Gen. Crowder is right here: Gen. Crowder insists that he has no revisory power, but only advisory power, while Gen. Ansell insists that under the law as it exists, the Judge Advocate General posesses power not only to revise but to modify or change. Have you ever examined into that?

Gen. SUMMERALL. No, sir; I never have examined it, and I do not think that the Judge Advocate General is the one to exercise that authority except in his capacity as a legal officer of the War Department. I think that the functionary who does that should be a person who exercises command, like the Secretary of War or the President of the United States.

Senator CHAMBERLAIN. Yes; but that leaves it altogether in a military status.

Gen. SUMMERALL. I think it should be. It is an element of command, I think.

Senator CHAMBERLAIN. In the last analysis that would leave the power, then, vested in the Chief of Staff, because he is the legal adviser, or the adviser in matters military, of the Secretary of War, and so of the Commander in Chief.

Gen. SUMMERALL. Except that it would seem to me that the Judge Advocate General of the Army would occupy a similar relation to the Secretary of War or the President that the judge advocate of a division or a corps holds to the commanding officer of that unit.

Senator CHAMBERLAIN. What objection have you to the British system, where the judge advocate general is disassociated from the army—that is, is a civilian—and holds his position for life?

Gen. SUMMERALL. The only purpose of discipline is to maintain troops in a condition for combat. The people who train and maintain them in condition for combat, and who employ them in combat, are the people who exercise command. If the basis of their employment in combat, which is discipline, is taken out of their hands, I do not think that our Army will be in a state fit for combat.

Senator CHAMBERLAIN. Was not the British Army in pretty good fighting condition, so far as discipline was concerned?

Gen. SUMMERALL. They fought well; there is no doubt about that; and they did well. I do not know what their administration of military justice is.

Senator CHAMBERLAIN. Did you ever compare the discipline of that army with ours?

Gen. SUMMERALL. I have been in the British Army and I have seen them. I think they have very good discipline.

Senator CHAMBERLAIN. You spoke about being advised that there was some reviewing authority here somewhere that you approved of.

Gen. SUMMERALL. That is, I approve of the principle.

Senator CHAMBERLAIN. Do you know what that consists of?

Gen. SUMMERALL. No, sir; I do not know what it is.

Senator CHAMBERLAIN. Or who functions in it?

Gen. SUMMERALL. No, sir; I do not know what it consists of.

Senator CHAMBERLAIN. Have you in mind the so-called clemency board?

Gen. SUMMERALL. I think it is called that; yes, sir.

Senator CHAMBERLAIN. That has been established since the armistice.

Gen. SUMMERALL. I do not know its history or its functions.

Senator CHAMBERLAIN. Yes. The difficulty with such a board is here, General: Take a man who has been convicted, say, before a court-martial. There may have been evidence admitted against him which was wholly inadmissible; or there might have been circumstances that were not considered by the court. Now, he is convicted by a military court. He is a criminal in the eyes of the law. There is no appeal for him from that. If his case gets to the Judge Advocate General, and the Judge Advocate General and the clemency board recommend clemency in his behalf, it simply disposes of the unexpired portion of the sentence. There is no way to get rid of the stigma of the conviction. Do you not think that that power ought to be lodged somewhere?

Gen. SUMMERALL. Yes; if a man has been unjustly subjected to the disabilities and disadvantages that go with conviction, he certainly is entitled to restitution.

Senator CHAMBERLAIN. There is no means under the law, as I understand it, to get rid of it now.

Gen. SUMMERALL. Our whole purpose is to do justice. I think we all want that, and there ought to be some way of accomplishing justice if injustice is done, so far as it is humanly possible.

Senator CHAMBERLAIN. Do you deem the imposition of severe sentences for minor infractions of the law as necessary in order to maintain discipline in the balance of the Army?

Gen. SUMMERALL. No, sir. On the contrary, I think that the only purpose of punishment is to vindicate discipline; to have it exercise a deterrent effect.

Senator CHAMBERLAIN. As to the individual or as to the mass of the Army?

Gen. SUMMERALL. As to the mass; and as to the individual, too, as a part of the mass.

Senator CHAMBERLAIN. The degree of an offense in the military service is bound to vary with the conditions under which the offense is committed. An absence without leave at a military post now, around Washington, for a day, say, would be a very minor infraction; but there are other conditions where it would become a very serious offense, in war. In the face of the enemy, for example.

Gen. SUMMERALL. In the face of the enemy, yes, sir. And yet that man might have had no intention of deserting or of evading his part in the fight; he is not a coward, but he takes it into his head to go away and see his brother in another command. Yet he subjects himself to very severe punishment; so that in the military service we are compelled to differentiate degrees of the same offense, and we have got to consider from a military viewpoint, in the interests of the service and of the country, the conditions under which the offense was committed as well as the offense itself. In any case the punishment, of course, should not be any more severe than is necessary to vindicate discipline and to act as a deterrent.

Senator CHAMBERLAIN. Then you do not believe in the doctrine of imposing sentences *in terrorem*, to frighten the balance of the army? That is, if a man was guilty of a minor infraction of the law, to impose a heavy sentence against that individual in order to terrorize the balance of the army against the commission of the same offense?

Gen. SUMMERALL. No; that is not my conception of discipline, at all. You do not impose these things to terrorize people, but in order to bring to their minds the gravity of them so that they will see that the offenses are so serious that they must not be committed; and the punishment should be a punishment intended to be served as commensurate with the offense itself.

Senator CHAMBERLAIN. What would you say about sentences imposed here by the Army in training, in the United States, of 10, 15, 25, and 50 years for absence without leave? Can you conceive of those offenses being grave enough to require such a sentence?

Gen. SUMMERALL. That is a new idea to me, sir. I would not have thought of such sentences.

Senator CHAMBERLAIN. I do not think you would, General; but that condition has prevailed. There are cases where long-term sentences have been imposed for absence without leave for a few days, and sometimes a very heavy sentence had been imposed against a man where a lighter sentence was imposed against another for some time of absence without leave.

Gen. SUMMERALL. Those inequalities are bound to result, within limits, I think, under any system; but their differences should not be so great as to work a marked injustice on the men who suffer the more severe punishment.

Senator CHAMBERLAIN. Did you ever see a case where a court imposed a heavy sentence against a man with the feeling that it would not be served; that leniency would be exercised?

Gen. SUMMERALL. Only where that sentence was mandatory. Only where the court considered it its duty to impose a sentence proportionate to the offense committed, although there may have been extenuating circumstances in the commission of the offense. That is the exceptional case, but I believe it has happened.

Senator CHAMBERLAIN. Speaking of letting enlisted men compose a part of courts under the court-martial system, you think it would not be wise to do that?

Gen. SUMMERALL. I think it is unwise, Senator.

Senator CHAMBERLAIN. Do you think it would be unwise if the judge advocate who attended the trial was not a member of the court, was not the prosecutor representing the Government, nor was he representing the defendant, but simply acting as the legal adviser, being there to steer the court, composed of commissioned officers and enlisted men, along the right legal course? Do you not think that the enlisted man could serve there under such instructions and guidance and leadership just as well as he could serve on a jury?

Gen. SUMMERALL. He could be guided by this adviser just the same as any other members of the court. But I am of the opinion that there are many things which will arise, in which he would not be as qualified to act as the officers.

I am of the opinion that he could be advised, and could be benefited just as any officer by the advice, but I do not think that the effect on the administration of justice would be in any way improved, and I do think that it would tend to a lessening of the efficiency of a court.

Senator CHAMBERLAIN. There was some testimony before the American Bar Association Committee that wherever sergeants were placed on a court, their disposition was to impose severer sentences on the enlisted men.

Gen. SUMMERALL. I want to admit that in my statement. There is no doubt about it. There is no doubt about it, Senator; because I have the highest opinion of and the best relations with my soldiers, but I do not think that they belong on a court-martial.

Senator WARREN. Will you state your opinion as to what would be the result, General; whether it would result in less severity or greater severity?

Gen. SUMMERALL. I think it would result in greater severity.

Senator CHAMBERLAIN. General, pursuing that thought a little further with reference to having the judge advocate disconnected with the court but simply sitting as a legal adviser of the court: One of the things that developed before the American Bar Association Committee—and I think it has developed before this committee—is where a prisoner is being defended by an officer of lesser rank acting as counsel, that counsel being called upon to cross-examine a superior officer on the stand, he was forbidden by the officer to cross-examine him touching questions affecting his veracity.

Gen. SUMMERALL. I think that would be a very exceptional thing. I never have experienced it, and certainly would not have allowed it on a court. Counsel has full right to perform all of his duties regardless of relative rank.

Senator CHAMBERLAIN. It ought to be so.

Gen. SUMMERALL. It is so, sir.

Senator CHAMBERLAIN. That is the only case I know of, that one case.

Gen. SUMMERALL. Yes, sir. I dare say there have been exceptional cases where almost every kind of abuse could be pointed out, but in the great mass of cases we tried, I believe that the intention and the practice was to secure a fair and impartial trial, and justice, with consideration to the person being tried.

Senator CHAMBERLAIN. Do you have in mind many cases where the commanding officer, the officer who appointed the court, sent cases back with instructions to the court to reconvene and convict?

Gen. SUMMERALL. I do not recall any such case, Senator. It may have been, but I recall none. The reverse is correct.

Senator CHAMBERLAIN. That is, to reduce the sentence?

Gen. SUMMERALL. Well, to reconsider the findings with reference to certain points. It might also carry a change in the sentence.

Senator CHAMBERLAIN. Mr. Chairman, I interrupted Gen. Summerall. He was calling attention to the changes in the Articles of War, and I got off on another branch of the subject, here.

Senator WARREN. We shall allow him to proceed in his own way. I should like to get a little more emphasis upon one point. I understand from the general that he believes an enlisted man, no matter whether he is a private or a noncommissioned officer, in performing his duties before a court as attorney, we shall say, for the accused, has the same respect and attention as if he had a commission?

Gen. SUMMERALL. Yes, sir.

Senator WARREN. Then if, in the examination of witnesses before courts on matters on which they might have had personal complaint, it seemed to this committee to be proven that in some cases there had been a rather continuous effort to cut them out, you would think it was more because of the personal nature of the man than because of the fact that he held a subordinate position, would you?

Gen. SUMMERALL. Yes, sir. Such action is wholly inconsistent with the status or the duties of the members of a court, to restrain counsel or restrict him in any proper line of action, and it should subject a court to very serious censure on the part of the reviewing authority.

Senator WARREN. As to leniency, the particular points that the witness has brought up are the differences on mooted questions, one as to the service of enlisted men on courts-martial, and another, that of having a final court outside of the military.

Senator LENROOT. A military court of appeals.

Senator WARREN. And some other matters. I would like to have you, if you will—because Senator Lenroot was out of the room at the time and I fear he may not have time to read this record—repeat what you said about a court to appeal to as a matter of final appeal.

Gen. SUMMERALL. I said that there should be a power of review, and that it was very desirable in my opinion that it should be vested in some element of the military command; that nothing connected with our courts-martial should be taken away from the command which is responsible for the training and the employment of the troops in combat; that instead of putting it in the hands of the Judge Advocate General, it is my opinion that it should be vested in the Secretary of War or the President; and that I should assume that the relation of the Judge Advocate General to the Secretary or to the President would correspond to the relation of a judge advocate at a division or corps headquarters or an Army headquarters to the division, corps, or Army commander.

Senator CHAMBERLAIN. But the difficulty of that proposition, General, lies here: There have been over three hundred thousand court-martial cases between the time we went into the war and the time of the armistice, and it would be a physical impossibility for either the Secretary of War or the President to review these cases.

Gen. SUMMERALL. Yes, sir; and that would apply to this court, I think, that is mentioned here, also. I calculated it would have had something over 50 cases a day. It would be necessary to empower certain commanding officers or the commander in chief of the Army in the field to carry out this function. I think, with the army in France, it is probable that justice was arrived at within all human possibility by the method that was followed there.

Senator CHAMBERLAIN. Did the Judge Advocate General with the American Expeditionary Forces over there undertake to review and reverse and modify the decisions of the several courts-martial, from corps courts down to regimental courts?

Gen. SUMMERALL. I think that general court-martial cases were reviewed.

Senator CHAMBERLAIN. When you say "reviewed" do you mean reviewed, reversed, or modified?

Gen. SUMMERALL. They approved or disapproved a great many.

Senator CHAMBERLAIN. I think if our Judge Advocate General had exercised the same authority and had placed the same construction on the law, this bill would not have been proposed.

Gen. SUMMERALL. I think you will find that he disapproved a great many of them.

Senator LENROOT. In case of disapproval, then what happened over there with the case?

Gen. SUMMERALL. Well, I presume the man was restored to liberty.

Senator LENROOT. Then do I understand you to say that the commanding officer exercised the jurisdiction to set aside the verdict of a court-martial?

Gen. SUMMERALL. That is my understanding.

Senator CHAMBERLAIN. May it not be that you are mistaken about that, for this reason: I understand that the cases, the sentences of general courts-martial, all came through military channels to the Judge Advocate General here, and he was the man who reviewed them.

Gen. SUMMERALL. I think you will find that they were first reviewed at the headquarters of the A. E. F.

Senator CHAMBERLAIN. I hope that you are right about it.

Gen. SUMMERALL. You will find that from the Judge Advocate General of the A. E. F.

Senator CHAMBERLAIN. Who was that officer?

Gen. SUMMERALL. Gen. Bethel.

Senator WARREN. We will have him before us later.

Gen. SUMMERALL. Yes.

Senator WARREN. He is one of those we expect to hear to-morrow or next day.

Senator CHAMBERLAIN. Yes. I hope that is true. That is not my understanding about it. I hope that he assumed that right.

Senator LENROOT. I do not want to ask the general to repeat anything that he has said, that has already gone into the record, but if you have not stated it I would like to have you go into what way you think a military court of appeals would impair efficiency.

Gen. SUMMERALL. On the contrary, I think it would increase efficiency.

Senator LENROOT. I mean such a court as you object to.

Gen. SUMMERALL. My main objection is that the court constitutes no part of our chain of command, and I believe that any part of its functions should be an element of command because command is responsible for the employment of troops in combat, and I do not believe we ought to divorce our discipline, which is all that courts-martial are intended to accomplish, from the element of command.

Senator LENROOT. In saying that, do you assume that the court of military appeals would attempt to substitute its judgment for the judgment of the court-martial upon the facts, and in that way interfere with discipline, or do you have in mind that such a court would only undertake to exercise jurisdiction where prejudicial error had been committed by the court-martial.

Gen. SUMMERALL. It is rather difficult to say how the facts would be affected. We must assume that they would attempt to make the same judgment as to facts as the court itself made, although we receive different impressions from reading things from what we do when we hear them stated. I think the main difference would probably lie in the degree of punishment inflicted.

Senator LENROOT. Suppose this court is given no jurisdiction whatever to pass upon the facts other than to ascertain whether there was any evidence on which the court-martial might exercise its judgment, but that it would have no power to substitute its judgment as to the correctness of the finding of a court-martial upon the evidence

as distinguished from the court-martial review as to whether the court-martial had actually committed prejudicial error in the conduct of the case?

Gen. SUMMERALL. If it was confined merely to the correction of error, there could be no objection to it.

Senator CHAMBERLAIN. That is the point I wanted.

Gen. SUMMERALL. But I understood its functions were very much more.

Senator CHAMBERLAIN. No, that is it.

Gen. SUMMERALL. If it is confined to the correction of error of law, there should be no possible objections to it. On the contrary, it would be a very desirable institution, because we want to do justice, and if injustice is done we all want to correct it. I think that no people are so sympathetic with the soldier as the officers who serve with him—certainly in action, in combat—and far from wanting to do him an injustice, they are the ones who are the keenest to see that he gets justice, and leniency, even.

Senator CHAMBERLAIN. Whether the appellate tribunal is within the military establishment or whether it is composed of civilians, there ought to be a greater power of review than is now exercised by the appellate power?

Gen. SUMMERALL. I think so, sir.

Senator CHAMBERLAIN. Because Gen. Crowder and those who stand with him insist that they have no appellate power; that they have no other right than simply to review a case; and that if the court had jurisdiction and the proceedings were regular, that ends it with them. But now there may have been prejudicial error, there may have been reasons why the case should be reversed, and yet there is no power to reverse. Do you not think that power should be lodged some place?

Gen. SUMMERALL. I do, indeed, sir.

Senator CHAMBERLAIN. That is my insistence about it, all the time, that there should be some power lodged somewhere to reverse for prejudicial error.

Senator WARREN. Do you find anything else that you want to speak of concerning differences between the present law and the proposed law?

Gen. SUMMERALL. There are a number of minor changes which are relatively unimportant compared to the other issues.

With reference to the investigation prior to the filing of charges, so far as I know, substantially what is required in the bill has been carried out, and I doubt very much if any embodiment in the law will secure a more thorough investigation than is now being made prior to the forwarding of charges. It is proper that they should be investigated and that there should be reasonable grounds for a finding of guilt before charges are sent forward.

I have before spoken of my feeling in regard to a prosecutor. I think there is no objection to an officer being detailed by the convening authority, subject to the convening authority, to assist the court in its functions, and if for any reason a judge advocate should be considered not qualified for that work, he might be an extra officer. But I would very much regret to see an officer detailed specifically to prosecute an enlisted man, in terms and intention. I think the effect

on the morale of the command would be injurious, and I do not believe it is consistent with the spirit in which most officers engage in their duties as judge advocate.

Senator CHAMBERLAIN. That is what I asked you about a while ago.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. It seems to me that the judge advocate who is appointed by the commanding officer has drifted into the attitude of a prosecutor.

Gen. SUMMERALL. Well, he does, many times, undoubtedly; but I still think we ought to preserve, as far as possible, the standard of justice to both sides in the conduct of a case.

Senator CHAMBERLAIN. Could not the judge advocate do that better—carry out your views, which are mine——

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN (continuing). Could he not carry out those views better if he were simply sitting there, not as a member of the court, not as a prosecutor and not for the defendant, but simply to watch the proceedings and advise the court as well as counsel as to the law of the case?

Gen. SUMMERALL. Yes, perhaps he could; but still, I would not want to call the other man a prosecutor. I would want to call him a judge advocate, or some name that would not imply that he was there to prosecute the soldier.

Senator CHAMBERLAIN. It would not make much difference what you called him.

Gen. SUMMERALL. I think it would, Mr. Senator.

Senator CHAMBERLAIN. You do not want the judge advocate to be a prosecutor, and yet that is what he is. All the records that I have examined show that he is a prosecutor. Now, calling him a judge advocate does not remove the fact that he is a prosecutor.

Gen. SUMMERALL. I would like to encourage and endeavor to instill into the officers the other idea, that they are there to find out the facts and to bring about justice.

I can speak briefly of some of the minor matters here. I do not believe that it should be contemplated that a civilian counsel should be employed by the judge advocate, except in very special cases. I think the terms here are too general.

Senator CHAMBERLAIN. You mean for the defense?

Gen. SUMMERALL. For the defense, yes, sir. I think the terms as to the employment of such counsel are too general, and would result in a civilian counsel—this is at the bottom of page 13 and is part of article 22. I prefer the present system of challenges to that provided in article 23.

I prefer the present oath to that prescribed in article 24.

I think the addition in article 26 is very good to protect the accused from the plea of guilty when he is not guilty.

Article 28 I think is also a very good article.

Article 29 is a good article.

Senator CHAMBERLAIN. That is in the proposed law?

Gen. SUMMERALL. Yes, sir.

Article 34 I think is not desirable, in that there might be a reason why a case should be reopened, and I do not believe any great hardship is worked upon the accused by the time that elapses, generally,

between the finding of the court and the reviewing of the sentence. I prefer the present system.

I do not think we should limit the punishment for contempt as is done in article 25; although punishment for contempt is a very rare thing for a court-martial.

I take it that in article 36, the proportion has been changed to conform to the new compositions proposed in here for a court-martial. I prefer the present court composition and the present ratios for conviction.

The whole question of punishments in articles 47 and 48 and the subsequent articles I believe would be adverse to the interests of the service in many cases. In time of peace I feel that the President is quite qualified to prescribe the limits of punishment, and I believe the limits of punishment prescribed in time of peace have been reasonable and lenient. But in time of war I think it is very dangerous to restrict a court in the punishment, since the offense will vary very greatly with the conditions under which it is committed. With the revisory power vested in higher headquarters, as I think so many have agreed upon, the interests of an accused will be amply safeguarded, and I think it is better not to try to fix the punishment for each offense, as is done in criminal law, but to continue as it now exists.

Senator CHAMBERLAIN. General, do you not think there ought to be a maximum penalty beyond which they ought not to be permitted to go?

Gen. SUMMERALL. Yes; in time of peace. I think that if the punishments laid down here go into effect in time of peace it will result in greatly augmented sentences for offenses, unless the President should intervene and make a lower limit. I think these limits are much too great for times of peace.

On the other hand, in time of war there are many of them that would not be sufficiently great, and for the reasons I have stated before, I believe it will produce more harm in time of peace than it will in war. I think the authority of the President now to fix the limit in peace times is correct, and in war the power that will probably be vested in superior commanders to mitigate and change sentences will protect men from excessive and unjust sentences.

Senator WARREN. You had given an illustration before Senator Lenroot came in, looking, I presume, to the proposition where different grades of punishment were prescribed for two different parties that committed the same offense, only that one might commit the offense in the face of the enemy while the other might commit it entirely away from danger or combat. The General need not go over that again, I suppose.

Senator LENROOT. No; of course not.

Senator CHAMBERLAIN. General, there are men in the Army—and I would place you in that category—who would see that the rights of the enlisted man and also of the noncommissioned officer were safeguarded and perfected; but there are men in higher command who do not do that. They have not the personal touch with the men that induces a man to look after these things. It is out of that state of things that these complaints grow.

Gen. SUMMERALL. I understand, sir, and I am just as anxious as possible to see anything done that will protect from injustice.

Senator CHAMBERLAIN. It seems to me that a properly arranged and organized tribunal will do more than anything else in that direction.

Gen. SUMMERALL. I think it is the greatest relief to be hoped for. As I said in the beginning, if we can increase the number of legal officers in the Army so that we can supply the courts with better legal advice as judge advocates, or in any capacity that Congress sees fit to give them—and I prefer that which is now constituted—we will undoubtedly avoid many of the errors of law that have been committed and complained of.

Now it so happens that the troops I have been dealing with had many lawyers among them, and I believe it was the rule to have good lawyers as judge advocates of courts-martial and judge advocates of the divisions, corps, and armies.

Senator CHAMBERLAIN. That would not be true in time of peace?

Gen. SUMMERALL. In peace times it is not true.

Senator WARREN. Not to the same extent.

Gen. SUMMERALL. But the same severity of punishment would not exist. Punishments are always very light in peace times.

Senator LENROOT. I do not know whether I understood you correctly. I thought you said the President in peace times fixed the limits of punishment.

Gen. SUMMERALL. Yes.

Senator LENROOT. Is that by law?

Gen. SUMMERALL. Yes; the President fixes the limits of punishment.

Senator LENROOT. How do those limits compare with the limits set out in this bill?

Gen. SUMMERALL. I have not compared them, but I think these are very much in excess of his limits; and as I say, it will work, undoubtedly, a hardship on men in peace times, because I think you have intended these to be the limits for war.

Senator LENROOT. Yes.

Senator WARREN. Would the matter you spoke of, the limits of the President, come through regulations from the War Department?

Gen. SUMMERALL. They are probably formulated in the War Department, but they come from the President.

Senator WARREN. You have them?

Gen. SUMMERALL. Yes; and when a case is tried reference is made to the limit for that case.

Senator WARREN. That is fixed by law?

Gen. SUMMERALL. That is within his power.

Senator LENROOT. Are there any other limitations in the regulations themselves further than as to the punishment—as to the punishment in time of war?

Gen. SUMMERALL. No; there are no limitations in time of war.

Senator LENROOT. There are no limitations in time of war?

Gen. SUMMERALL. No.

Senator CHAMBERLAIN. It is entirely in the hands of the court-martial.

Gen. SUMMERALL. Yes; and of the reviewing authority.

Senator CHAMBERLAIN. Of course that is the commanding officer?

Gen. SUMMERALL. The commanding officer that serves with troops.

Senator CHAMBERLAIN. You have served in peace time. Do you not find a great difference between the enlisted personnel now and in the peace-time army?

Gen. SUMMERALL. I do not find the difference to be serious as affecting discipline.. The men from our peace-time army that we took into the war were fine soldiers, and in fact they formed the backbone of our force until we got the new men in. The new men poured in and they are also fine men. I have a very high idea of all of our men. They respond, they have high ideas, good morale, and fine traits. I have a very high idea of our peace-time army.

Senator WARREN. Now, you were at article 50, were you not, when you were interrupted, in going through the bill?

Gen. SUMMERALL. I was at article 48. There I began the discussion of the limits of punishment.

Article 49 has very good provisions.

Senator CHAMBERLAIN. That is, the new one?

Gen. SUMMERALL. The new one; yes, sir. But I think that a provision for this review by superior command is necessary rather than have it wait for the President himself. I believe it impracticable to send all these cases to the President.

Senator CHAMBERLAIN. In death sentences?

Gen. SUMMERALL. Yes, sir; and the commander in chief approved a number and executed them. It had to be so. I think you will find that the commander in chief approved and executed a number.

Senator CHAMBERLAIN. There were 10 executions during the war with the Expeditionary Forces, but those cases all came here.

Gen. SUMMERALL. There, again, I was not at the headquarters; but I am only telling what I understood. Gen. Bethel will enlighten you on that, and I think you will find that the commander in chief himself approved death sentences; and I think it is necessary.

Senator CHAMBERLAIN. Well, it may be. That was a matter of regulation. Up to the time of the execution of those Texas negroes, the commanding officer exercised control.

Gen. SUMMERALL. Yes, sir.

Senator CHAMBERLAIN. But after the execution of those men, within 48 hours, there was a general order issued by the commander in chief requiring that before execution such cases should come here.

Gen. SUMMERALL. Article 50, "Mitigation and remission," does not deal with the loss of files. I have read that rather hurriedly, and on the whole I prefer our present system, that which was in use in this country.

Article 52 contemplates the reviewing in the War Department of general courts-martial cases and is virtually mandatory, because I think that no accused would request that his case be not reviewed.

I do not believe it is possible for one board of three men to review the cases that would arise in war. But aside from all that, I believe as I stated before that unless this decision is confined to questions of law it should be vested in the element of command. But I do not believe it should be confined to law. I think it should have power to approve, disapprove, mitigate, and reverse, and do all those things that a reviewing authority can do. By vesting it in the War Department a number of persons could be assigned to the work, and

the decision made by the Secretary or the President, as is done by a division or a corps commander.

Senator LENROOT. Let me ask you right there, General, with reference to the competency of the same man or men, who might be entirely competent to pass judgment, from a military standpoint, upon a fact and mitigation, and so forth, but would not be competent to pass upon prejudicial error of law.

Gen. SUMMERALL. Yes, it would require people who understood the law.

Senator LENROOT. Then if this reviewing authority were confined to the command would you say that there would be that review by competent authority of errors of law?

Gen. SUMMERALL. It would be necessary to install a considerable number of officers in some part of the War Department for this work. It would take a very considerable number of officers and they would have to be fairly competent in the law. But the principal is sound, and it is a matter of arriving at some working basis upon a very great scale.

With reference to the punitive articles they are practically the same as those that now exist, and my only objection there is the placing of the limit of punishment for each article; and I will state again that I believe the effect would be to greatly increase the punishment in time of peace and to unduly restrict the administration of discipline in time of war.

Senator CHAMBERLAIN. In my opinion it is better to punish a man who is actually guilty, and whom a properly constituted appellate tribunal had said had had a fair trial and was guilty—it is better to punish him with a 10 year sentence than to punish an innocent man or a man who has not had a fair trial with a one-year sentence.

Gen. SUMMERALL. Yes.

Senator CHAMBERLAIN. This is, the appellate tribunal should see that every man has a fair deal.

Gen. SUMMERALL. Yes. The principal is sound, but it is a question of arriving at a working basis for it, and I do not believe the court here constituted could handle the cases.

Senator CHAMBERLAIN. The judge advocate general is the revisory power under the law now. He does not attempt to do it all himself.

Gen. SUMMERALL. That is true, and in principle I think the decision should be in the name of some element of command, like the Secretary of War or the President. The effect on the Army is better. We have to consider the effect on the Army, the confidence that the Army has in the agencies created, and the effect on morale of everything we do in the matter of discipline.

Senator LENROOT. Under the bill proposed, General, do you think there would be a review in practically all cases?

Gen. SUMMERALL. I do not think any soldier would ask not to have his case reviewed. I should advise every man to have his case reviewed.

Senator CHAMBERLAIN. Where it involved a conviction practically of a felony.

Gen. SUMMERALL. I should insist that whatever could be reviewed should be reviewed if the law gives the right. I think that the accused should have everything that the law allows him. I should discourage in every way requests not to have those cases reviewed.

I do not think I have anything more of material bearing, Mr. Senator.

Senator CHAMBERLAIN. Mr. Chairman, may I put in the record the letter of Mr. Gardiner? You remember I tried to get him to come down, but he could not get here very well, and he wrote Mr. Wadsworth a letter giving his views on the subject of courts martial. May I have that put in the record?

The Chairman. Yes. That is all right.

(The letter referred to is as follows).

NEW YORK, *September 11, 1919.*

Hon. JAMES W. WADSWORTH, JR.,
United States Senate, Washington, D. C.

DEAR SIR: In response to your telegraphic invitation, I have the honor to submit to your committee, the following comments on the Senate bill relating to military justice.

I am somewhat familiar with the administration of military justice, having graduated from West Point, and having served three years at the Military Academy as an Instructor in law.

I would say at the outset that I regard the criticism of the existing system, more as a symptom than as a disease itself. The disease is seated much more deeply and is much more malignant than the mere matter of court-martial reform would indicate. The thing that is basically wrong, in my opinion, is the extreme distinction that prevails in the Army between the enlisted man and the officer. This distinction is practically the same as was drawn in feudal times between the serf and the overlord. I do not think that this is an extreme view; when an American Army was first formed, in prerevolutionary times, it adopted in entirety the code, the traditions, the customs and the laws that prevailed in England at that time. We did even worse than this; one of the first instructors or drillmasters in Washington's army was Von Steuben. Von Steuben was a German with all of the German ideals of military caste and military discipline, and it is a strange fact that there has been but little change in ideas in this country during the hundred and fifty years which have elapsed since that time. The whole idea might be called the cult of the shoulder strap. It is practiced at West Point in an extreme degree, and West Point has set the standard for the Army in this, as in other respects.

We must remember that it has not been many years since there were but relatively few officers in the Army who were not West Point men, and it is the ideas, traditions, and customs handed down by these men that have fixed the Army standard. The result has been the perpetuation of an entirely false idea of the relation that should exist between enlisted man and officer. We need go no further than to state that at West Point the nickname or cadet name for an enlisted man is "bum"; at least so he was known in my time at the Academy and I presume is so known yet. Because of the kingly origin of our military conception, we have come to regard military discipline as resting very largely on fear, and the club which engenders this fear is the court-martial. That this is true is shown by the testimony of Maj. Gen. Glenn, before a committee of the American Bar Association, sitting in Washington last spring, and the testimony of Maj. Gen. O'Ryan, given but recently, I think before your committee, whereas discipline should be the discipline of leadership, both of these distinguished officers have pleaded for a discipline based on terrorism or fear. The fallacy of this becomes immediately evident when we realize that if a man is kept within bounds only through fear, he will pass without bounds, the minute the thing that causes fear is removed. In other words, if Gens. O'Ryan and Glenn have the correct idea of discipline, that an American soldier is not to be trusted, except under the immediate supervision of an officer, that in spite of the testimony of these distinguished gentlemen, it is nevertheless true that the least number of court-martials is found in the best disciplined command. It is my opinion that there is an important piece of work to be done by your committee at West Point, and the worship of the shoulder strap at that place be destroyed, before the evil of the court-martial system can be entirely corrected.

To take up specifically the matter of court-martial, the specific failure of the army to do substantial justice to the man in the ranks, is due almost entirely to the failure of the Army to appreciate and apply the meaning of the decision of the Supreme Court of the United States in what is known as the Grafton case. Previous to this decision of the Supreme Court, an army court-martial was regarded as an executive agency, and as an executive agency was entirely within the control of the executive

representative, who was the commanding officer. It was not regarded as a court of law at all. In the Grafton case, however, the Supreme Court decided that the court-martial was not an executive agency but was a congressional agency, and placed it on exactly the same footing, in this respect, with other courts created by Congress. The application of this principle, however, the Regular Army has always resisted, and they have resented any attempt which has been made to divest them of supreme power, even of the power of life and death, over the men under them. The result is that up to the present time, a commanding officer, by virtue of his position of command, exercises an almost unrestrained discretion, in deciding who shall be tried, the legal sufficiency of the charge, the legal sufficiency of the proof, the composition of the court, and all questions of law that arise during the progress of the trial. He falls but little short in fact of being judge, jury and lord high executioner, all in one. Thus questions of pure law are decided solely by the power of military command In other words, we have in our court-martial system that very failing which is most positively antithetical to every principle of American Government. A so-called legal system, controlled entirely by men and not by law. It has been my understanding that it is this very thing that we sent our men to Europe to kill and destroy, and it is not a little painful to find that having destroyed it in Europe, there are many who would still retain it in America.

There are a few points in connection with this proposed bill that, from such experience as I have had, I am not entirely in accord with. I do not think that general courts, or in fact any courts, should contain enlisted men. As courts-martial are at present organized, junior officers are frequently, if not invariably, influenced by the opinion of their seniors on the court. This condition would be much aggravated if enlisted men, whether privates or noncommissioned officers, were to sit in such capacity. Moreover, such a step leans toward running one department of the Army to a soviet, and is, therefore, drawing too close to Bolshevism. It is my opinion that if through a proper legal code, adopted by Congress, wise restrictions are thrown around the power of military command, in its administration of military justice, there will be no need for such a radical and questionable change in the Constitution of the court. I think, therefore, that in this particular the bill goes too far.

In the matter of counsel, it has, of course, most frequently occurred that the accused was inadequately represented. I do not think, however, that this furnishes sufficient grounds for giving an accused, in all cases, a right to civil counsel, as such a provision in the law, may readily become the subject of great abuse. I do think, however, that in all cases where charged with offenses, the punishment for which may include death, life imprisonment, or dishonorable discharge from the Army, this privilege should be granted, as no man should be deprived of his citizenship without the most ample opportunity having been given him for his own defense.

Articles 62 and 64 in the proposed law are to me not consistent. In the first place, for a strictly military offense, such as disobedience of orders. I do not think that either the death penalty or life imprisonment should ever be possible in times of peace. In the second place, a military order given by a military superior is just as binding, and may be just as important, whether given by a commissioned or noncommissioned officer. I can see no reason, therefore, why in one case the maximum punishment should be death, and in the second place, six months.

In general, I think that the tendency of all amendatory laws should be to definitely and positively fix a status of a court-martial as a congressional agency; make it truly a court of law in which the rules of evidence, nature of offenses, the offenses themselves, and the punishing power of the court, in each case, be made as definite as possible. right of review (and by the term of "review" I do not mean General Crowder's interpretation) should be definitely fixed along some such lines as that provided for in all the bill. I do not think, however, that it would be feasible for the accused to state his desire for a review before the court, as it can very readily happen that a court has been dissolved by the time the court sentence had been approved by the reviewing authority, and, of course, an accused would have no reason for wanting a review until the sentence was determined.

In conclusion, I would say that I hope to send you to-morrow a copy of Collier's Magazine containing an article by myself on this subject, which fully expresses my view.

Very respectfully, yours,

J. B. W. GARDINER.

(Thereupon, at 5.10 o'clock p. m., the committee adjourned, subject to the call of the chairman.)

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ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, SEPTEMBER 24, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations, at 10 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman), Lenroot, and Chamberlain.

Senator WARREN. Col. Rigby is here this morning, and we shall hear him now.

STATEMENT OF LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, OFFICE OF THE JUDGE ADVOCATE GENERAL.

Senator WARREN. Colonel, will you give the stenographer your name and rank?

Lieut. Col. RIGBY. William C. Rigby, lieutenant colonel, judge advocate, at present on duty in the Office of the Judge Advocate General, room 129, State, War, and Navy Building; temporarily assigned to what is called the legislative section of the office.

Senator WARREN. Colonel, you have been on the other side, have you not?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. How long did you serve over there?

Lieut. Col. RIGBY. I went over there, sailing on the 7th of April last, I think. I was not over there prior to that. I came into the service from civil life, from the practice of law, in August, 1918.

Senator WARREN. You came into the military service in August, 1918?

Lieut. Col. RIGBY. In August, 1918. I had been practicing law in Chicago, and I was assigned to duty in the Office of the Judge Advocate General, in the Military Justice Division of the office, and remained there until I left for Europe in April last.

Senator WARREN. Tell us of your service there.

Lieut. Col. RIGBY. I served in the different sections of the Military Justice Division, first in what was known and still is known as the retained-in-service section, reviewing the records of cases of the more minor character, where there was no dishonorable discharge, the man remaining in the Army.

Then I was transferred, after a while, to the disciplinary barracks section, reviewing cases of men sentenced to the disciplinary barracks.

From there I went to the penitentiary section and stayed in the penitentiary section for some time reviewing the cases of men sentenced to the penitentiary; and then I was transferred to what was known as the death and dismissal section, reviewing sentences of death and dismissals of officers, and I stayed there from, I think, November until I left, in April.

I was for a time chief or acting chief of that section, but about February was assigned to the work of examining the statutes and regulations and laws of Great Britain, France, and Italy, and that took me away to some extent from the work of the Military Justice Division proper, and I did not act as chief of the section after that.

Senator WARREN. Your work there was at different headquarters, or at the headquarters, or at Paris, or where?

Lieut. Col. RIGBY. In my work abroad an office was given me at Paris, from which I worked; and later on, just the last two or three weeks, I was given an office in the headquarters at London when I was there a good deal.

Senator WARREN. At London, did you say?

Lieut. Col. RIGBY. At London, the last two or three weeks I was there, I had an office given to me. My work was chiefly at Paris and London, and then from those headquarters, visiting, where I needed to, the British and the French armies, and some little examination was made of the Belgian system.

Maj. W. Calvin Wells, Judge Advocate, was assigned to me as assistant. He had formerly been on duty in the Judge Advocate General's Office as the chief of the disciplinary barracks section of the Judge Advocate General's Office, and was sent to France and assigned to duty in the Military Justice Division of the office of the Acting Judge Advocate General at Chaumont, I think in January, and then was assigned to assist me after I went over there. I think he came to me in May. I might say that Maj. Wells has now returned to civil life. He is really quite a well-known, really a distinguished. lawyer of Mississippi. I think that he was the secretary of Senator Harrison's campaign committee during the last senatorial campaign.

He did most of the work of the investigation in Belgium. I went up with him the first time, and we met, together, the Secretary of War and the other officials in Belgium; and then I turned that work over to him, so that really my information as to Belgium, outside of the statutes and regulations, comes to me from Maj. Wells's report.

Investigations outside of those countries were simply made by correspondence through military attachés who procured for me laws and regulations, and some rather fragmentary information in Italy, Switzerland, Holland, Denmark, Sweden, and Norway; and I was given some translators in the Paris office to translate them. That was all that I could do with that work.

Senator WARREN. I judge from your testimony that you know something of the administration of military justice in the English Army and in the French Army?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. And in Belgium?

Lieut. Col. RIGBY. Yes.

Senator WARREN. If you feel free to tell us, what can you say as to the comparison of the American system, under the laws as they stand, with the systems of foreign countries?

Lieut. Col. RIGBY. I had thought possibly it might be most convenient to take it up somewhat by sections, and perhaps with relation to some of the things in the pending bill which is before you. I wondered how you would want it.

Senator WARREN. Well, Colonel, you are before this committee to inform the committee what your judgment is, based, of course, upon your experience, as to the necessity of changing our present Articles of War and how to change them, and we have before us the bill, which you have seen, which has been introduced by Senator Chamberlain. Of course you are familiar with the laws as they stand. I presume that Senator Chamberlain will understand, with other Senators, that if his bill is perfection, we want that, and if it is not perfection, and there is any way to improve that bill as well as to better the system, this subcommittee, of course, is open to hear about it. Am I right on that?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I would ask, Senator, whether in your judgment it would not make my testimony more valuable for me to take one section, say, as to the composition of the court, and speak of that.

Senator WARREN. Proceed in your own way.

Lieut. Col. RIGBY. I think perhaps I might make it a little briefer and clearer in that way.

Senator CHAMBERLAIN. What are you going to take up, the Senate bill 64 with the comparative print of the present law, or how do you take that up?

Lieut. Col. RIGBY. Suppose that I speak first of the composition of the court as it is proposed in this bill and as I find it in France and Great Britain.

Senator CHAMBERLAIN. Will you refer to the articles as you go along?

Lieut. Col. RIGBY. Certainly, sir. The articles of the proposed bill, of Senate bill 64, that as I understand relate to the composition of the court, are——

Senator WARREN. That bill is intended, as I understand it, to reform the entire Articles of War—the entire system of military justice.

Senator CHAMBERLAIN. Not all. Some sections are wholly unchanged.

Senator WARREN. Yes; I understand; but the intention is to substitute this bill in place of the present Articles of War, although some parts of the Articles of War are inserted unchanged in this bill. Am I right about that?

Senator CHAMBERLAIN. Senate bill 64 is a redraft of the Articles of War and has many articles which are not changed at all.

Senator WARREN. Yes, exactly; but the bill is intended to take the place of the Articles of War, although part of the Articles of War are unchanged in the bill.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. As I understand it, the outstanding features of the changes in the courts are those mentioned in articles 4, 5, 6, 10, 12, and 23, relating to special and general courts. The outstanding proposed changes as I see them are:

First, to make a court of a fixed number, of eight I think it is, for the general court and of three for the special court, instead of a number which may vary, as at present.

Second, that in both the general and the special court, enlisted men may be members, and in the case of the trial of privates by general court, at least three members of the court sitting on the trial must be private soldiers, and in the trial of a noncommissioned officer or warrant officer, at least three members of the court must be noncommissioned officers or warrant officers; and in the special court there must be at least one member who is a private or a noncommissioned officer under similar circumstances.

Third, that there is to be with every general or special court an officer to be designated as "judge advocate"; but whose functions are radically different from those of the present trial judge advocate; who is not to be a prosecutor at all, but is rather to be a judge.

Fourth, that the court is not to impose sentence, but is only to make findings of guilt or innocence, and that the judge advocate is to have the power and the duty to approve, or approve in part, and I assume to disapprove, the findings; and the power to impose sentence; and also the power to suspend in whole or in part any sentence which does not extend to death or dismissal.

Fifth, that the rulings and advice of the judge advocate are to govern the court.

Sixth, as to the organization of the court, the change is also that, instead of the members of a court being appointed directly by the convening authority, the convening authority is only to name a panel from which the judge advocate is to organize the court at the trial.

Seventh, that the right of peremptory challenge is to be introduced.

Before going on to compare that with the analogous laws, or the corresponding laws, rather, of the other countries, I might say that there are, as I understand it, really two different philosophies as to the functions and the powers and duties of courts-martial; and, as I understand it, the basic purpose of Senate bill 64 is to radically change the philosophy, if one may use that word, of the system of administration of military justice. I think it has been said by some that the proposal is to change the system from a system governed by the authority of military men to a system governed by law. As I understand it, I think it would be fairer to say that it is to change the authority in the matter of the government of the court and the administration of military law, as proposed, from military men to lawyers. I suppose that the law is—well I mean this, that somebody has to administer any system of law, so that in the end it is a question of who administers it. Everyone, even its severest critics, will concede that the present system is a system, in a sense, certainly, of law. It is administered within the laws provided; and the proposed system would have to be administered by somebody.

Senator CHAMBERLAIN. It is administered practically by the commanding officer.

Lieut. Col. RIGBY. The commanding officer has the power to approve or disapprove the sentences of courts. The men on the courts are officers of the Army.

Senator CHAMBERLAIN. Appointed by the commanding officer?

Lieut. Col. RIGBY. Yes, sir; and the proposal, as I understand it, is to place the predominating authority, both in the trial and in the review afterwards, in the hands, not of the commanding officer or of a military man, but of a civilian lawyer.

Turning, then, to the composition of the court as we find it in the other armies, first as to the place of the proposed judge advocate, I do not find that there is any other system, so far as my investigation went, that gives to any such officer nearly as broad powers, as are proposed in Senate bill 64. These proposed powers, to a large extent, are experimental; in the sense that they never have been tried before in any other army. The supposed model for the proposed judge advocate is, of course, the judge advocate of the British general court-martial.

Senator CHAMBERLAIN. Right in that connection, would you state who the judge advocate general is in Great Britain; how he is appointed, his tenure of office, and whether or not he is in the military establishment?

Lieut. Col. RIGBY. Surely, Senator. I was, of course, speaking of the judge advocate attached to the court, what we would call the trial judge advocate; but I will be glad to answer the other now.

The judge advocate general of Great Britain is a civilian. He is appointed by patent from the Crown and is appointed for life, with the right to retire at 65 years of age. He receives a salary of 2,000 pounds per annum. The present judge advocate general is Hon. Felix Cassel, who was a barrister, and a distinguished barrister, before his appointment. Judge Cassel went into the army on the outbreak of the war. I think he was a captain. On the death of Sir Thomas Milvain, the former judge advocate general, Judge Cassel was, in October, 1916, appointed judge advocate general, and has served as such since.

Senator CHAMBERLAIN. He resigned his commission in the army?

Lieut. Col. RIGBY. He resigned his commission in the army, because he is required to be a civilian.

Senator WARREN. I understand the judge advocate general has a life commission and is retired at 65 years of age.

Lieut. Col. RIGBY. Yes.

Senator WARREN. He receives a salary of £2,000 a year?

Lieut. Col. RIGBY. That is my understanding of the salary. The powers of the judge advocate general are advisory only, at present. They have, indeed, always been advisory; although it seems that up to about 1905, because the judge advocate general in those days tendered his advice directly to the Sovereign, his powers were sometimes considered as almost what might be called executive; although even then they were really only advisory, and back in 1873 Sir George Jessel and Lord Coleridge gave an opinion that the powers of the judge advocate general were only advisory. Nevertheless, in practice, in those times he sometimes acted almost as though the office were executive. And sometimes, in those days, his advice to the Crown was in the form "must be quashed," and similar expressions. In those days the judge advocate general had a seat in Parliament, and, as I said, tendered his advice directly to the Crown, so that the advice may, in a sense, have been almost tantamount to orders.

That was changed when Sir Thomas Milvain was appointed judge advocate general, in 1905. There was no change in the statute, but

a change in the wording of the patent under which he took office. He was not made a member of Parliament, or rather he resigned his seat in Parliament, because he had been a member in Parliament before that time, and he became simply the adviser to the war department; and that new plan was continued on the appointment of Judge Cassel.

The result of it is that the judge advocate general is no longer a direct adviser to the Sovereign; but now reports in a "minute," as it is called, to the "S. of S.," which means the secretary of state for war. But that does not go directly to the secretary of state for war; it goes, in fact, to the deputy adjutant general, by whom it is reviewed, and who is the one who tenders the advice to the secretary of state for war. The present deputy adjutant general is Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B.

Senator CHAMBERLAIN. Does he exercise the power, in reviewing the minutes of the judge advocate general, to reverse or change the recommendations of the judge advocate general?

Lieut. Col. RIGBY. Yes, sir; that is, he may or may not agree with the judge advocate general. Of course, in the great majority of cases he agrees. I have, among other papers, a signed statement by Gen. Childs, which I might put in evidence if you care to have it, in which that, among other points, is covered. I have the original here, which really belongs to the files of the Judge Advocate General's Office, but I have a copy which I can furnish.

Senator WARREN. Very well.

Lieut. Col. RIGBY. Gen. Childs speaks in the highest possible terms of Judge Cassel. Perhaps I misspoke when I said that I had a signed interview from Gen. Childs. What I have is the transcript of the interview, corrected by Gen. Childs personally, and his letter returning it with his corrections. He did not personally sign the interview; but he returned it with a letter with his corrections. I will put the letter in with the transcript.

(The document and letter referred to are printed in full in the record as a part of Lieut. Col. Rigby's statement of Sept. 25, 1919, infra, pp. 455–468.)

Senator CHAMBERLAIN. Before leaving that branch of the subject, have you the laws fixing and defining the duties and powers of the judge advocate general in Great Britain?

Lieut. Col. RIGBY. Yes, sir.

Senator CHAMBERLAIN. Will you have that put in the record?

Lieut. Col. RIGBY. I will be glad to do so; there is really not very much about it in their statutes and regulations; that was one reason why I got these authoritative statements from Judge Cassel and Gen. Childs, which I am going to put in. And I will put in here also copies of some letters and "minutes" given me as specimens by Judge Advocate General Cassel, showing in just what form his advice is tendered, both as to charges before trial and upon reviewing the record after trial. I am putting in copies of three letters advising upon charges before trial and of seven "minutes" containing recommendations of the judge advocate general after trial. These are all copies of actual documents except that names are deleted. You will observe that the letters concerning charges before trial are not signed by Judge Cassel himself, but by his "military assistant." This is in pursuance of his policy of so dividing up the work in his office that

the same man will not pass upon the charges before trial and also upon the record of the case after trial. In selecting the "minutes" of recommendation after trial, of which I have quite a number, I have chosen these seven, which, I think, fairly represent the different classes of cases that most often arise. I am putting in two general court cases, one where confirmation is recommended and one where it is not; two district courts-martial; and three field general court cases. In reading them you will notice that the judge advocate general tenders his advice in the form of an "opinion" in very much the language that a lawyer would use in giving an opinion to a client as to a title to real estate. His usual formula is, "In my opinion the evidence did not justify a conviction, and accordingly the proceedings should not be confirmed"; or, "I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial."

BRITISH LAWS AND REGULATIONS RELATING TO THE JUDGE ADVOCATE GENERAL.

REFERENCES OF CHARGES TO JUDGE ADVOCATE GENERAL BEFORE TRIAL.

12. At home stations in all cases of fraud the charge and summary of evidence must be submitted to the judge advocate general before the trial is ordered. This does not apply to cases of simple theft. (King's Regulations, par. 561A; printed in the Manual of Military Law, p. 396, as Note 12, to sec. 17 of the Army act.)

2. In the case of a general court-martial in the United Kingdom, the charge sheet and summary of evidence should invariably be submitted by the convening officer to the judge advocate general before the court is convened. (Note 2, to Rules of Procedure, 17; Manual of Military Law, p. 580.)

HISTORY OF THE OFFICE OF JUDGE ADVOCATE GENERAL.

58. By the side of the civilian officers above mentioned (i. e., secretary of war, third secretary of state, secretary of state—W. C. R.) there was the purely military administration, which remained under the direction of the sovereign as commander in chief, assisted by a board of general officers, till the establishment of the office of the general commanding in chief in 1793. The administration of military law was, however, checked by the judge advocate general, a privy councillor, and usually a member of Parliament and one of the ministers of the day, who advised the sovereign on the legality of the proceedings of courts-martial. (See Clode's Military Forces of the Crown, Ch. XXVII.) The office of the judge advocate general, having ceased to be paid, was, in 1892, made nonpolitical, and was, from that date down to 1905, held by the president of the probate, divorce, and admiralty division. In that year, on a new appointment being made to the office, the position of the judge advocate general was considerably altered. He is now a permanent official under the orders of, and acting as legal adviser to, the secretary of state; he is no longer a privy councillor, nor does he advise the Crown directly. (Manual of Military Law, p. 161.)

TRIAL AND AFTER.

103. The powers and duties of a judge advocate are as follows:

(*b*) At a court-martial he represents the judge advocate general. (Rules of Procedure, 103B; Manual of Military Law, p. 629.)

In the case of a general court-martial in the United Kingdom, the warrant to the convening officer does not give him power to appoint a judge advocate. Application must be made to the judge advocate general for the necessary authority. (Rules of Procedure, 101, note 1; Manual of Military Law, p. 629.)

165. The original proceedings of a court-martial, purporting to be signed by the president thereof and being in the custody of the judge advocate general, or of the officer having the lawful custody thereof, shall be deemed to be of such a public nature as to be admissible in evidence on their mere production from such custody; and any copy purporting to be certified by such judge

advocate general or his deputy authorized in that behalf or by the officer having such custody as aforesaid, to be a true copy of such proceedings or of any part thereof, shall be admissible in evidence without proof of the signature of such judge advocate general, deputy, or officer; and a secretary of state, upon production of any such proceedings or certified copy, may, by warrant under his hand, authorize the offender appearing therefrom to have been convicted and sentenced to any punishment, to be imprisoned and otherwise dealt with in accordance with the sentence in the proceedings or certified copy mentioned. (Army act, sec. 165.)

592. When a general court-martial is held at home the proceedings are to be transmitted by the judge advocate direct to the G. O. C. in C. who convened the court, and the latter will forward them, together with his recommendation and remarks, to the judge advocate general. If the sentence awarded is one which requires to be confirmed by His Majesty the King, the judge advocate general will transmit the proceedings to the secretary of state for war for confirmation by His Majesty. If the sentence awarded is one which does not require confirmation by His Majesty, the judge advocate general will, after review, return the proceedings to the G. O. C. in C. for confirmation or such action as may be necessary, and, after completion, the G. O. C. in C. will forward the proceedings to the war office. If a general court-martial is held elsewhere, the proceedings will be forwarded to the officer having power to confirm the findings and sentences of general courts-martial, who, if from any cause he has no power to confirm the finding and sentence of that particular court-martial will forward the same to the judge advocate general for transmission to the secretary of state for war for confirmation by His Majesty. (King's Regulations, par. 592, as amended by Army Order No. 110, Mar. 17, 1917.)

SPECIMENS OF LETTERS FROM "MILITARY ASSISTANT" OF BRITISH JUDGE ADVOCATE GENERAL, ADVISING AS TO FORMS OF CHARGES AND REFERENCES OF CASES FOR TRIAL.

JULY 1, 1919.

Upon the evidnce submitted, I am of opinion that the first charge (now submitted under section 40) should be laid under section 6(1) (b) framed as follows:

"Leaving his picquet without orders from his superior officer, ———, in that he, ——— at ——— on the night of the ——— whilst acting under the orders of ———, and in command of a picquet of the ———, left his picquet without orders to do so."

In support of this charge ——— must state clearly that the accused was acting under his orders, that he gave the accused no order to leave his picquet on the night in question, and that no one else had authority to give such order.

The evidence on the charge of drunkenness is not strong nor is it, in my opinion, sufficient to justify trial upon the second charge submitted under section 19 of the army act as now amended in blue pencil, unless one, at least, of the witnesses for the prosecution is prepared to state on oath that, in his opinion, the accused was drunk.

Otherwise the evidence outlined in the abstract is in order.

Kindly submit the name of a suitable officer for appointment to act as judge advocate at the trial.

H. D. F. MACGEAGH,
Lieutenant Colonel, A. A. G.

JULY 18, 1919.

The General Officer i/c Administration.

If, as appears from the evidence, the accused was at the time of the alleged offense attached to the royal air force, he would be subject to the air force act, as modified by section 179A of that act amended by the air force act (statutory amendments) order, 1919 (A. M. W. O. 603/19) and not to the army act. Before advising on the case it will be necessary for me to be definitely informed whether or not the accused was in fact attached to the royal air force, and to have before me a copy of the order of attachment, if any.

Documents returned herewith. Kindly resubmit.

K. MACMORRAN, *Captain, S. C.*,
For Lieutenant Colonel A. A. G.,
Military Assistant.

JULY 22, 1919.

The general officer commanding in chief, ———.
Second Lieut. ———.

Upon the evidence in the summary I am of opinion that the accused should be tried upon a charge under section 15 (1) of the army act in substitution for the charge submitted under section 9 (2), framed as follows:

"Absenting himself without leave, ———, in that he, ———, at ———, on the ———, absented himself without leave until the ———."

There is a discrepancy in dates between the evidence of the second and third witnesses. It would appear that the date to which Capt. ——— refers is the 24th of June and not the 23d. He should make this clear at the trial.

Otherwise the evidence as amended is in order.

Formal appointment of ——— to act as judge advocate at the trial is forwarded herewith.

H. F. MACGEAGH,
Lieutenant Colonel, A. A. G., Military Assistant.

SPECIMENS OF "MINUTES" ADDRESSED BY BRITISH JUDGE ADVOCATE GENERAL TO "S. OF S.", THE SECRETARY OF STATE FOR WAR.

S. of S.

Herewith I forward proceedings of a general court-martial held at ——— on the ——— for the trial of ——— an officer of the regular forces, who was tried on the following charges:

1. Deserting His Majesty's service, ——— in that he, ——— at ——— on ——— absented himself from the ——— until apprehended by the civil power at Cork on the ——— dressed in plain clothes.

2. When concerned in the care of public money fradulently misapplying the same, ——— in that he, ——— at ——— on ——— when he was concerned in the care of ——— the property of the public being the proceeds of three cheques for ———, ——— and ——— drawn upon public accounts applied the same to his own use with intent to defraud.

The accused was found guilty of both the charges and sentenced to be cashiered and to be imprisoned without hard labor for one year.

I have the honor to inform you for the information of His Majesty the King that the charges were well laid, that there was evidence to justify the findings of the court, and that the sentence was according to law.

The recommendation of the ——— is attached.

F. CASSEL, J. A. G.

J. A. G.'S OFFICE.
March 28, 1919.

S. of S.

Herewith I forward the proceedings of a general court-martial held at ——— on the ——— for the trial of Second Lieut. ———, who was tried on four charges, as follows:

1. Behaving in a scandalous manner unbecoming the character of an officer and a gentleman, ——— in that he———, at ———, on ———, in exchange for £1 (one pound) in cash, gave ——— a check for £1 (one pound) on Messrs. Holt & Co., army agents, well knowing that he had not sufficient funds in the hands of the said agents to meet the said check, and having no reasonable grounds for supposing that the said check would be honored when presented.

2. An alternative charge under section 40.

3. A similar charge under section 16, relating to a check for £12, given to Lieut. ——— at ——— on ——— in payment of his mess account.

4. An alternative charge under section 40.

who was found not guilty of the first, second, and fourth charges and guilty of the third charge, and was sentenced to be cashiered.

I have to point out that in my opinion the evidence did not justify a conviction under section 16 of the Army act and that accordingly the proceedings should not be confirmed.

The recommendation of the general officer commanding in chief, ———, is attached.

S. of S.

In forwarding the proceedings of a district court-martial held at ——— on the ——— for the trial of Pvt. ———, I have to point out that there was no evidence before the court that Maj. A. either on ——— or on ——— gave any orders to the accused as alleged in the charges.

In these circumstances I am of opinion that the conviction on both charges should be quashed, and the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

SEPTEMBER 12, 1918.

S. and S.

In forwarding the proceedings of a district court-martial held at ——— on the —— for the trial of Corpl. ———, I have to say that in my opinion the evidence before the court did not justify a conviction on a charge of desertion.

In these circumstances I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial.

I desire to add that there was no evidence before the court that the accused ever received A. F. 33959 and a free warrant.

F. CASSEL, J. A. G.

AUGUST 14, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held at ——— on the ——— for the trial of Pvt. ——— I have to say that in my opinion upon the evidence given at the trial the accused could not reasonably or safely be convicted of willfully maiming himself.

Moreover, A. F. W. 3428 was not admissible in evidence and was prejudicial to the accused.

In these circumstances I am of opinion that the conviction on the first charge should be quashed and the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

AUGUST 15, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held at ——— on the ——— for the trial of ——— and ———, both of the ———, I have to say that in my opinion the special finding amounts to an acquittal of the charge as laid and a conviction of a different offense.

Under these circumstances I am of opinion that the conviction should be quashed and each of the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

JULY 12, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held ——— on the ——— for the trial of ——— I have to point out that contrary to the provisions of section 54(2) of the army act the court, after having arrived at their finding and awarded sentence, proceeded to take further evidence upon reassembly for revision.

Under these circumstances I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial.

I desire to add that the order for revision is not attached to the proceedings, but it appears from the attached minute from the major general commanding ——— that the court was reassembled for that purpose.

F. CASSEL, J. A. G.

Senator CHAMBERLAIN. Have you a copy of the articles of war of Great Britain?

Lieut. Col. RIGBY. They do not have articles of war in that form any more. Their articles of war were merged into the army act of 1881, I think, which has been reenacted ever since. What they have is the army act, the annual act; and then they have the rules of procedure, which are promulgated under a provision of the army

act quite similar to our thirty-eighth article of war, providing that rules of procedure may be enacted by the sovereign and must be submitted to Parliament (army act, sec. 70); and with that they also have "King's Regulations," covering minor details, so that they have the three sources of authority or law. There is statutory authority to enact "articles of war," (army act, sec. 69), but it has fallen into disuse.

Senator WARREN. You say the army annual act?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. That is not connected with the support of the army—that is, the appropriations of the army—is it?

Lieut. Col RIGBY. No, sir; that inherits from the old mutiny act of 1689.

Senator WARREN. Do they undertake to reform it or reenact it in an act every year?

Lieut. Col. RIGBY. It is reenacted every year. It automatically goes out of force, and if it were not reenacted the Army would go out of existence.

Senator WARREN. It is enacted each year as it stands or as it may be changed?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. It is reenacted every year.

Lieut. Col. RIGBY. Every year; and they do change it somewhat from time to time. In the 1919 reenactment they put in a change that Judge Cassel suggested, giving general officers disciplinary power over officers; so that for minor offenses it will not be necessary to bring an officer before a general court-martial.

Senator WARREN. Now, why is not that a good idea? Have you thought of that, Senator?

Senator CHAMBERLAIN. I think the British system is generally a good one. When you come to revise your statement made here, Colonel, refer us to the last annual act for the British Army, so that we may have it printed in the record, and the Senate may have access to the statute.

Lieut. Col. RIGBY. I will do so, Senator. In fact, I have them right here, so that I can easily refer to it. The army act was revised and reprinted as a whole in 1918.

(The act referred to is here printed as follows:)

ARMY (ANNUAL) ACT, 1919 (9 GEO. 5, CH. 11).

CHAPTER 11.

An act to provide, during 12 months, for the discipline and regulation of the army.

Whereas the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law; and

Whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defense of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of 2,650,000, including those to be employed at the depots in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad, but exclusive of numbers actually serving within his Majesty's Indian possessions; and

Whereas it is also judged necessary for the safety of the United Kingdom, and the defense of the possessions of this realm, that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service, under the direction of the lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral aforesaid; and

Whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government of His Majesty's forces by sea; and

Whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet, nevertheless, it being requisite, for the retaining all the before-mentioned forces, and other persons subject to military law, in their duty, that an exact discipline be observed, and that persons belonging to the said forces who mutiny or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offenses to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment that the usual forms of the law will allow; and

Whereas the army act will expire in the year 1919 on the following days:

(a) In the United Kingdom, the Channel Islands, and the Isle of Man on the 30th day of April; and

(b) Elsewhere, whether within or without His Majesty's dominions, on the 31st day of July:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited as the army (annual) act, 1919.

2. (1) The army act shall be and remain in force during the periods hereinafter mentioned, and no longer, unless otherwise provided by Parliament; that is to say:

(a) Within the United Kingdom, the Channel Islands, and the Isle of Man, from the 30th day of April, 1919, to the 30th day of April, 1920, both inclusive: and

(b) Elsewhere, whether within or without His Majesty's dominions, from the 31st day of July, 1919, to the 31st day of July, 1920, both inclusive.

(2) The army act, while in force, shall apply to persons subject to military law, whether within or without His Majesty's dominions.

(3) A person subject to military law shall not be exempted from the provisions of the army act by reason only that the number of the forces for the time being in the service of His Majesty, exclusive of the marine forces, is either greater or less than the number hereinbefore mentioned.

3. There shall be paid to the keeper of a victualing house for the accommodation provided by him in pursuance of the army act the prices specified in the schedule to this act.

AMENDMENTS OF THE ARMY ACT.

4. In section 42 of the army act (which relates to the mode of complaint by officers), after the words "examine into such complaint, and" there shall be inserted the words "if so required by the officer."

5. In subsection (1) of section 46 of the army act (which relates to the proceedings upon investigation of a charge), after the words "for bringing the offender to court-martial," there shall be inserted the words "or, in the case of an officer below the rank of field officer, may refer the case to be dealt with summarily by a general officer under the provisions of this act."

6. After section 46 of the army act the following section shall be inserted:

"46A. (1) Any of the following authorities shall have power to deal summarily with a charge against an officer below the rank of field officer referred for that purpose, or for trial by court-martial, under the foregoing section of this act—that is to say, any general officer authorized to convene a general court-martial—and also, on active service, the general officer commanding in chief in the field, and any officer (not under the rank of major general) appointed for the purpose by him, or by the army council.

(2) The authority having power to deal summarily with the case may, with or without hearing the evidence, dismiss the charge, if he in his discretion

thinks that it ought not to be proceeded with, or, where he thinks the charge ought to be proceeded with, take steps for bringing the offender to a court-martial, or may, after hearing the evidence deal with the case summarily by awarding one or more of the following punishments:

(*a*) Forfeiture of seniority of rank either in the Army or in the corps to which the offender belongs, or in both.

(*b*) Severe reprimand or reprimand.

(3) Where the authority having power to deal summarily with the case considers that he may so deal with the case, he shall, unless he awards a severe reprimand, or a reprimand, in every case ask the officer charged whether he desires to be dealt with summarily or to be tried by a court-martial, and if the officer elects to be tried by a court-martial, take steps for bringing him to trial by a court-martial, but otherwise shall proceed to deal with the case summarily.

(4) In every case where an authority has power to dispose of a case summarily, and decides so to do, the accused officer may demand that the evidence against him should be taken on oath, and the same oath or solemn declaration as that required to be taken by witnesses before a court-martial shall be administered to each witness in such case.

(5) An offender shall not be liable to be tried by court-martial for any offense which has been dealt with summarily under this section, and shall not be liable to be punished by a general officer under this section for any offense of which he has been acquitted or convicted by a competent civil court or by a court-martial."

7. Section 114 of the army act (which provides for the preparation of an annual list of persons liable to supply carriages and animals) shall be amended as follows:

In subsection (1A) the second paragraph shall be omitted.

After subsection (1A) the following subsection shall be inserted:

"(1B) With respect to horses, the following provisions shall have effect:

(*i*) It shall be the duty of the owner of any horse, and the occupier of any premises where horses are kept, to furnish, if so required, to the authority hereinafter mentioned before such date in each year as may be prescribed a return specifying the number of horses belonging to him or kept on his premises, and giving with respect to every horse such details as may be so prescribed; he shall also afford all reasonable facilities for enabling any horse belonging to him or kept on his premises to be inspected and examined as and when required by the said authority; if any person fails to comply with the said requirements of this paragraph, he shall be liable on summary conviction for each offense to a fine not exceeding £50.

(*ii*) The army council may, for the purposes of this subsection, make regulations prescribing anything which under this subsection is to be prescribed, and prescribing the forms to be used, and generally for the purpose of carrying this subsection into effect.

(iii) Regulations made by the army council may provide for excepting from the provisions of this subsection horses of any class or description specified in the regulations."

After subsection (3) the following subsection shall be inserted:

"(3A) If an officer is obstructed in the exercise of his powers under this section, a justice of the peace may, if satisfied by information on oath that the officer has been so obstructed, issue a search warrant authorizing the constable named therein, accompanied by the officer, to enter the premises in respect of which the obstruction took place at any time between 6 o'clock in the morning and 9 o'clock in the evening, and to inspect any carriages or animals that may be found therein."

For subsection (4) there shall be submitted the following subsection:

"(4) The authority for the purposes of this section shall be the army council or any authority or persons to whom the army council may delegate their powers under this section."

8. At the end of section 115 of the army act (which provides for the supply of carriages and animals in case of emergency) the following subsection shall be inserted:

"(10) A requisition of emergency issued under this section may prohibit, during such period as may be specified in the requisition, the sale and purchase of horses to or by any person other than a person appointed by the army council to purchase horses; and if any person sells or purchases or is concerned in the sale or purchase of a horse in contravention of such prohibition, he shall be liable on summary conviction to a fine not exceeding one hundred pounds or

to imprisonment for a term not exceeding three months, or to both such imprisonment and fine."

9. The following provision shall be added at the end of subsection (2) of section 131 of the army act (which provides for arrangement as to prisons with colonial governments):

"Notwithstanding anything in this act, a secretary of state may arrange with the governor of a colony that any person or class of persons enlisted in the colony shall, if sentenced under this act to penal servitude, be transferred to or kept in the colony and there undergo his sentence in any prison or place in which persons sentenced to penal servitude by a civil court in the colony can for the time being be confined or, if there be no such prison or place, in an authorized prison as defined by section 65 of this act."

10. (1) Where an order had, before the commencement of the army (annual) act, 1918, been made under section 145 of the army act authorizing deductions from pay, a further order maye be made increasing the amount of the deduction to be made after the commencement of this act under the former order up to the limit authorized by section 10 of the army (annual) act, 1918.

(2) This section shall, notwithstanding anything in section 14 of the army (annual) act, 1904, come into operation, both within the British Islands and elsewhere, on the passing of this act.

11. Section 153 of the army act (which imposes a punishment for inducing soldiers to desert) shall be amended as follows:

(*a*) For the words "any soldier," "a soldier," and "such soldier," wherever those words occur, there shall be substituted respectively the words "any officer or soldier," "an officer or soldier," and "such officer or soldier."

(*b*) After the word "desert," wherever that word occurs, there shall be inserted the words "or absent himself without leave," after the word "deserting" there shall be inserted the words "or absenting himself without leave," and after the word "deserter" there shall be inserted the words "or absentee without leave."

12. Subsection (1) of section 156 of the army act (which imposes penalties in respect to the sale of military necessaries) shall be amended as follows:

(1) For the words "an officer or soldier or any person acting on his behalf" in paragraph (*a*), and for the words "an officer or soldier" in paragraphs (*b*) and (*c*) there shall be substituted the words "any person."

(2) After the words "or clothing" there shall be inserted the words "issued for the use of officers or soldiers."

(3) For the words "or of the person with whom he dealt being or acting for a soldier, or that the same was sold by order of the Army Council or some competent military authority," there shall be substituted the words "or that the same was sold by order or with the consent of the Army Council, or some competent military authority, or that the same was the personal property of an officer who had retired or ceased to be an officer, or of a soldier who had been discharged, or of the legal personal representatives of an officer or soldier who had died."

In subsection (2) of section 156 of the army act, for the words "to a penalty not exceeding five pounds" there shall be substituted the words "to the same penalties as are prescribed in the case of a contravention of the last preceding subsection."

13. After section 156 of the army act, the following section shall be inserted:

"156A. If—

(*a*) any unauthorized person uses or wears any military decoration or medal, or medal ribbon, or any badge, wound stripe, or emblem supplied or authorized by the army council, or any decoration, medal, or medal ribbon, badge, wound stripe or emblem so nearly resembling the same as to be calculated to deceive; or

(*b*) any person falsely represents himself to be a person who is or has been entitled to use or wear any such decoration, medal, or medal ribbon, badge, wound strips, or emblem as aforesaid; or

(*c*) any person without lawful authority or excuse supplies or offers to supply any such decoration or medal as aforesaid to any person not authorized to use or wear the same;

such person shall be liable on summary conviction to a fine not exceeding £20 or to imprisonment for a term not exceeding three months:

"*Provided*, That nothing in this section shall be deemed to prohibit the wearing or supply of ordinary regimental badges or any brooch or ornament representing the same."

14. In paragraph (j) of subsection (1) of section 163 of the army act the words "or by whom the arrest" and the words "or arrest" shall be omitted.

15. The following paragraph shall be substituted for paragraph (3A) of section 175 of the army act.

"(3A) Officers of the territorial force other than members of the permanent staff, if on the active list at all times, and if on the territorial force reserve, at any time when they are doing duty with any body of troops for the time being subject to military law or are ordered on any duty or service for which as such reserve officers they are liable."

16. (1) Section 179A of the army act (which makes provision as to officers or airmen of the air force attached to or seconded for service with the regular forces) shall be amended as follows:

Paragraphs (a) and (b) of subsection (2) shall be omitted.

The following paragraph shall be substituted for paragraph (c) of subsection (2):

"(c) The finding and sentence of any general court-martial for the trial of any such officer or airman may be confirmed by His Majesty or by an officer authorized to confirm the findings and sentences of general courts-martial under the air-force act, and not otherwise, except that when such officer or airman, while subject to this act, is serving beyond the seas with a military force, and in the opinion of the general or other officer commanding that force (such opinion to be stated in the confirmation and to be conclusive) there is not present any officer authorized to confirm the findings and sentences of general courts-martial under the air-force act, the findings and sentences may be confirmed by a general or other officer authorized to confirm findings and sentences of general courts-martial under this act."

After paragraph (*f*) the following paragraph shall be inserted:

"(g) The power of a court-martial to inflict on an officer the punishment of forfeiture of seniority of rank shall include power to inflict a punishment of forfeiture of seniority of rank in the air force, or any corps or unit thereof, or both."

At the end of the section the following section shall be inserted:

"179–B. In the application of this act to officers of His Majesty's naval forces who are subject to military law, the power of a court-martial to inflict the punishment of forfeiture of seniority of rank shall include power to inflict the punishment of forfeiture of seniority of rank in the navy."

(2) The finding and sentence of any court-martial convened before the commencement of this act, under section 179–A of the army act, may, after that date, be confirmed in the manner provided for by this act.

17. In paragraph (e) of subsection (2) of section 180 of the army act (which relates to the application of the army act to His Majesty's Indian forces), after the words "court-martial," there shall be inserted the words "or where the case is dealt with summarily under the provisions of this act, the authority having power so to deal with the case."

18. (1) In paragraph (4) of section 190 of the army act (being the definition of "officer"), after the words "or part thereof," where they occur for the third time, there shall be inserted the following words:

"It also includes any officer of His Majesty's naval or air forces who is for the time being subject to military law."

(2) This section shall, notwithstanding anything in section 14 of the army annual act, 1904, come into operation, both within the British Islands and elsewhere, on the passing of this act.

SEC. 3. *Schedule*—

Accommodation to be provided.	Maximum price.
Lodging and attendance for soldier where meals furnished	Sixpence per night.
Breakfast as specified in Part I of the second schedule to the Army act	Sixpence each.
Dinner as so specified	One shilling and twopence each.
Supper as so specified	Fourpence each.
Where no meals furnished, lodging and attendance, and candles, vinegar, salt, and the use of fire, and the necessary utensils for dressing and eating his meat.	Sixpence per day.
Stable room without forage	Sixpence per day.
Lodging and attendance for officer	Two shillings per night.

NOTE.—An officer shall pay for his food.

Senator CHAMBERLAIN. Does that contain all that would ordinarily be termed articles of war?

Lieut. Col. RIGBY. No, sir. You have to take with that these rules of procedure. There is the army act; with these amendments of 1919 printed in a separate pamphlet. Then with that you have to take the rules of procedure and the King's Regulations, and one or two separate statutes. Those are all collected in what they call the Manual of Military Law. The last edition of that is the one of 1914, which covers everything; and then you have to pick out from the circulars the amendments since 1914—amendments to the King's Regulations and amendments of the rules of procedure.

Senator CHAMBERLAIN. Have you those so that you can submit them?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Would you not like to have him leave them with us, Senator?

Senator WARREN. Yes; if you can get it all in concrete form, so that we may not have to spend a great deal of time in examining it. It looks as if it were rather involved, the way Col. Rigby states it. Please get it in the shortest form you can for us to examine. I think that it is highly important that we have access to it.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I think I might make a compilation—in fact, I have already done that in connection with my report which I am getting up for the judge advocate general—of the regulations on the different subjects.

Senator CHAMBERLAIN. Of course, I do not wish to interfere now with your course that you have mapped out in your own way for addressing this committee, but I am anxious to ascertain the powers and the functions of the judge advocate general of Great Britain. You say that he was formerly an executive officer and later that function was changed?

Lieut. Col. RIGBY. No; he was never an executive officer; but in the old days he may sometimes have been treated as almost so, in practice, up to 1905.

Senator CHAMBERLAIN. As executive officer, he exercised the power of control over the sentences of court-martial?

Lieut. Col. RIGBY. The difference was that at that time he tendered his advice direct to the Sovereign, so that really there was no higher authority to check it over; whereas now he tenders his advice to the secretary of state for war through the deputy adjutant general, and it is checked over in every case by the deputy adjutant general.

Senator CHAMBERLAIN. What is the course of a sentence of a court-martial in Great Britain in the field? Does it go through military channels to the judge advocate general of Great Britain?

Lieut. Col. RIGBY. When you say "in the field," you mean outside of the United Kingdom?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Because they make a distinction in that—between the United Kingdom and outside.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Outside, it goes to the confirming authority, who would probably be the commander in chief of the particular

expeditionary force, although not necessarily; that is fixed by the patent or warrant issued by the Crown; but it would probably be the commander in chief of the expeditionary force. He would be advised by the deputy judge advocate general on his staff, who is appointed on the recommendation of the judge advocate general.

Senator CHAMBERLAIN. Is he a civilian?

Lieut. Col. RIGBY. No; he is a military officer. He may be appointed from civil life. He may be a barrister, appointed to that position, but he is given military rank.

Senator CHAMBERLAIN. But the judge advocate general appoints him to attend each court-martial proceeding?

Lieut. Col. RIGBY. No; not the deputy judge advocate general; no, sir. I am speaking of the review. Perhaps, to get it perfectly clear, I might begin with the history of a case and trace it through.

Senator CHAMBERLAIN. Yes; I would like to have it.

Lieut. Col. RIGBY. If you will allow me, before I do that, I want to say just a word more about the course of the proceeding through the deputy adjutant general's office, so as to have that complete at this time.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. The record, after being reviewed, with the minute containing the recommendation of the judge advocate general, goes to Gen. Childs, as it is now; the deputy adjutant general. He always carefully and personally reviews the whole record, reads the whole record. What he says is that he has the very highest possible respect for the ability of Judge Cassel—speaks of him as a brilliant man, even said to me once in conversation that he considered Judge Cassel probably the foremost living military lawyer—but nevertheless he feels that it is his duty to himself examine the records, for two purposes; one, because he feels that he ought to examine them, and not pass them blindly; and the other, that by doing that he keeps in close touch with the discipline of the Army, and he thinks that of value.

If he agrees with the judge advocate general, then it is passed to the secretary of state for war, as a matter of course, for signature. If he disagrees or does not fully concur, he usually has a conference with Judge Cassel; they get together and see whether they can not agree. If they can not agree, then it is referred to the attorney general for his opinion—at present, Sir Frederick E. Smith—and they usually get together and try to agree. If, however, they are unable to agree, the theory is that the opinion of the attorney general, rather than the opinion of the judge advocate general, will be the one that will guide the secretary of state for war, on the theory that the judge advocate general is the adviser only to the war department, whereas the attorney general is the adviser to the whole Government.

Senator CHAMBERLAIN. He is a civilian?

Lieut. Col. RIRBY. He is a civilian, also; but the ultimate decision is wholly in the hands of the secretary of state for war, and he is not bound to follow the advice of either of them. He may do as he pleases.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Of course, in almost every case where it is purely a legal question, the advice of the judge advocate general is followed. There has been one class of cases on which Judge Cassel

and Sir Frederick Smith differed, and there were quite a number of cases of that class which came up during the war, and of course all of those went in that way—that is, the judge advocate general was overruled on all of these cases. Outside of that particular class of cases, there were very few where, on legal questions, they differed.

Senator CHAMBERLAIN. Does the judge advocate general assume the right to reverse a decision of a court-martial?

Lieut. Col. RIGBY. The Sovereign has the power to quash, as it is called, at any time; and after confirmation the judge advocate general may advise what they call quashal. That may come up better with relation to tracing a case through the courts outside of the United Kingdom, because that is the kind of case where that power more often comes in. In the United Kingdom, general court cases are all submitted to the judge advocate general, before confirmation, because the Sovereign is usually the confirming authority for general courts within the British Isles.

Senator WARREN. The British secretary of state for war corresponds to our Secretary of War?

Lieut. Col. RIGBY. Yes, sir. The present secretary of state for war is Winston Churchill.

Senator WARREN. He is like the commander of the army, who relies upon the military authorities here; and I presume the Sovereign there would rely upon the military authority there.

Lieut. Col. RIGBY. Of course, Winston Churchill personally signs without asking King George to sign; in most cases, at least, I take it.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Now, as I say, the general course within the United Kingdom is that the record goes directly from the court to the judge advocate general.

Senator CHAMBERLAIN. Does that mean every record?

Lieut. Col. RIGBY. Every record of a general court within the United Kingdom.

Senator CHAMBERLAIN. Whether of an enlisted man or of a commissioned officer?

Lieut. Col. RIGBY. Yes; but, of course, you must remember that their general courts are practically all officers' courts. They scarcely ever use general courts for any other cases except officers' cases, except that, since the district court can not impose the death sentence and can not impose penal servitude (that is, a penitentiary sentence), the general court must be used where those sentences are contemplated. During times of peace the general court is practically never used except for officers' cases; because in time of peace they turn practically all civil offenses over to the civil courts for trial. During the war there have been, of course, some serious cases where it was anticipated that the death sentence would have to be imposed, or a sentence of penal servitude; but outside of those, they sent enlisted men before the district court.

Senator CHAMBERLAIN. So that the system differs radically from ours, in time of peace, in that infractions of law on the part of enlisted men are turned over to the civil courts for disposition?

Lieut. Col. RIGBY. For what we call civil crimes; yes, sir. But that is not restricted to enlisted men. They would turn over an officer charged with a civil crime, to the civil courts.

Senator CHAMBERLAIN. Like larceny or embezzlement?

Lieut. Col. RIGBY. Yes, sir. I can not quote now the statistics since the war began, because of the confidential character in which they were turned over to me by the British authorities, but for the nine years prior to the war I have examined the statistics, from 1905 to 1913, inclusive; and there were but 12 general courts-martial held within the United Kingdom in that time, an average of only one and one-third cases per annum; which means, of course, that all of the work, practically, was being done by the district courts.

Senator CHAMBERLAIN. That is, the civil courts?

Lieut. Col. RIGBY. No; the district court is a military court, too. It is the court that corresponds in a way to our special court; but it may punish with confinement up to two years. They held on an average about 3,800 district courts-martial every year during that time, when they were holding only one and one-third general courts per annum. I am talking, now, about within the United Kingdom.

Senator WARREN. And both within the army?

Lieut. Col. RIGBY. Yes; and both within the army.

Senator CHAMBERLAIN. Do you know how many cases were decided by the civil courts?

Lieut. Col. RIGBY. No, sir.

Senator CHAMBERLAIN. But that differs essentially from our system, where the military courts, even in time of peace, have jurisdiction of all those things.

Lieut. Col. RIGBY. It is rather a difference of policy and practice than of law; because their military courts would have the power, with some limitations as to the gravest crimes, to try these offenses by soldiers. But in practice, they do not. They turn over everything that they can in time of peace to the civil courts.

Now, of a general court outside of the United Kingdom, the record goes, as I said, to the general commanding, for confirmation.

Senator CHAMBERLAIN. That is, cases against officers?

Lieut. Col. RIGBY. Yes, sir; of course, any general court. Of course, the general court is used outside of the United Kingdom just as within.

At the general court, whether sitting in the United Kingdom or outside of the United Kingdom, wherever the general court sits, there is attached to it a judge advocate. I might say, to be perfectly correct, that what I am saying does not necessarily apply to India. There is a separate judge advocate general in India, who functions separately.

Senator CHAMBERLAIN. We do not care so much about that.

Lieut. Col. RIGBY. I will omit India, then.

Senator CHAMBERLAIN. The judge advocate is appointed by the judge advocate general?

Lieut. Col. RIGBY. Within the United Kingdom.

Senator CHAMBERLAIN. He attends these general courts outside of the United Kingdom?

Lieut. Col. RIGBY. Outside of the United Kingdom the commander in chief appoints the judge advocate. Within the United Kingdom the judge advocate would be appointed by the judge advocate general on the recommendation of the convening authority.

Senator CHAMBERLAIN. He attends all courts outside of the United Kingdom?

Lieut. Col. RIGBY. At every general court, whether in France or elsewhere abroad, or in the United Kingdom, there is a judge advocate. We might call him a trial judge advocate for distinction.

Senator CHAMBERLAIN. He is not a member of the court?

Lieut. Col. RIGBY. He is not a member of the court.

Senator CHAMBERLAIN. He does not participate in the trial?

Lieut. Col. RIGBY. He does not participate in the trial; no, sir: that is, he is not a member of the court.

Senator CHAMBERLAIN. He simply advises the court as to the admissibility of evidence?

Lieut. Col. RIGBY. Yes, sir. Now, the history of that is this. Of course, the trial judge advocate arose out of an officer who was substantially the same as our judge advocate; because if you go back to the time when we took the old 1774 articles, and practically adopted them in 1776, they then contemplated the kind of trial judge advocate who was also a prosecutor.

Senator CHAMBERLAIN. The systems were the same?

Lieut. Col. RIGBY. The same, substantially.

Senator CHAMBERLAIN. They modified theirs, and ours remain the same until now.

Lieut. Col. RIGBY. Theirs remained the same until in 1829, and in 1829 an act was passed permitting—not requiring, but permitting—the appointment of a separate prosecutor and providing that where such a prosecutor was appointed, in those cases the judge advocate should not prosecute, but should limit himself to advising the court. That left a double system running. That continued until 1860, if I remember correctly. I am quite sure it was 1860 or 1861. During that time there was, of course, a great deal of discussion, and in 1860 or 1861 the act was further amended forbidding the judge advocate from prosecuting in any case, which left him as simply the adviser to the court; and as the law has stood since, and in the form it now stands, he is the adviser to the court and is required to have substantially the same qualifications as to impartiality as a member of the court. He may be a civilian or he may be an officer. I have attended general court trials where a civilian was sitting as judge advocate, and I have attended general court trials where an Army officer was sitting as judge advocate; but in any event he would be a man skilled in the law.

Senator CHAMBERLAIN. He rules on questions of law and upon the admissibility of evidence and acts as general adviser to the court?

Lieut. Col. RIGBY. It is not accurate to say that he rules. He does not do that. His powers and duties in that regard are fixed by rule 103 of the Rules of Procedure, which is not long, and I might perhaps read it here.

Senator WARREN. You may do so.

Lieut. Col. RIGBY (reading):

POWERS AND DUTIES OF JUDGE ADVOCATE.

103. The powers and duties of a judge advocate are as follows:

(A) The prosecutor and the accused, respectively, are at all times, after the judge advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court.

(B) At a court-martial he represents the judge advocate general.

(C) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he will inform the convening officer and the court of any informality or defect in the charge or in the constitution of the court, and will give his advice on any matter before the court.

(D) Any information or advice given to the court on any matter before the court will, if he or the court desire it, be entered in the proceedings.

(E) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceed to deliberate upon their finding.

(F) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not overrule it, except for very weighty reasons. The court are responsible for the legality of their decision, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point. The court in following the opinion of the judge advocate on a legal point may record that they have decided in consequence of that opinion.

(G) The judge advocate has, equally with the president, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible, or otherwise, and may for that purpose, with the permission of the court, call witnesses and put questions to witnesses which appear to him necessary or desirable to elicit the truth.

(H) In fulfilling his duties the judge advocate will be careful to maintain an entirely impartial position.

That defines his position, and it defines it, I think, fairly, as it actually is in practice.

Senator CHAMBERLAIN. That differs from our Judge Advocate General in that the practice as to the Judge Advocate General in our Army has grown to be that he is a man who represents the Government?

Lieut. Col. RIGBY. You said "Judge Advocate General," Senator. You meant the judge advocate.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. It does. Our judge advocate is expected to prosecute, and also to some extent to represent the accused. It is, of course, very difficult to hold those two positions fairly, balancing the two interests; and in reviewing the records of cases, one can not help but be struck by that. Some judge advocates go to one extreme and are too favorable to the accused, and others go to the other extreme and are practically prosecuters.

Senator CHAMBERLAIN. The grave consequence of that is that if a court disobeys the advice of the judge advocate in Great Britain he subjects himself to civil damages, does he not?

Lieut. Col. RIGBY. No; that is putting it a little stronger than it should be. The accurate way, I think, Senator, to state that, is, that in case an action for damages is brought, if the court is able to say that it did follow the advice of the judge advocate in acting as it did, that may, in a doubtful case, be a protection to them.

Senator CHAMBERLAIN. Otherwise, they incur the risk of a judgment?

Lieut. Col. RIGBY. That is, if they do not follow his advice, in that case, the failure to follow the advice is not anything one way or the other; whereas it may be a shield to them if they can show that they followed his advice.

Senator CHAMBERLAIN. Have you finished with that regulation?

Lieut. Col. RIGBY. I have finished with that.

Senator CHAMBERLAIN. Go right along.

Lieut. Col. RIGBY. As I see it, the difference between the judge advocate under that regulation, and the proposed trial judge advocate under Senate bill 64, is that the British judge advocate does not by his rulings bind the court at all. He is only an adviser to the court. While the court are to listen to his advice, and are cautioned not to overrule it except for very weighty reasons, still the power resides in the court, and not in the judge advocate; and a court, of course, composed wholly of army officers; so that, in the last analysis, it is the military men, the Army officers, who have the power, advised by the impartial lawyer attached to the court.

Furthermore, the British court imposes its own sentence, instead of simply making a finding and letting the judge advocate impose the sentence, as is proposed in Senate bill 64; and the British judge advocate has no power to in any way approve, or to approve only partly, or to disapprove, the finding of the court—has no jurisdiction similar to that of a reviewing authority, or of a civilian judge. He has no office of that kind, at all. And he has, of course, no power to impose sentence.

Then, the British judge advocate has no power to suspend or modify a sentence, such as is proposed to be given to the judge advocate by Senate bill 64.

Senator CHAMBERLAIN. They usually follow his advice, though, do they not?

Lieut. Col. RIGBY. Undoubtedly they usually follow his advice; but the decision lies with the military officers of the court and not with the lawyer who is the adviser. Pardon me, Senator, for interrupting you.

Senator CHAMBERLAIN. Before leaving that: Where is there lodged, anywhere in the military system of jurisprudence, the appeal jurisdiction? Is there anything——

Lieut. Col. RIGBY. You are speaking of the British system?

Senator CHAMBERLAIN. Yes; of the British system.

Lieut. Col. RIGBY. Nowhere; any more than with us; except that there is a practice which you might call, in effect, a kind of appellate jurisdiction. There is nowhere in the statutes or in the regulations any appellate jurisdiction provided for; but, in practice, petitions are entertained by the War Office, really at any time after a conviction. A man may petition, or his relatives or anybody may petition for him, and that petition, if it involves any legal questions, as it usually will, is turned over to the Judge Advocate General for examination; and, in that case, Judge Cassel says in his statement here that he will again review the record in the same way as if it were coming up as an original case, although he has reviewed it before; and will tender a recommendation, if he thinks one ought to be tendered, to the Sovereign, through the secretary of state for war.

Senator CHAMBERLAIN. Does that take in the general courts only, or does it take in the minor courts also?

Lieut. Col. RIGBY. Yes; any petition will be examined; and he has the power, because the Sovereign of England has the full power to quash; so that there is, in effect, a kind of appellate power there.

Senator CHAMBERLAIN. To quash or to modify?

Lieut. Col. RIGBY. Yes; to do anything with it.

Senator WARREN. How does the power of the commander in chief compare with that of the President of the United States to veto or quash and set aside, as they call it?

Lieut. Col. RIGBY. The power of the President of the United States is limited to clemency, after the sentence has once been finally approved, and confirmed, if confirmation be necessary.

Senator WARREN. To pardon?

Lieut. Col. RIGBY. To pardon.

Senator WARREN. Or to a partial reduction of the sentence?

Lieut. Col. RIGBY. Yes; whereas the British Sovereign may exercise, really, by what is called "quashal," an appellate power, and wipe the whole thing out.

Senator CHAMBERLAIN. Where is the appellate power under our system?

Lieut. Col. RIGBY. Of that kind, there is, of course, no appellate authority after the final confirmation of the judgment.

Senator CHAMBERLAIN. By the commanding officer?

Lieut. Col. RIGBY. By the commanding officer; if he has power to finally confirm, or by the department commander, or by the President, as the case may be, in those cases which require additional confirmation.

Senator CHAMBERLAIN. So that, as I understand it, there is really no appellate power vested in anyone, here, under our system?

Lieut Col. RIGBY. Not in the sense of a power exercised after the regular review is finished and the sentence has been finally approved and confirmed; and at the request or petition or appeal, if you please, of the accused. We have, under our reviewing powers and confirming powers, a system of what has been called automatic review, under which every general court-martial record is reviewed, and I may say carefully reviewed, by lawyers attached to the staff of the reviewing authority, and then in the office of the judge advocate general. But that is a different thing, perhaps, from what would be strictly called appellate power.

Senator CHAMBERLAIN. Does the judge advocate general, even after these cases have been reviewed, assume to exercise any power over the sentence except a revisory power, except in cases where there is an entire lack of jurisdiction, or there have been errors in the trial?

Lieut. Col. RIGBY. Of course where there has been entire lack of jurisdiction, we can recommend setting the proceedings aside, just as can the British judge advocate general, and in any case, so far as the judge advocate general is concerned, there is not much difference, really, between our judge advocate general and the British judge advocate general; because the British judge advocate general, like our judge advocate general, simply recommends and advises the Secretary of State for War, or the commanding general; just as our judge advocate general recommends to and advises the Secretary of War or the President, or the commanding general, as the case may be. I think really that our power is quit analogous, and its method of exercise is quite analogous, to that of the British judge advocate general, in the review. His powers are advisory, and ours are advisory. I have submitted to you the forms of the minutes that they use. They are in the shape of recommendations. Ours are recommendations. The Secretary of State for War in Great Britain

is not bound to follow the recommendations of the judge advocate general. The Secretary of War, the President, and the commanding general, as the case may be, are not bound to follow the recommendations of our judge advocate general.

Senator CHAMBERLAIN. They usually do in both countries?

Lieut. Col. RIGBY. They usually do in both countries, and there is usually not much difference between the percentages in which they follow them in the two countries. Perhaps the percentage is a little higher there, but it is almost unanimous with us.

I made some investigations as to those figures last winter, at the direction of the Judge Advocate General; and, as I remember it, it ran that something about 98 per cent of the recommendations of the Judge Advocate General for reversal or modification—anything of that kind—had been followed, both by the Secretary of War and the commanding generals, with us. I do not want to attempt to speak accurately, but it is around about that figure. Practically always, they follow the recommendations.

Senator CHAMBERLAIN. You were going to illustrate the proceedings over there by the progress of a case, from step to step.

Lieut. Col. RIGBY. Yes; and speaking of the general court in the field—because in the field and at war the general court is a thing that was but little used—I would rather use the field general court, which is the court that is used very largely. It is the usual trial court for the Army outside of the United Kingdom, in time of war. The field court has all of the powers of the regular general court. It is appointed in instances where the officer with the power to convene a general court finds that it is not practicable to appoint a full general court; and, therefore, he appoints a field court. The field court may consist of any number of officers, from three (3) up. It usually consisted, during the late war, of three (3) and sometimes of five (5). In emergency it might have but two members, but then it could not impose death nor penal servitude.

Senator CHAMBERLAIN. All commissioned officers?

Lieut. Col. RIGBY. All commissioned officers. Since September, 1916, they got into the habit of attaching to the field courts an additional member whom they called the "specially qualified member," who was a lawyer, and was a member of a body of officers which they created in September, 1916—lawyers, called "court-martial officers."

Senator CHAMBERLAIN. They were independent of the judge advocate that accompanied the field court?

Lieut. Col. RIGBY. No judge advocate accompanies the field court at all, Senator; and it was to fill that gap in serious and difficult and complicated cases that this habit grew up of appointing an additional member of the court. So that, during the latter part of the war, when a general appointed a field court of, say, three officers, he would also appoint a fourth member, an officer who was a court-martial officer—that is, a lawyer. These court-martial officers were appointed under a circular. I think I have a copy of that little circular here. It is a war office letter. That was issued in September, 1916, by the war office.

Senator CHAMBERLAIN. You can just insert that in the record.

Senator WARREN. Yes.

Lieut. Col. RIGBY. I wanted to find it, if I could.

Senator WARREN. It is just a general order?

Lieut. Col. RIGBY. It is, in effect, a general order. It is what they call a "War Office Letter of Instruction"; but it is the same thing as a general order of our War Department.

Senator WARREN. If you have it, you may insert it later.

Lieut. Col. RIGBY. Yes; I have it, and will read it in a few moments. But under that order this corps of court-martial officers was established, and as it finally came into practice, perhaps after some little time in practice, they attached two of those officers, as a rule, to every division. They would use one of them as a staff judge advocate and use the other one as this additional member of the field court.

Senator CHAMBERLAIN. Were they civilians?

Lieut. Col. RIGBY. They were appointed from civil life, just in about the same way that our temporary judge advocates were appointed to the Judge Advocate General's department.

Senator WARREN. But they were commissioned?

Lieut. Col. RIGBY. They were commissioned and were given field rank usually. They used them at home, also, by the way, as presidents of district courts-martial, and as general legal advisers to the commanding generals. In a division there would be appointed, as with us, quite a number of field courts—their field courts corresponding to our general courts in active service at the front. Then one court-martial officer would be appointed as the additional member of each of those field courts within that division. He was not required, and was not expected, to be present at every session of each court of which he was a member; but the regulations, which were finally, after some fluctuation, compiled in a "circular memorandum" gotten out August 1, 1918, provided that no case of a serious, difficult, or complicated nature should be tried without the presence of that "specially qualified member" of the court, the court-martial officer; but the little ordinary cases of absence without leave and the ordinary run of little stuff the court would try without his presence.

The commanding general—the convening authority, of course usually advised by his staff judge advocate in practice—directed what cases this "specially qualified member" should sit in at and should attend. I have, for instance, in my files, a telegram—that shows the way it was generally done—received by the court-martial officer in the Cologne district, directing him to be present on such and such a day at such and such a town for the trial of a case.

Senator CHAMBERLAIN. Did those courts try enlisted men?

Lieut. Col. RIGBY. They tried enlisted men and officers.

Senator CHAMBERLAIN. It was practically the only court?

Lieut. Col. RIGBY. Not quite that; but it was the court that tried a great deal more than a big majority of the cases during the war, outside of the United Kingdom. There were some general courts convened in France, but not very many.

Now, at trials where that additional member was present, the regulations provided that he should advise the court on legal questions, in the same manner and with the same effect as their judge advocate at their general courts.

Senator CHAMBERLAIN. Under rule 103?

Lieut. Col. RIGBY. Under rule of procedure 103; so that he acted in a dual capacity. He was an ordinary member of the court and voted as a member of the court, but on legal questions he advised the court, the other members being free, under rule 103, to follow his advice or not, but being warned not to disregard his advice on a legal point except for weighty reasons.

Senator CHAMBERLAIN. The others being lawyers or not?

Lieut. Col. RIGBY. Probably not. They were Army officers.

Now, that system is said to have worked very well. You will see, in looking over Judge Cassel's statement, that they think very highly of it; and Judge Cassel expected to recommend it to their court-martial committee as a thing to be adopted as a permanent thing in the British Army. The "specially qualified member" of the court acted exactly the same as their judge advocate, except that he did not sum up in open court. Being a member of the court, that would seem unnecessary, and as a matter of practice he did not do it. I think, balancing between the two plans of the judge advocate who is not a member of the court and of the "specially qualified member" who is a member of the court, Judge Cassel is rather inclined to favor the plan of the judge advocate not a member of the court.

You will see in the statement that Judge Cassel makes that he recognizes that some arguments can be made on both sides; but, balancing them, his mind inclines rather that way, that is, toward the judge advocate. But, in any event, as to the plan of having this body of court-martial officers attached to the Army, they say it has worked well in practice; and it seems to be the opinion of officers, practically the opinion of every one that I have talked with, that it ought to be in some way or other perpetuated and made a permanent part of their military system. Was there something further on that?

Senator CHAMBERLAIN. No; I think not.

Senator WARREN. If you have come to a pause, let me ask you this: Take these Army officers that are educated at West Point; what, if any, law course do they take?

Lieut. Col. RIGBY. Of course, I have no personal knowledge of that.

Senator WARREN. Perhaps I might put the question in another way. Is there an appreciable difference, in your judgment, as shown in these trials, in the knowledge of law of officers who have been graduated from West Point and of those who have gone in from civil life?

Lieut. Col. RIGBY. I should not say, Senator, that I could discern, in reading the records, any difference as to knowledge of law. I think it is fair to say that one can see something of a difference as to the mental attitude, one might say the sureness with which they sit in the saddle. In other words, as it seems to me, a good many of the judges in courts-martial without experience are not very sure of themselves, and are a little inclined—well, to put it that way, to "pass the buck." I have in mind a particular case that I remember when I was reviewing officers' cases, where an officer was charged with being absent without leave. I think he was gone five or six days. The circumstances were that he was directed to be away for a day or two. He was just reporting, and they had not quarters for him and sent him away temporarily, and he was taken down with the

"flu"—it was while there was that epidemic of "flu"—and was sick in bed. He was sick, I suppose, was the reason, but, at any rate, he did not take the trouble to have anybody telephone, and no report was made of the cause of his absence, and he came back five or six days late. He was charged with absence without leave, and was tried. The court, of course, could have given him any sentence, from a reprimand up. They gave him the heaviest sentence possible, dismissal from the Army; and then turned around, and every one of them joined in a recommendation of clemency. Now, the only way that I could understand that at all, was that those men simply did not know what ought to be done, and they were giving the heaviest sentence possible, thinking it could then be cut down to what was right, forgetting that it had to go clear up to the President, through all the machinery.

Senator WARREN. There is nothing in the law requiring that kind of a sentence?

Lieut. Col. RIGBY. Nothing at all. It was simply one of those foolish sentences, because the men did not know what to do.

Senator WARREN. Another question along the same line: Have you observed, in the course of your service, differences as to severity or leniency in the courts predominated over by those fresh from civil life and those in the Army—those longer experienced, perhaps?

Lieut. Col. RIGBY. No; unless one could deduce that from the statistics. It is pretty hard to tell; but it is true that for one reason or another during the progress of the war the sentences were getting heavier, and, of course, it is also true that the number of Regular Army officers sitting on the courts was necessarily progressively getting smaller in proportion as the Army increased in numbers. Now, whether those two things are connected, and how far they may be connected, I would not have any way of judging.

Senator WARREN. Another question: In selecting the court, it may or may not have been in the mind of the commanding officer to have a part of the court made up of experienced officers and the rest from civilian life. Were the courts generally made up of both elements, or was there an absence of such intent, and were the courts made up just as they happened to be?

Lieut. Col. RIGBY. I could not answer that question, except from general observation.

Senator WARREN. That is what I want.

Lieut. Col. RIGBY. It seemed to me, from what I could observe, that in the earlier part of the war that was true. Of course, later on most of the regular men were overseas, and the courts here at home were necessarily made up almost exclusively of temporary officers. My own experience in reviewing records has been on this side. I have not reviewed any records overseas, so that I would not be able to know how that was after they got over there.

Senator WARREN. They are all here now.

Lieut. Col. RIGBY. Yes; they are all here now, and of course during the latter part of last year, during the time I was reviewing records here at home, there were very few Regular Army officers here at all to put on the courts.

I was going, then to pass to the French system as to the composition of the court, unless there was something further on the British system.

Senator CHAMBERLAIN. Before you pass from that: The records of all these general courts were made by stenographic reports?

Lieut. Col. RIGBY. Of the general courts, yes, sir. And, by the the way, I have, if it should interest you, copies of quite a number of records that were given to me by the British Judge Advocate General's office and others, as samples of the way they do it.

Senator CHAMBERLAIN. Do you have printed records?

Lieut. Col. RIGBY. No, sir; they are typewritten. I forgot a little what I was going to do with them. I was going to trace the history of a field general court case for you.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I have, for instance, here, a printed verbatim copy of two field general court records. These happen both to be cases—both of them are actual cases—that were presented in the course of the testimony before the British Court-Martial Committee, and this particular document has been released by Judge Cassel from the confidential status, so that I am permitted to show it to you.

Senator CHAMBERLAIN. Why could we not put that into the record?

Lieut. Col. RIGBY. That could go right in the record; that shows just how they do it.

Senator CHAMBERLAIN. If it is released from confidence, we would like to have it go in the record.

Senator WARREN. Let it be inserted here.

(The document referred to is here printed in full in the record as follows:)

FORM FOR ASSEMBLY AND PROCEEDINGS OF FIELD GENERAL COURT-MARTIAL (A).

PROCEEDINGS.

At Chateau Combreux, Tournan, this 6th day of September, 1914. [If troops are on active service.]

Whereas it appears to me, the undersigned, an officer in command of —— Army Corps, on active service, that the person named in the annexed schedule, and being subject to military law, has committed the offenses in the said schedule mentioned.

And I am of opinion that it is not practicable that such offenses should be tried by an ordinary general court-martial.

I hereby convene a field general court-martial to try the said person, and to consist of Col. J. K., president, O. C. —— Army Corps troops; Capt. L. M., —— Regiment; Lieut. N. O., —— Regiment.

(Signed) H. L. SMITH-DORRIEN,
General Commanding —— Army Corps.

First witness, C. D., being duly sworn, states: At Tournan on 6th September, 1914, about 8.15 a. m., I was in search of my bicycle which I had lost; and from information received I went toward the Medlin and found there the accused here present before the court, dressed in civilian clothes. I asked him what he was doing, he answered "I have lost my Army and I mean to get out of it," or words to that effect. I asked him where his clothes were and what regiment he belonged to. He said, "the —— Regiment." I searched him and found on him the book which I produce. I conducted him to the place where he thought he had left his clothes, rifle, and cartridges. We found his clothes in a woodshed, the rifle and cartridges were missing. I took him to the Mairie and gave him up to the French police. I also produce his uniform, which is marked ———, —— Regiment.

Question by the accused: Did I say I wanted to get out of it, or, that I wanted to find my way out of it?—A. He said "I have had enough of it, I want to get out of it, and this is how I am doing it."

The accused declines to further cross-examine this witness, who withdraws.

Second witness, Captain E. F., —— Regiment, being duly sworn, states:—When I arrived at Chateau Combreux, near Tournan, on the morning of the 6th September, 1914, I received a telegram (which I produce) and an order to go to the farm of Mons. ———, Rue du ———, Tournan, and arrest a deserter. I obeyed and then went to the Mairie, and was given the uniform and Active Service pay-book of Private A. B., ——— Regiment. The uniform was marked with his number. I took over the man and handed him to the Provost-Marshal. The man, the accused here present, was dressed in plain clothes, just as he is now, as well as I can remember, or perhaps he had a coat on. I asked him why he had run away. He answered that he left his bivouac this morning and remembered nothing more.

The accused declines to cross-examine this witness, who withdraws.

The prosecution is closed.

The accused, No. ———, Private A. B., —— Regiment, has no witnesses to call, but elects to give evidence on oath, and states after being duly sworn: I came out of bivouac with my regiment this morning; we halted on the side of the road. I fell out on the right to ease myself. The regiment went on before I was finished. I went on, but could not find them; got strolling about; went down into a farm, lay down in an empty house, and have a slight remembrance of putting some civilian clothes on, but do not remember exactly what happened until the man came down to arrest me. I was coming back then to see if I could find my clothes and my regiment, but I was taken to the police station before I could get back. When I was asked by the man who arrested me who I was I answered him at once and told him who I was.

Cross-examined by the prosecutor (A. P. M., —— Army):

Q. Why did you say to C. D. you "wanted to get out of it and that was how you were doing it," or words to that effect?—A. When he came to me I told him that I was trying to get out of it, meaning that I had lost my way—wanted to get out of the place in which I was and wanted to rejoin my regiment. I can not say why I was in civilian clothes.

The court is cleared.

COPY OF TELEGRAM PRODUCED BY C. F.

Civilian reports an English deserter in plain clothes at the farm of M. ——, Rue du ———, Tournan. Can you deal?

(Signed) R. C. G.

Exhibit II, the A. B. 64 of the accused is attached to the proceedings.

I certify that the above court assembled on the 6th day of September, 1914, and duly tried the person named in the said schedule, and that the plea, finding, and sentence in the case of such person as stated in the third and fourth columns of that schedule.

Signed this 6th day of September, 1914.

J. K.,
Colonel, O. C. —— Army Corps Troops,
President of the Court-Martial.

I have dealt with the findings and sentences in the manner stated in the last column of the above schedule, and, subject to what I have there stated, I hereby confirm the above findings and sentences; and I am of opinion, with reference to the sentences of summary punishment mentioned in the schedule, that imprisonment can not, with due regard to the public service, be carried into execution.

(And I am of opinion that it is not practicable, having due regard to the public service, to delay the cases for confirmation by any superior qualified authority.)

Signed this —— day of ——— 19—.

H. L. SMITH-DORRIEN,
General, Commanding —— Corps.

COURTS-MARTIAL.—FORM OF DECLARATION OF MILITARY EXIGENCIES OR THE NECESSITIES OF DISCIPLINE UNDER RULE OF PROCEDURE 104.

In my opinion [military exigencies, namely] proximity of the enemy render it inexpedient to observe the provisions of rules 4 (C), (D), and (E) 5, 8.

13, 14, on the trial of No. —— Private A. B., —— Regiment, by field general court-martial assembled pursuant of my order of the 6th of September, 1914.

Signed at Tournan, this 6th day of September, 1914.

H. L. SMITH-DORRIEN,
General, Commanding —— Army Corps.

Subject to what I have stated in the last column of the schedule, I hereby confirm the sentence of death in the case of No. ——, Private A. B., —— Regiment.

Signed this 6th day of September, 1914.

J. D. P. FRENCH, *Field Marshal.*

Schedule.

Name of alleged offender.	Offense charged.	Plea.	Finding, and if convicted, sentence.	How dealt with by confirming officer.
No. ——, Private A. B., —— Regt.	When on active service, deserting His Majesty's service.	Not guilty	Guilty. To suffer death by being shot.	Confirmed. J. D. P. FRENCH, *Field Marshal, Commander-in-Chief.*

H. L. SMITH-DORRIEN,
General, Commanding ——— Corps.

Sentence executed at 7.7 a. m. on the 8th September, 1914.

J. C. MONTEITH,
Captain, A. P. M., ——— Division.
7.15 a. m., 8.9.14.

H. L. SMITH-DORRIEN, *General, Commanding —— Army Corps, Convening Officer.*

J. K., *Colonel, Commanding —— Army Corps Troops, President.*

MEDICAL CERTIFICATE.

I have this day examined No. ——, Private A. B., ——— Regiment, and find him in sound mental and bodily health, fit to undergo imprisonment with or without hard labor.

E. L. MOSS,
Captain, R. A. M. C.

6th September, 1914.

M. O. Headquarters, ——— Army Corps, Chateau Cambreux.

J. K., *Colonel,*
Commanding ——— Army Corps Troops, President, F. G. C.-M.

——— CORPS.

A. 483, 8.9.14. I have to inform you that the sentence on Private A. B., —— Regiment, was carried out at 7.7 a. m. this morning. Certificate from the Provost-Marshal, who carried out the sentence, is attached, and the proceedings of the F. G. C.-M. are also returned herewith.

W. H. ANDERSON, *Lieut. Colonel.*
A. A. and Q. M. G.

——— Division. 10.20 p. m., 8.9.19. Kindly acknowledge safe receipt.

HEADQUARTERS, ——— DIVISION.

In accordance with orders I have the honor to state that I interviewed Headquarters, ——— Infantry Brigade, and in the presence of the C. of E. clergyman, I read out the sentence of death to Private A. B., ——— Regiment, at 6.22 a. m., on the 8th September, 1914. I arranged place of burial. Firing and burial parties were found by O. C., ——— Regiment.

In the presence of one company of the ——— and the ——— Regiments, I promulgated and carried the sentence into effect at 7.7 a. m. Death was instantaneous.

J. C. MONTEITH, *Captain.*
A. P. M., ——— Division.

7.15 a. m., 8.9.14.

PROVOST MARSHAL.

A. 472. Reference carrying out of death sentence on Private A. B., ——— Regiment.

(1) Explain to G. O. C., ——— Brigade, that he is asked to arrange, as this Brigade Group is marching last.
(2) Prisoner to be given about three-quarters of an hour—after he is informed of sentence—with a clergyman.
(3) Burying party can remain behind.
(4) Carrying out of sentence to be as public as convenient.
(5) Certificate that sentence has been carried out.

V. W., *Lieut. Colonel,*
A. A. and Q. M. G.

5.10 a. m., 8.9.14.

A 2

BRIGADIER GENERAL,
—— *Infantry Brigade.*

A. 471, September 8. The proceedings of F. G. C.-M. on Pvt. A. B., —— Regiment, are forwarded herewith. The lieutenant general would like you to arrange for the death sentence to be promulgated and carried out at once, as publicly as convenient. The proceedings herewith to be returned.

W. H. ANDERSON, *Lieut. Colonel,*
A. A. and Q. M. G., —— Division.

COULOMMIERS, *5 a. m., 8.9.14.*
To The ADJUTANT GENERAL, G. H. Q.
B. 145, —— Corps.

I submit the proceedings of a F. G. C.-M. on No. 00000, Private A. B., of the —— Regiment, for desertion in the face of the enemy for confirmation by the commander in chief.

H. L. SMITH-DORRIEN, *General,*
Commanding —— Corps.

6th September, 1914.

Herewith the proceedings of the F. G. C.-M. and certificate of sentence carried out, on Private A. B., —— Regiment.

GRANVILLE SMITH, *Colonel and Q. M. G.,*
for G. O. C. —— Army Corps.

9th September, 1914.

B.
This will be promulgated in Army Orders.
J. A. G.
Passed to you, the necessary extracts having been taken.

B. W. CHILDS, *Major, D. A. A. G.*

G. H. Q., *9.9.14.*

D. J. A.
Forwarded. Word "confirmed" has been added.

GRANVILLE-SMITH, *Colonel,*
for D. A. Q. M. G., —— Army Corps.

28th September, 1914.

ADJUTANT GENERAL,
General Headquarters, London.

A. G's. CM./2880 of 3.11.18.

The proceedings of F. G. C.-M. in the case of No. ———, Private A. B., —— Regiment, are returned herewith as requested.

A certificate that the finding and sentence have been promulgated has been entered on page 3 of A. F. A. 3.

F. B. MERRIMAN, *Major, D. A. A. G.,*
for General Commanding —— Army.

H. Q., —— ARMY, *15.11.18.*

—— ARMY A.

With reference to your CM./15055, of 4.11.18, Proceedings of F. G. C.-M., in the case of No. ———, Private A. B., —— Regiment, are returned herewith, the sentence having been carried out on 7.11.18.

J. W. OLDFIELD, *Major,*
for Major General Commanding —— *Corps.*

13.11.18.

—— CORPS A.

Proceedings of field general court-martial in the case of No. ———, Private A. B., —— Regiment, are returned herewith.

The sentence was carried out on the 7th inst.

A. E. J. WILSON, *Lieut. Colonel,*
for Major General Commanding —— *Division.*

11.11.18.

DEATH CERTIFICATE.

I certify that No. ———, Private A. B., —— Regiment, was executed by shooting at ——— on November 7, 1918, at 6.29 a. m. Death was instantaneous.

H. W. BARBER, *Captain, R. A. M. C.*

D. A. P. M.,
—— *Division.*

The commander in chief has ordered that the sentence of death in the case of No. ———, Private A. B., —— Regiment, be put into execution.

The sentence will be carried out at dawn on November 7, 1918.

P. R. ROBERTSON, *Major General,*
Commanding —— *Division.*

6.11.18.

—— DIVISION.

For information and necessary action.

Proceedings to be returned to this office after promulgation.

J. W. OLDFIELD, *Major,*
D. A. A. G. —— *Corps.*

4.11.18.

—— ARMY, CM. 15055.

—— CORPS A.

1. The proceedings of field general court-martial held for the trial of No. ———, Private A. B., —— Regiment, are forwarded herewith for necessary action, the commander in chief having confirmed the sentence of death.

2. Please have the instructions contained on page 26 of Circular Memorandum on Courts-Martial, S. S. 412B, Part III, para. 68, complied with and the proceedings returned to this office after promulgation.

3. —— Division have been notified direct by wire.

F. B. MERRIMAN, *Major,*
D. A. A. G., —— *Army.*

H. Q., —— ARMY, *4.11.18.*

GENERAL OFFICER COMMANDING, —— ARMY.

In confirmation of my telegram No. A (b) 3 of to-day.

Please note that the commander in chief has confirmed the sentence in the case of No. ———, Private A. B., —— Regiment.

The return of the proceedings direct to this office after promulgation is requested.

R. T. KINNER WILLIAMS, *Captain,*
for Adjutant General.

G. H. Q., *3.11.18.*

——— ARMY, CM. 15055.

ADJUTANT GENERAL,
General Headquarters.
(Through Deputy Judge Advocate General.)

Proceedings of Field General Court-martial, held for the trial of No. 00000, Private A. B., ——— Regiment, are forwarded herewith.

I recommend that the sentence be put into execution. A very bad case.

J. BYNG, *General,*
Commanding ——— *Army.*

H.Q. ——— ARMY, *30.10.18.*

A. G.
For submission to the Commander in Chief.

R. P. HILLS, *Major,*
for D. J. A. G.

30.10.18.

——— ARMY, A.
Forwarded.
I recommend that the sentence be carried out. The crime was deliberate and no excuse is possible.

C. D. SHUTE, *Lieut. General,*
Commanding ——— *Corps.*

29.10.18

——— CORPS.
Reference proceedings of F. G. C.-M. herewith attached, on No. 00000, Private A. B., ——— Regiment. I consider that the crime was deliberately committed, and can find no extenuating circumstances in the case, further than that the accused has served in France for more than two years. I recommend that the extreme penalty be carried out.

P. R. ROBERTSON, *Major General,*
Commanding ——— *Division.*

B. E. F., *26.10.18.*

——— DIVISION, A.
Reference attached A. F. A. 3, in the case of No. 00000, Private A. B., ——— Regiment.
Private A. B. is being handed over by O. C. ——— Division Reception Camp, to A. P. M., *vide* attached copy of ——— Division A. R. 199 of 22.10.18.
Private A. B. has served continuously in the B. E. F., 16.7.16.
I. Commanding officer's opinion of character from a fighting point of view. Attached, marked "A."
II. Discipline of battalion. Very good.
III. Commanding officer's opinion as to deliberate nature of crime. Attached marked "B."
IV. I recommend that the extreme penalty be carried out for the following reasons:
(*a*) Private A. B.'s action was deliberate.
(*b*) He has previously attempted to desert unsuccessfully. See C. O.'s remark, 25.10.18.
(*c*) He is worthless as a soldier.
(*d*) During an action he deliberately abandoned his comrades.
(*e*) His example is a disgraceful one.

J. M. HOPE, *Brigadier-General,*
Commanding ——— *Infantry Brigade.*

24.10.18.

To ——— Infantry Brigade.
Reference my previous memo. My reason for stating Private A. B.'s desertion was deliberate is, that this was the second occasion within two days, that Private A. B. had come away from the line without permission. Two days prior to the date on which he was charged, he had made his way back to ——— Echelon without permission and been sent up by the quartermaster. This, together with the man's record, induced me to form the opinion I have already stated.

W. GIBSON, *Lieut. Colonel,*
Commanding ——— *Regiment.*

25.10.18.
(Signed) J. M. HOPE,
Brigadier General, Commanding ——— *Infantry Brigade,*
Convening Officer.

(Signed) Z. A., *Major, President.*

"A"

—— Regt. 60.
To ——— Infantry Brigade.
Reference S. C. 99, of 20.10.18.

I. No. ———, Private A. B. has not got a good record in this battalion. His fighting value is nil.

III. I have very little knowledge of this man, but I have questioned several officers, and in their opinion his deserting was deliberate. When I remanded him for court-martial I considered his case one of deliberate desertion. I am still of that opinion.

W. GIBSON,
Lieutenant Colonel, Commanding ——— Regiment.

23.10.18.

Certified that No. ———, Private A. B., ——— Regiment, has been taken over by me to-day.

J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— Division.

25.10.18.

FORM FOR ASSEMBLY AND PROCEEDINGS OF FIELD GENERAL COURT-MARTIAL ON ACTIVE SERVICE.

PROCEEDINGS.

On active service, this 6th day of October, 1918.

Whereas it appears to me, the undersigned, an officer in command of —— Infantry Brigade, on active service, that the person named in the annexed schedule, being subject to military law, has committed the offense in the said schedule mentioned.

And whereas I am of the opinion that it is not practicable that such offense should be tried by an ordinary general court-martial.

I hereby convene a field general court-martial to try the said person, and to consist of the officers hereunder named.

Maj. Z. A., —— Regiment, president.
Capt. V. M., —— Regiment.
Capt. B. C., C. M. O., —— Corps, H. Q.

(Signed) J. M. HOPE,
Brigadier General, Commanding —— Infantry Brigade,
Convening Officer.

Schedule.

Number, rank, name, and unit of accused.	Offense charged.	Plea.	Finding and, if convicted, sentence.	How dealt with by confirming officer.
No. ——, Private A. B., — Regiment.	AA, section 4 (7): "Misbehaving before the enemy in such a manner as to show cowardice."	Not guilty.	Not guilty.	
	Alternative charge.			
	AA, section 12 (1): "Deserting His Majesty's service."	Not guilty.	Guilty. Death. Opinion unanimous.	Reserved. J. M. HOPE, Brigadier General, commanding — Infantry Brigade. Confirmed. D. HAIG, Field Marshal. 3d November, 1918.

TRIAL OF NO. ———, PRIVATE A. B., ——— REGIMENT.

Prosecutor: Captain D. E., ——— Regiment.
Accused's friend: Lieutenant F. G., ——— Regiment.

PROSECUTION.

First witness, No. ———, Sergeant H. I., ——— Regiment, sworn, states:

On the night of the 2d September, 1918, the battalion was preparing to make an attack from ——— on ———. The accused was present at the assembly point. On reaching our objective, I called the roll and the accused was absent. I did not see the accused again until he was brought up at orderly room at ———. I can not remember the date; it was about seven or eight days later, I think. The battalion made the attack on ———.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

Second witness, No. ———, Private J. K., ——— Regiment, sworn, states:

On the night of the 2d September, 1918, during the advance from ——— to ———, I was in charge of a Lewis gun team. The accused was attached to my gun team. During the advance we halted a short while in some shell holes. There the accused dumped his haversack, mess tin, and oil sheet. We got the order to take our final objective, but the accused hung back. On reaching our final objective, the accused was missing. I never saw him again until he was before the colonel. I should think it was about three weeks after. The accused was never with my team from the time he went away. There was practically no opposition to our advance. There were only a few German patrols knocking about. We took one prisoner. There was no firing on us whatever.

Cross-examined.—I did not speak to accused when he dumped his kit.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

Third witness, Lieutenant L. M., ——— Regiment, sworn, states:

At 11 a. m. on the 3d September, 1918, I was at ———, echelon of my battalion at ———. I saw the accused. I asked him what he was doing there; in consequence of his reply I placed him under arrest.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

DEFENSE.

The accused declines to make any statement in his defense.

AFTER FINDING.

The prosecutor, Captain D. E., ——— Regiment, duly sworn, states:

I produce certified true copy of A. F. B. 122, relating to the accused.

(Copy marked X, signed by president and attached hereto.)

Not cross-examined.

The accused calls no witnesses to character.

The accused in mitigation of punishment, states:

I joined the Army in early 1915. I was discharged in England as unfit. I rejoined the Army in the beginning of 1916. I came out in March, 1916. I have served in this country since 1916. I am 23 years old. Not married.

Sheet No. 1.

No. 00000. Name: A. B. | Sqn., batty., or company: B. Corps: —— Regiment. | Date of enlistment: 11. 4. 16. G. C. Badges: | Service or proficiency pay: Character:

Date of last entry in company conduct sheet } No. and date of last drunk } Period not reckoning towards freedom from extra fine } Signature O. C. company, etc. } G. R. Baines, *Captain.*

Place.	Date of offense.	Rank.	Cases of Drunkenness.	Offense.	Names of Witnesses.	Punishment awarded.	Date of award or of order dispensing with trial.	By whom awarded.	Remarks.
——	5. 6. 16.	Pte.		Very untidy on parade when been warned.	C. S. M. A.	7 days' C. B.	5. 6. 16.	Capt. N. O.	N. O.
——	15. 6. 16.			Improperly dressed on parade	C. S. M. A. Verified, Certified correct,	3 days' C. B. 24. 6. 16, R. S., *Capt.* B. C., *Capt.*, 4. 7. 16.	15. 6. 16.	Capt. N. O.	N. O.
O. A. S.	10. 9. 16.	Pte.	Nil.	Not complying with battalion orders	2nd Lt. B.	4 days' C. C.	11. 9. 16.	Capt. C.	
In the field	25–26. 1. 18.	Pte.		When on active service—not alert at his post while on brigade headquarters guard	Documentary	28 days' F. P. No. 1	6. 8. 18.	Lt.-Col. D.	A. Z.
"	4. 6. 18.			When on active service absenting himself from his company from 3.30 p. m., 4. 6. 18, until surrendering himself to the brigade guard 8.10 p. m., 4. 6. 18 (absent 4 hours 40 minutes)	L.-Cpl. E. Cpl. G. Cpl. H. Documentary.	28 days' F. P. No. 1	25. 6. 18.	Major F.	

Certified true copy.—A. J. Brown, *Lieutenant, Adjutant* —— *Regiment.*

Sheet No. 2.

No. 00000.
Name: A. B.

Sqn., batty., or company: B.
Corps —— Regiment.

Date of enlistment: 2. 3. 16.
G. C. Badges:

Service or proficiency pay:
Character:

Date of last entry in company conduct sheet } No. and date of last drunk } Period not reckoning towards freedom from extra fine } Signature O. C. company, etc. } F. H. R. LAW, *Lieutenant.*

Place.	Date of offense.	Rank.	Cases of Drunkenness.	Offense.	Names of Witnesses.	Punishment awarded.	Date of award or of order dispensing with trial.	By whom awarded.	Remarks.
In the field	10. 9. 16....	Pte.....	.....	When on active service—improper conduct.	2nd Lt. E.....	4 days' C. C.....	11. 9. 16.....	Capt. B. A....	D. E.
"	18. 9. 16....	Pte.....	.....	When on active service—not complying with an order.	L. Cpl. Y..... Pte H. Lt. F. G. Sgt. J.	14 days' F. P. No. 1	17. 9. 16.....	Lt.-Col. G.....	D. E.
"	13. 10. 16...	Pte.....	.....	When on active service—refusing to obey an order.	L.-Cpl. L..... L.-Cpl. M. Pte. T. Pte. S.	7 days' C. C.....	14. 10. 16.....	Capt. B. A....	D. E.
"	29. 10. 16...	Pte.....	.....	When on active service—absent from the trenches.	Sgt. U..... C. S, M. R. Sgt. Q.	5 days' F. P. No. 1.	4. 11. 16.....	Lt.-Col. W....	D. E.
"	14. 11. 16...	Pte.....	.....	When on active service—refusing to obey an order.	Sgt. X..... Pte. V.	5 days' C. C.....	15. 11. 16.....	Lt. Z.....	D. E.
"	15. 11. 16...	Pte.....	.....	When on active service—disobeying a lawful command given by his superior officer.	Sgt. Y..... L.-Sgt. A. C. S. M. J. Sgt. O.	3 months' F. P. No. 1.	21. 11. 16.....	P., G. C. M...	B. W.
"	25. 12. 16...	Pte.....	.....	When on active service—losing by neglect his trench waders.	Cpl. U.....	5 days' F. P. No. 1, ordered to pay one-third value of the trench waders.	27. 1216.....	Major N.....	F. G.
"	11. 9. 17....	Pte.....	.....	Whilst on active service—unshaven on 7.30 a. m. parade.	Sgt. K.....	3 days' C. C.....	11. 9. 17.....	Capt. Y.....	H. I.

× A. F. G. ANDERSON, *Major.*

Certified true copy.—A. J. BROWN, *Lieutenant, Adjutant —— Regiment.*

I certify that the above court assembled on the 19th day of October, 1918, and duly tried the persons named in the schedule, and that the plea, finding, and sentence in the case of each such person were as stated in the third and fourth columns of that schedule.

I also certify that (1) the members of the court, (2) the witnesses, were duly sworn.

A. F. W. 3996 has been handed to the accused by me.

S. S. 412 (*b*) was before the court.

Signed this 19th day of October, 1918.

Z. A.,
Major, President of the Court-Martial.

I have dealt with the findings and sentences in the manner stated in the last column of the Schedule, and, subject to what I have there stated, I hereby confirm the above findings and sentences.

Signed this 25th day of October, 1918.

J. M. HOPE,
Brigadier General, Commanding ——— *Infantry Brigade,*
Confirming Officer.

Promulgated and extracts taken in the case of No. ——, Private A. B., ——— Regiment.

(Dated) 6-11-18 at 7.45 p. m.

(Signed) J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— *Division.*

Sentence duly carried out at ——— at 6.29 a. m. on 7-11-18.

(Signed) J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— *Division.*

Extracts taken 9-11-18.

W. GIBSON,
9-4-18. *Lieut Col., Commanding* —— *Regiment.*

Lieut. Col. RIGBY. I also have now, and want to put in, if I may, this war office letter of September, 1916, creating the body of court-martial officers. It is war office letter No. 1852, entitled "Officers attached to certain formations for duty in connection with courts-martial, etc." And also a table prepared in the office of the British Judge Advocate General, showing the normal progress of a case through their different courts-martial.

Senator WARREN. Let that go in.

(The letter and table referred to are here printed in full in the record as follows:)

1852.—*Officers attached to certain formations for duty in connection with courts-martial, etc.:*

1. Approval has been given for the attachment to the staff of certain formations of an officer for duty in connection with courts-martial. List of formations printed as Appendix 159 to these Instructions.

2. The appointments are of a temporary nature and the officers appointed will be seconded from their units and will receive extra-duty pay at the rate of 2s. per diem.

3. The duties of this officer, who should be a barrister or solicitor and well acquainted with military law, will be to assist and advise the commander of the formation, to which he is attached, on all matters in connection with courts-martial, including the reviewing of the proceedings, as also any other questions of military law which may arise. When a court-martial is being convened in a case which appears to present unusual difficulty, the officer attached for court-martial duties may, if available, be detailed as a member of the court.

4. It is to be distinctly understood that this officer is not a staff officer and is not entitled to wear staff distinctions.

5. The names of officers whom it is desired should be appointed will be forwarded by the G. O. C. in C. of each command to the war office without delay, and will be considered with others.

6. A report should reach the war office from the G. Os. C. in C. by the 14th February, 1917, stating whether there is justification for the continuance of these appointments.

Specimen statement of events from commission of offence to trial and promulgation.

Date.	R. C. M.	D. C. M.	G. C. M.	F. G. C. M. held behind "forward area." [1]
1st, Monday....	Offence committed. Accused confined.	As for R. C. M.....	As for R. C. M.....	As for R. C. M.
2nd, Tuesday..	Commander of guard sends guard report and charge to orderly room early in the morning. O. C. Coy. makes preliminary investigation before C. O.'s orderly room. C. O. investigates charge, and, unless he deals with case summarily, remands accused for C. M. Adjutant takes summary of evidence.	As for R. C. M.....	As for R. C. M.....	As for R. C. M.
3rd, Wednesday	C. O. signs charge sheet. Adjutant warns accused for trial at least 18 hours before court is to assemble. R. C. M. convened in bn. orders.	C. O. signs charge sheet and makes application for trial.	As for D. C. M.....	As for D. C. M.
4th, Thursday..	R. C. M. assembles. President sends proceedings to C. O.	Application received in brigade office.	Application received in brigade office. Forwarded to divisional commander.	As for D. C. M.
5th, Friday....	C. O. confirms proceedings.	D. C. M. convened in brigade orders for Monday, 8th.	Application received in divisional office. Forwarded to command H. Q.	F. G. C. M. convened in brigade orders for Sunday, 7th.
6th, Saturday..	Proceedings promulgated.	Accused warned for trial at least 24 hours before court assembles.	Application received at command H. Q.	As for D. C. M.
7th, Sunday....	.....	Dies non.....	Dies non.....	F. G. C. M. assembles. President sends proceedings to brigadier.
8th, Monday...	.....	D. C. M. assembles. President sends proceedings to confirming officer.	Application made to J. A. G. as to whether charge sheet and summary of evidence are in order and for warrant for J.A.	Proceedings received by brigadier, who confirms them (unless sentence is beyond his power),[2] and sends them to O. C. unit.
9th, Tuesday...	.....	Proceedings received by confirming officer, who confirms them and sends them to O. C. unit.	Application received by J. A. G. Returned with warrant to command H. Q.	Proceedings received by O. C. unit and promulgated.
10th, Wednesday.	.....	Proceedings received by O. C. unit and promulgated.	Charge sheet and summary of evidence and warrant received at command H. Q.	
11th, Thursday.	.....	.....	G. C. M. convened in command orders for Monday, 15th.	
12th, Friday...	.....	.....	Accused warned for trial at least 24 hours before court assembles.	
13th, Saturday.	.....	.....	Unusual day for G. C. M. to assemble.	
14th, Sunday ..	.....	.....	Dies non.	

[1] It is quite impossible to make a useful estimate for courts held in a "forward area," as military exigencies are so various.

[2] If the sentence be "death," the proceedings are sent through usual channels to C. in C., Expeditionary Force, unless any intermediate commander commutes to a less punishment. A sentence of penal servitude or imprisonment must, after confirmation, be submitted to the army commander for instructions as to whether the sentence is to be put into execution or suspended.

Specimen statement of events from commission of offense to trial and promulgation—Continued.

Date.	R. C. M.	D. C. M.	G. C. M.	F. G. C. M. held behind "forward area."
15th, Monday	.....	.....	G. C. M. assembles; J. A. sends proceedings to G. O. C. in C. command.	
16th, Tuesday	.....	.....	Proceedings received at command H.Q.; forwarded with G. O. C.'s remarks to J. A. G.	
17th, Wednesday.	.....	.....	Proceedings received by J. A. G.; returned to command H. Q. (unless sentence requires confirmation by H. M. the King).[1]	
18th, Thursday.	.....	.....	Proceedings received at command H Q.; confirmed by G. O. C. in C. and forwarded to divisional commander.	
19th, Friday	.....	.....	Proceedings received in divisional office; forwarded to brigadier.	
20th, Saturday	.....	.....	Proceedings received in brigade office; forwarded to O. C. unit.	
21st, Sunday	.....	.....	Dies non.	
22nd, Monday	.....	.....	Proceedings received by O. C. unit and promulgated.	

[1] If the sentence be one requiring confirmation by His Majesty the King, the judge advocate general sends the proceedings to secretary of state for war to submit to His Majesty. After confirmation the proceedings are sent from war office to command H. Q. and the procedure stated above is followed.

Lieut. Col. RIGBY. I would like to call attention to the third paragraph of that, in regard to the duties of the law officer.

(Lieut. Col. Rigby here read again paragraph 3 of the above letter.)

I should also like to put in the record this "Circular Memorandum on Courts-Martial for Use on Active Service," under date of August, 1918.

Senator WARREN. The whole of that is pertaining to the subject?

Lieut. Col. RIGBY. I think the whole of this might interest you. This was practically a court-martial manual for these field courts-martial.

(The circular referred to is here printed in full in the records as follows:)

CIRCULAR MEMORANDUM ON COURTS-MARTIAL FOR USE ON ACTIVE SERVICE.

[For official use only. This document is the property of H. B. M. Government.]

FORMS OF OATHS.

SWEARING COURT.

(*a*) "You ——— do swear that you will well and truly try the accused person (or persons) before the court according to the evidence, and that you will duly administer justice according to the army act now in force, without par-

tiality, favor or affection, and you do further swear that, except so far as may be permitted by instructions of the army council for the purpose of communicating the sentence to the accused, you will not divulge the sentence of the court until it is duly confirmed, and you do further swear that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

WITNESSES' OATH.

(*b*) "The evidence which you shall give before this court shall be the truth, the whole truth and nothing but the truth. So help you God."

INTERPRETER'S OATH.

(*c*) "You do swear that you will, to the best of your ability, truly interpret and translate, as you shall be required to do, touching the matter before this court-martial. So help you God."

OATH FOR OFFICER UNDER INSTRUCTION.

(*d*) "You do swear that you will not divulge the sentence of this court-martial until it is duly confirmed; and that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

JUDGE ADVOCATE'S OATH.

(*e*) "You do swear that you will not, unless it is necessary for the due discharge of your official duties, divulge the sentence of this court-martial until it is duly confirmed; and that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

CIRCULAR MEMORANDUM ON COURTS-MARTIAL.

This pamphlet, S. S. 412 (*b*), takes the place of S. S. 412 (*a*).

The distribution is much wider than was the case with S. S. 412, but it should be clearly understood that this fact in no way alters the incidence of responsibility for the correctness of court-martial procedure. Convening officers will continue to be solely responsible for the legality of charges, evidence, etc., and will insure that their staff officers are fully qualified to give them all the assistance required. The fact that a unit is in possession of the pamphlet in no way diminishes the necessity for strict supervision at every stage of a case.

Convening officers will see that a copy is laid before every court-martial.

Commanding officers of all units, to which copies are issued, will take steps to insure that all officers under their command make themselves acquainted with the contents.

If a copy is lost, the unit concerned will at once apply to the Publications Department, Army Printing and Stationery Services, Boulogne, for a copy in replacement.

S. S. 412 (*a*) is canceled.

The notes and instructions contained in this pamphlet are in no sense intended to be a substitute for the Manual of Military Law, but are meant to supply information on points which are not dealt with in it, or are found in practice to require further explanation. Officers dealing with courts-martial will continue to make constant reference to the manual in the course of their duties.

The contents have been drawn up with regard to the conditions of warfare which have existed in France for a long time past and still prevail. If and when these circumstances change materially it may be found difficult or even impossible to comply with many of these requirements, local commanders will then have to take the responsibility for any departure from what is laid down, bearing only in mind that these instructions represent the standard to be kept in view and that only such deviations are to be made as are dictated by the circumstances of the moment.

Under present conditions a large proportion of officers have little or no knowledge of military law, and every opportunity should be taken to instruct them in court-martial duties. Staff officers, whose duty it is to deal with courts-martial, should therefore endeavor to give lectures or less formal instructions on the subject as frequently as possible. The pamphlet affords ample material for the groundwork of such lectures, to which examples and comments should be added.

PART I.—PROCEDURE BEFORE TRIAL.

NOTE.—Rules of procedure 1–104 do not, in terms, apply to field general courts-martial. Many of the principles underlying these rules, however, have to be observed in conducting the proceedings of courts-martial of all kinds, and whenever, in the course of these notes, it is necessary to refer to any principle which is clearly stated in a rule, a reference is made to that rule: not because of a legal obligation to follow the rule itself, but for convenience of reference.

New matter inserted in this edition is marked by a marginal line.

CH. I.—PRELIMINARY PROCEDURE.

1. *Expedition.*—Every effort should be made to expedite court-martial cases at every stage. The main object of a F. G. C. M. is to bring an offender to justice with the least possible delay, and for this reason the rules of procedure are specially framed to make the procedure of a more expeditious character than that of an ordinary court-martial. (*See* G. R. O. 3232.)

2. *Arrest.*—(*a*) An accused when under close arrest can only be called upon to perform such duties or obey such orders as are necessary for his personal cleanliness and well-being.

(*b*) When men are in the trenches, arrest is neither appropriate nor necessary, except in cases where a man is behaving in such a way that he would be dangerous unless an armed sentry were placed over him. If, therefore, when a battalion goes into the trenches, or a battery into action, it is thought desirable, having due regard to the circumstances of each case, to release soldiers from arrest for the performance of their duty, this may be done, without prejudice to rearrest when the period of duty terminates.

(c) In serious cases, if information is received that the witnesses will not be available for some time, the accused can be released from arrest, without prejudice to rearrest when it becomes possible to proceed with the case. Unless, however, it is imperative to try by court martial, the case should be disposed of summarily.

3. *Application for F. G. C. M.*—The following documents should be forwarded by the unit to the convening officer (usually an infantry brigade commander or an officer holding an equivalent command):

(*a*) Summary or statements of evidence.

(*b*) Proposed charges, whether in form of charge-sheet or otherwise.

(*c*) Certified true copy of conduct sheet.

The use of unnecessary documents when applying for a F. G. C. M. should be avoided; e. g., duplicates of above, Army Form B. 116 (Form of Application for a Court-Martial), Army Form B. 296 ("Statement of character and particulars of service of accused"), lists of witnesses or routine medical certificates.

4. *Summary or statements of evidence.*—(*a*) For a F. G. C. M. a summary should be taken, if practicable, and in all cases, whether a summary is taken or not, sufficient statements in writing are required to show the convening officer and the accused the nature of the evidence which will be given by each witness. As a general rule it is not necessary to bring a witness from a long distance for the purpose of a summary, provided that a statement of his evidence (signed if possible) is obtained. For instance, it is never necessary to bring a military policeman from a distant town merely to prove the arrest of the accused. In such a case either the statement on the back of the crime sheet (A. F. B. 252) should be attached, or a statement such as the following:

No. ———. Sgt. ——— M. M. P., will prove the arrest of the accused at ——— at —— p. m. on ———.

(*b*) The accused will be present if a summary is taken, and all statements of witnesses not taken in his presence will be shown to him. The nature of

the charge or charges on which it is proposed to try him should be explained to him by an officer when the summary is taken or the statements are shown, and as soon as the convening officer has signed the convening order a copy of the charges should be given to the accused.

(*c*) The utmost care should be taken to insure that the accused fully understands the nature of the offense and of the evidence, and that all reasonable requests in connection with his defense are granted.

5. *Defense of accused.*—(*a*) When a court-martial is to be held for the trial of an offense of so serious a character that a death sentence is likely to be awarded, the convening officer, whenever practicable, will arrange for the attendance at the trial of an officer to act as friend of the accused. Care will be taken to select from the officers available one who is a barrister or solicitor or, if in special circumstances this is not possible, one who by reason of ability and discretion will be able to present the case of the accused adequately to the court.

(*b*) This must not be taken in any way to derogate from the right of the accused to be assisted or represented by such friend or counsel as he may himself select.

(*c*) The friend of the accused should be notified and a copy of the evidence given to him in sufficient time to enable him to give due consideration to the case and to consult with the accused.

(*d*) The attendance of a friend of the accused in no way relieves the court of the responsibility for safeguarding the interests of the accused and eliciting all facts which may tell in his favor.

(*e*) If assistance has been offered to the accused and has been declined, that fact will be stated in the proceedings.

6. *Attendance of witnesses.*—(*a*) As early as possible he should be asked for the names of any witnesses he may wish to call, and steps should be taken to secure their attendance.

(*b*) Before application is made for the attendance of a witness from a distance, care should be taken to ascertain that his evidence really is material, and in forwarding an application to superior authority, the facts should be stated which the witness is expected to prove.

(*c*) It should be remembered that written evidence as to character can always be accepted for the defense, and this will often obviate the necessity for the attendance of a witness.

7. *Notes on taking summaries.*—(*a*) Witnesses are not sworn unless the accused specially demands it.

(*b*) The warning given to the accused before he makes a statement is to the effect that he is not bound to make a statement, and that if he does make one it may be used in evidence against him.

(*c*) A summary will contain all material facts, stated shortly and to the point. All hearsay and other inadmissible evidence must be excluded.

(*d*) On a charge of drunkenness a witness will definitely say that a man is "drunk" or "sober," and will be prepared to give reasons for his opinion, if necessary. In law there is no intermediate state.

8. *Form of summary.*—The following is an example of a summary of evidence, and may be useful as a guide: Summary of evidence in the case of No. ———, Private ———, 1st Battalion ———.

1st Witness: No. ———, Corporal ———, 1st Battalion.

At ——— on the 25th June, 1918, the accused, who is a member of my section, was absent from 6 a. m. parade. I called the roll.

Cross-examined: I do not know whether you reported sick that morning.

———, *Corporal,*
1st Battalion ———.

2d Witness: No. ———, Sgt. ———, 1st Battalion ———, states:

At ——— at 8.30 p. m. on the 25th June, 1918, I saw the accused near the battalion lines. He was drunk. I placed him under arrest.

———, *Sergeant,*
1st Battalion ———.

3d Witness: No. ———, Cpl. ———, 1st Battalion:

At ——— at about 8.30 p. m. on the 25th June, 1918, I was with Sergt. ——— when he arrested the accused near the battalion line. Accused was drunk.

———, *Corporal,*
1st Battalion ———.

The accused, being duly warned, states:

I was not drunk when Sgt. ——— arrested me. I was sick, and asked to be paraded before a medical officer.

———, *Private,*
1st Battalion ———.

or

Accused declines to make statement.

Taken down by me at ——— this 27th day of June, 1918, in the presence of the accused.

Rules of procedure 4 (*c*, *d*, and *e*), complied with.

——— *Lieut.,*
1st Battalion.

9. *Charges.*—Rule of procedure 108 provides that in the case of a F. G. C. M.—"The statement of an offense may be made briefly in any language sufficient to describe or disclose an offense under the army act." All that is generally necessary is a form of charge (without particulars or with brief particulars) as in the Manual of Military Law, pages 650–659. It is advisable to use the exact words of the army act.

For further notes on charges, see below.

10. *Certified true copy of conduct sheet.*—A copy of the original sheet should be made, and the words "certified true copy" written across it, signed and dated by an officer. The prosecutor will produce this on oath at the trial.

11. *Attendance of witnesses at the trial.*—(*a*) Although the evidence of witnesses at the taking of the summary may be dispensed with, at the trial the presence of every witness is essential. Documentary evidence such as written statements of evidence can not be admitted at a court-martial. The practice of not summoning witnesses for the trial because the accused states his intention of pleading guilty is wholly incorrect. For instance, in a case of desertion the attendance of the military police, or the person who first made the arrest, will be secured.

(For evidence of surrender see army act, S. 163 (j) and (k), and K. R. para. 517*a*.)

(*b*) Certificates of surrender must be signed personally. They can not be signed by one officer "for" another.

CH. II.—CONVENING F. G. C. M.

12. *Composition of court.*—(*a*) Though, according to the rules of procedure, any commanding officer may convene these courts, a field general court-martial ought not to be considered the equivalent of a regimental court-martial as regards the composition of the court (see R. P. 20, note 1), and, whenever practicable, such courts should be convened by infantry brigade commanders or officers holding equivalent commands.

(*b*) Specially qualified officers are stationed at convenient centers (usually corps headquarters or bases) whose whole time is devoted to sitting as members of courts-martial. No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers.

(*c*) A court-martial officer will take no part in preparing for trial any case in which he may have to act as a member of the court.

(*d*) He will invariably make the record of evidence and will advise the court on all points of law and procedure. His opinion will have the same weight as that of a judge advocate (see R. P. 103 F).

(*e*) The convening order on Army Form A 3 must be signed personally by the convening officer. An officer can not sign it "for" another officer. All alterations will be initialed by the convening officer.

(*f*) The members of the court must be named.

12 (a). The convening officer will insure that a competent prosecutor is appointed (for duties, see R. P. 60).

CH. III.—CHARGES.

13. *Responsibility of staff captains.*—Staff captains of brigades and officers holding similar appointments should remember that they are responsible to convening officers that the proper charges are preferred, that there is evidence to support them in every detail, and that all inadmissible evidence is erased. They are not relieved of any responsibility by the fact that this pamphlet is issued to battalions, etc.

14. *Complicated cases.*—All complicated cases, all cases of fraud, or cases where there is doubt whether the weight of evidence is sufficient to secure a conviction, should be submitted, for legal advice, to Army headquarters, or to the D. J. A. G., as the case may be, prior to the convening of the court.

15. *Multiplication of charges.*—Multiplication of charges should be avoided, and convening officers should bear in mind that when a soldier is to be arraigned on a serious charge, any minor offenses against him may be dropped.

16. *Number of cases on A. F. A. 3.*—In serious cases, *e. g.*, *desertion*, *cowardice*, one case only should be entered on each A. F. A. 3. At the same time, if two or more prisoners are concerned in the same transaction, it is eminently desirable that the proceedings should be forwarded at the same time.

17. *Election to be tried.*—When a man elects to be tried by F. G. C. M., the words "Elects trial," should be written prominently on A. F. A. 3 and on the charge sheet, if any. (See K. R., para. 487A and 583 (1).)

18. *Entering the charge.*—(*a*) Though the charge can be framed in any language sufficient to describe an offense under the Army act, it should follow the words of the act as far as possible. For instance, "using obscene language to a N. C. O." is incorrect. It should be "using insubordinate language to a superior officer."

The following are also incorrect, because they do not sufficiently show the offense intended: "Willfully becoming a straggler," "not joining regiment when ordered to do so," "refusing to obey."

(*b*) A charge sheet is not essential, and in most cases it should be possible to enter in the second column of the schedule, on page 2 of A. F. A. 3, all that is necessary. Otherwise, a separate sheet can be used which will be initialled by the convening officer.

(*c*) In all charges of a general nature, *e. g.*, an offense under S. 40 A. A., or an offense against an inhabitant, sufficient particulars must be given, and if it is found impracticable to enter these in the schedule, they may be entered on a separate piece of paper, or a charge sheet may be attached. The object in view is to let the accused know, from the charge set out, exactly what the offense is which the prosecution intends to prove, *e. g.*:

"Offense against person of inhabitant, indecent assault on * * *," or "neglect to the prejudice, self-inflicted wound."

(*d*) More than one offense will never be included in one charge (R. P. 11*a*): If the evidence discloses more than one offense, sufficient particulars will be given to show which offense is included in each charge laid, *e. g.*, if an accused is alleged to have stolen the goods of several comrades, the particular goods and the comrade referred to in each charge will be stated.

(*e*) Such matters as "when a defaulter," "when undergoing F. P. No. 1" will not be inserted in a charge.

(*f*) Alternative charges should be marked "alternative" in the schedule.

19. *Cowardice, A. A., S. 4 (7).*—Charges of cowardice, in the absence of specific evidence of an exceptional character, can only be sustained when the occurrence takes place under fire or in immediate proximity to the enemy. The fact of absence is not, by itself, sufficient to support a charge of cowardice.

20. *Offenses by sentries, A. A., S. 6 (1) (k).*—In such cases it must always be proved what the post was, that the accused was posted, and that he was still on duty when the offense was committed.

If the accused received permission to leave his post for a short time but did not return, he can not be charged with leaving his post.

If he is found asleep away from his post, he should not be charged with sleeping on his post, but with leaving it.

(See notes 3 and 13 to A. A., S. 6., M. M. L., page 382.)

The words "sentinel" or "sentry" do not apply to telephone operators or to men on traffic control duties. For stablemen, see K. R., para. 560.

If there is any doubt as to an offense falling under S. 6, it should be charged under S. 40.

21. *Drunkenness.*—(*a*) If a person subject to military law takes a drug, and the effect of that drug, either by itself or in conjunction with alcohol, is to render him unfit for duty, that person may be lawfully convicted of the offense of drunkenness, from whatever motive he may have taken the drug, unless he takes it, upon the order of a medical officer, having previously reported sick in the proper manner.

In the case of a medical officer, the opinion of another medical officer will be necessary before taking a drug that may render him unfit for duty.

(*b*) In framing charges of drunkenness together with other charges, *e. g.*, threatening or insubordinate language, particular attention is drawn to M. M. L., page 22, para. 30 and Note (*c*).

22. *Violence, A. A., S. 8 (i) and (2).*—Charges should only be framed under subsection (*i*) in cases where the violence has been committed under exceptionally grave circumstances.

23. *Disobedience, A. A., S. 9 (i) and (2).*—(*a*) A charge under A. A., S. 9 (*i*), should only be preferred in cases of so grave a nature that the court are likely to award the sentence of death. "Willful" defiance must be proved specifically, and it is always advisable to submit the case for legal advice beforehand.

(*b*) In all other cases the charge will be laid under A. A., (9) (2).

(*c*) A command means an order given to a man as an individual.

(*d*) A charge under this section will not lie unless the accused was given sufficient opportunity to comply, and the fact that he did not comply must be proved.

(*e*) The expression "refused to obey" will not support a charge under this section. This or other irregular conduct in connection with an order may come under S. 8 or S. 40.

(*f*) When in close arrest a soldier may not be ordered to perform any duties except such as are necessary to his own cleanliness and health, or as stated in K. R., paragraph 482 (*q. v.*).

In open arrest he may also be ordered to attend parades.

(*g*) Paragraph 9, M. M. L., page 17, should be carefully studied.

24. *Desertion* (M. M. L., p. 18, pars. 23 and 16).—The distinction between desertion and absence without leave consists in intention.

A soldier is guilty of the crime of absence without leave when he is voluntarily absent, without authority, from the place where he knows, or ought to know, that it is his duty to be.

If, when he so absented himself, the soldier intended either (*a*) to leave His Majesty's service altogether, or (*b*) to avoid some particular important duty for which he would be required, he is guilty of desertion.

In other words, desertion is absence without leave caused by either of the intentions mentioned in the last paragraph, and the court, before convicting a man of desertion, must be satisfied beyond reasonable doubt that he had one or other of those intentions.

The existence of an intention, like any other fact, must be proved by evidence, but its existence is proved when facts are established from which the intention may reasonably be inferred. E. g., it is a rule of law that every man is presumed to intend the natural and probable consequences of his acts; therefore if it is proved that the accused knew that his battalion had been ordered to attack next morning and that he absented himself without leave and remained absent until the attack was over, the court would be justified in finding that he intended to avoid taking part in the attack, unless he can account satisfactorily for his absence.

A. *Intention to desert His Majesty's service altogether.*—The existence of this intention is to be inferred from the circumstances of the absence, e. g., length of absence (though this by itself is inconclusive), distance from his unit and nature of the place at which accused is arrested, whether when arrested he was wearing uniform or plain clothes, and if the former whether he was in possession of arms or equipment or of pay book or other marks of identity, whether he was arrested in hiding or surrendered himself into military custody, and so on.

B. *Intention to avoid a particular important duty* (sometimes called "constructive" or "short" desertion).—In order to establish this intention, evidence must be produced to prove:

1. That the man knew with reasonable certainty that he would be required for this special duty;

2. That he was absent and thereby avoided the duty.

To prove 1, the prosecution should show:

(i) That the man was warned, or failing this—

(ii) That the company, etc., as a whole was warned, if possible on parade at which the roll was called, and that the accused was present, or

(iii) That, having regard to the usual custom of reliefs, he must have known that the turn of his company, etc., was imminent.

(An officer or senior N. C. O. should give evidence as to the usual custom of reliefs; and definite evidence as to the dates of the special duty which the accused missed should be given by these witnesses), or

(iv) That the period of absence was so long that he must have known for a certainty that he would miss active operations by such lengthy absence.

The burden of proof is then shifted, and the man will have to convince the court that he did not know that he would miss the duty in question.

Desertion involves a question of special intention, and there can be no intention without knowledge; where, therefore, the accused has been absent for a short time only, the prosecutor must prove that the offender knew, with reasonable certainty, that he would be required for some special duty. If the only evidence is that the man absented himself, and no evidence is produced (e. g., special warning, usual routine, length of absence), to show the probable state of his mind, the court can not make any assumption as to his intention, and they can convict the accused of absence only.

It should be noticed that it is necessary to produce evidence of facts such as those specified above, which will prove the accused's knowledge. Such statement as "The accused knew," "It was common knowledge," "The whole company knew," are not evidence.

Where desertion or absence is charged it is advisable, and often necessary to show, with approximate certainty, the time and the circumstances of the commencement and termination of the period of absence.

As regards the commencement of the period of absence the best evidence is usually that of a noncommissioned officer who called the roll and found the accused absent, and such evidence should always be produced; if this is impossible owing to casualties or other causes, evidence can often be given by some noncommissioned officer or man that on or about a certain date or time the accused was present with, and that at a later period he was absent from his section or platoon.

It is as a rule impossible to sustain a charge of desertion without proof as to the manner in which the period of absence terminated. It is of no use to call a noncommissioned officer to say that at such a date the accused was brought back under escort.

But unexplained absence for however short a time is sufficient in law to sustain a conviction for absence, as distinguished from desertion.

Doubtful cases to which the above rules are difficult to apply should be submitted for legal advice before trial. If after trial a doubt arises, the confirming officer should obtain advice before confirming, with a view, if necessary, to ordering a revision, the court being directed to convict of absence only.

Where there is a charge of desertion an alternative charge of absence will not be added.

In cases where a soldier surrenders himself as an absentee or deserter, a certificate under army act, section 163 (j) or (k) should be obtained to obviate the attendance of a witness. The certificate must comply strictly with the requirements of the act. This procedure does not apply where the man has been arrested.

If the accused has been taken into custody in the zone of operations, evidence, which must be given personally at the trial, can be obtained through the agency of the provost marshal, whose staff have full information as to the apprehension of stragglers (see pars. 6 and 11). If the accused was arrested in England the original A. F. O., 1618, Part I, will be obtained and produced by a witness on oath.

When the accused has been arrested by or has surrendered to the civil police in England and A. F. O. 1618 is to be produced as evidence, the "particulars in the evidence" on this form should be pasted over so as not to be seen by the court if likely to prejudice the accused, e. g., if they contain a statement that he was arrested for a civil offense; but evidence in relation to the charges of desertion or absence on which the soldier is being tried which would be admitted as parole evidence before the court should not be pasted over.

25. *Looting.*—(*a*) Any man who is absent from his unit and found to be in possession of what is obviously plunder, or found in a furnished house which is unoccupied and in which he has no right to be, should be charged with "Leaving his commanding officer to go in search of plunder."

In this case it may be advisable to add an alternative charge for absence.

(*b*) If it can not be proved that the man was absent from his unit when arrested, but he is found in an unoccupied furnished house where a door or window has been forced by him, he should be charged with "Breaking into a house in search of plunder."

(*c*) If it can not be proved that the man was absent from his unit when found to be in possession of what is obviously plunder, or if he is found in a furnished house which is unoccupied and there is no evidence of "breaking," he should be charged under S. 40.

26. *Offenses against the censorship regulations.*—If a genuine letter is submitted for censorship in the ordinary course, it will not be made the subject of disciplinary action. If, however, there is evidence that an objectionable letter is submitted, not bona fide as a letter for transmission, but expressly for the purpose of insulting any officer who may read it, a charge under S. 40 can be preferred.

A letter containing a cipher is not a letter submitted bona fide, and a charge under S. 40 can be laid.

27. *Murder.*—When a charge of murder is preferred an alternative charge of manslaughter should always be added, if the facts are such that the court may wish to convict of the lesser offense. Charges of murder should be submitted to the D. J. A. G. before trial.

28. *Self-inflicted wounds.*—(*a*) The object in view is to prevent any man who has inflicted a wound upon himself, either intentionally or negligently, from being withdrawn further from the firing line or for a longer period than is absolutely necessary.

(*b*) Special provision for dealing with these cases is made in each army, and the circulars issued on the subject should be studied.

(*c*) Trial is held at the earliest possible moment, and if convicted, the man when fit for duty returns to his unit. In every case where he is likely to be fit for duty again in a few weeks the sentence should be commuted to field punishment. Medical officers when giving their evidence should be asked as to the probable duration of incapacity.

(*d*) It is usually impossible to obtain a conviction under S. 18 for "maiming," as the special intention has to be proved. Consequently, unless the evidence is conclusive, such cases should be tried under S. 40, "Neglect to the prejudice," etc.

29. *Section 15.*—(*a*) Where the charge is for absence by reason of overstaying leave, the period of absence charged will be that between the date when the accused might reasonably have rejoined his unit and the date on which he did, in fact, rejoin, or on which he was arrested.

(*b*) A charge of "Failing to appear at the place of parade," etc., should never be preferred on active service, nor should any charge under S. 15 (3) or (4). A charge of absence should be laid instead.

CH. IV. MISCELLANEOUS.

30. *Acting and lance rank.*—In consequence of difficulties which have arisen in dealing by court-martial with offenses committed by privates and N. C. O.'s holding acting rank, the following instructions have been published:

> Whenever a private or N. C. O. holding acting rank is brought to trial before a court-martial, the permanent rank of the accused should invariably be shown, e. g., "private (acting corporal)" or "corporal (acting sergeant major)."

In this manner the permanent rank of the accused will be brought to the notice of the court. Sentences are frequently rendered inoperative through N. C. O.'s being wrongly described. (See M. M. L., p. 550, note 4.)

31. *Insanity*—The procedure in the case of insanity is set forth in army act, S. 130.

Where there is ground for supposing that the accused was insane when he committed the crime, or is insane at the time of trial, a medical board should be held.

(1) If the board is of opinion that the accused was insane when the offense was committed but is now fit for trial, a court-martial will be held and evidence will be taken to enable the court to bring in a finding as indicated in R. P., 57 (A).

(2) If the board is of opinion that the accused is now insane, then, if the offense is trivial, the accused should be evacuated without trial; but if it is a

serious offense, a trial will be held and evidence taken to enable the court to bring in a finding as indicated in R. P., 57 (A).

In both the above cases, the evidence will be given before the finding.

NOTE.—The proceedings of the board are not admissible in evidence unle s the accused wishes to use them in his defense. Evidence will usually be given by one or more members of the board.

32. *Mental deficiency, shock, etc.*—Where a medical board has been held and the accused found sane, or when the question of insanity has not arisen at all, the prosecution or the defense may call evidence to show that the accused is lacking in intelligence, or is suffering from mental shock, etc.

This class of evidence should usually be given after the finding, unless the accused calls it in his defense to prove that he was not responsible for his actions at the time of the occurrence, when it may be given before the finding.

It is similar to statements made by the accused in mitigation of punishment, and will be considered by courts in estimating the sentence.

(NOTE.—In no case can further evidence be heard by the court by way of revision or otherwise after they have completed the proceedings and have forwarded them to the confirming officer.)

PART II.—THE TRIAL.

CHAPTER V. BEFORE STARTING THE TRIAL.

33. *Charge.* (See R. P. 108, M. M. L., p. 632.)—(*i*) Read carefully the charge and particulars (if any), and compare them with the corresponding section of the army act, to see whether any offense is disclosed.

If no offense seems to be disclosed, consult the convening officer. A charge will not be altered in any way by the court without his authority.

(*ii*) Read the whole of the section of the army act under which the offense is charged, including any proviso, and also the notes in the M. M. L. on that section.

(*iii*) Split up the offense into its component parts, with a view to making sure that each part of it is established by the evidence, e. g., in a charge under the following section the following facts would have to be proved:

Section 6 (i), (k):

1. That accused had been posted as a sentry.
2. What his post was.
3. That accused was found asleep.
4. That he was then on his post.
5. That he was then still on duty.

CHAPTER VI. PROCEDURE AT TRIAL.

34. *Preliminary.* (Have the M. M. L. open at R. P. 105 et seq., and see that the R. P. are complied with.)

(*a*) See that the court is properly constituted according to R. P. 106 and 107 M. M. L., pages 631 and 632.

(*b*) Have all the accused, prosecutors, witnesses, etc., in, and read page 1 of the A. F. A. 3 (convening order).

(*c*) Give each accused his right of challenge (see R. P. 110). If any accused challenges, and the challenge is upheld, report the matter immediately to the convening officer, and, if necessary, adjourn the trial of that accused.

(*d*) Swear the court. A. A., S. 52 and R. P. 109 and 111. Forms of oaths are printed inside the cover of this book. (For affirmations, etc., see M. M. L., A. A., S. 52 (4) and note, p. 432; R. P. 28, p. 588; R. P. 30, p. 589.)

(*e*) March out the witnesses and all accused except the accused person (or persons) to be tried first and their counsel or friends (see R. P. 109).

An accused charged jointly with another accused has the right to demand to be tried separately, and if several accused are charged separately they can not be tried together unless they consent. Such consent should be entered on the proceedings.

(*f*) Arraign the accused (see R. P. 112), and enter plea of accused on each charge in column 3 of page 2 of A. F. A. 3.

35. *On plea of guilty.*—(*a*) If the accused pleads guilty, see that the provisions of R. P. 35 (B), M. M. L., p. 591, and R. P. 37, p. 593, are complied with before entering the plea.

(*b*) A plea of "guilty" should not be accepted in any case in which a death sentence is likely to be awarded.

(*c*) Where charges are alternative, a plea of "guilty" can not be taken on more than one charge.

(*d*) As a rule, unless the accused pleads "guilty" to the more serious of alternative charges, pleas of "not guilty" will be entered on both charges, and the trial proceeded with. After hearing the evidence the court can determine on which charge the accused is "guilty." Findings of "guilty" and of "not guilty" should then be entered in column 4 of page 2 of A. F. A. 3 accordingly.

(*e*) A plea of "guilty" covers all defects in the evidence unless it appears from the summary, if any, or otherwise, that the accused has not in fact committed the offense charged, in which case a plea of "not guilty" should be entered.

36. *Statement in mitigation of punishment.*—(*a*) In addition, the court should record any statement in mitigation made by the accused. Such statements may be on oath. If the accused makes no such statement on a plea of guilty, that fact should be recorded. (R. P. 37 (F), p. 593, and note 4 on p. 594.)

(*b*) Whenever the accused makes any statement in mitigation of punishment, or otherwise, which implies that he did not commit the offense, a plea of not guilty will be entered and the accused tried on that plea.

(*c*) For the purpose of deciding whether or not to accept a plea of guilty, the accused's statement will be assumed to be true. The test is not whether it is believed or is likely to be believed; but whether, if true, it would afford a defense to the charge or would suffice to reduce the finding to one of a less grave offense.

(*d*) E. g., if an accused charged with striking a superior officer says that he did not know that he was a N. C. O., a plea of not guilty will be entered. A similar course will be followed, if an accused pleads guilty to drunkenness, and says, "I admit having had drink, but I was fit for duty," or to a charge of desertion, and says, "I admit I was absent, but I had no intention of missing duty."

(*e*) It is usually advisable to enter a plea of "not guilty" whenever the accused says anything about his intentions or alleges ignorance that he was doing wrong.

(*f*) The summary, or statement of evidence, if available, will be attached to the proceedings.

(*g*) If there is none, sufficient evidence on oath will be taken down to enable the confirming officer to judge of the gravity of the offense.

(*h*) Evidence of character. The procedure is exactly the same as on conviction after a plea of "not guilty."

(*i*) Complete A. F. A. 3.

37. *On plea of not guilty.*—The case proceeds as laid down in R. P. 114, M. M. L., page 633.

38. *Record of evidence.*—(*a*) The summary will not be used as a record of the evidence given at the trial, nor is it sufficient to say, "The witness corroborated his evidence on the summary" or "corroborated the last witness." A short note of what the witness actually says at the trial will be taken in narrative form.

(*b*) Where a number of accused persons are tried together for an offense charged to have been committed by them collectively, one record covering all the accused can be taken. Where men are being tried separately, the record of evidence against each of them must be complete in itself, and such a statement as "For further evidence see trial of * * *" is improper, as this does not comply with the requirements of R. P. 114 (*c*).

(*c*) Evidence (including cross-examination) need not be taken down as question and answer unless the prosecution or defense specially demand it. It is within the discretion of the court to make the record in such manner as will then make the facts clear.

(*d*) Ordinary witnesses should be called in the order of the events to which they testify, and not in order of rank or seniority.

(*e*) Proper names should be recorded in block letters.

39. *Form of record.*—Statements such as "R. P. 83B complied with," "Witness withdraws," "The prosecution is closed," etc., are not necessary.

The following is sufficient:

Trial of (number, rank, name, unit).

(The name, etc., of the prosecutor, and if a friend of the accused represents him or assists him at the trial, his name, etc., will be entered. If either person is a qualified barrister or solicitor, the fact will be stated.)

40. *Prosecution.*—First witness (number, rank, name, unit), sworn, states ———.

(The witness should describe himself, e. g., "I am C. S. M., of B Company, to which accused belongs," and his evidence should then continue with time, date, and place, e. g., "At 4.30 p. m., on the Jan. 12, 1916, in the fire trenches * * *," or "about 2 or 3 p. m., on a Thursday (I forget the date) in billets, * * *.")

Cross-examined ———.

(A witness may be cross-examined about any matter which has a bearing on the case. The notion that cross-examination is limited to questions directly arising out of a witness's evidence in chief is erroneous. For instance, a witness can, and should, be cross-examined as to any facts tending to assist the intended defense, though he has not referred to them; or a witness as to facts for the prosecution can be cross-examined to establish the good character of the accused.)

Reexamined and not cross-examined.

Examined by the court ———.

(A witness also, at any time before the court is closed for consideration of the finding, may be "examined by the court" to clear up any point either for the prosecution or for the defense. He may be recalled, if necessary, for the purpose. R. P. 86, M. M. L., p. 622.)

Second witness. (As before.)

41. *Defense.*—It is the duty of the president to inform the accused at the close of the case for the prosecution that he can either—

(*a*) Give evidence as a witness on oath, in which case he is liable to be cross-examined by the prosecution and examined by the court; or

(*b*) Make or hand in a statement, not on oath, in which case he is not liable to be questionad in any way; or

(*c*) Say nothing.

(*d*) He can also, if he wishes to do so, hand in a written statement, on oath, in which case the statement becomes his evidence, and he can be cross-examined on it.

The president should also inform the accused that the court will attach more weight to evidence on oath than to a statement not on oath.

The president should then ask the accused which course he wishes to adopt and whether he has any witnesses to call in his defense.

Accused (Number, rank, name, unit), sworn, states ——— or hands in written statement marked ———. Cross-examined ——— (*see* R. P. 80 (3)), examined by court ——— (*see* R. P. 80 (3)), or accused (No., rank, unit), not sworn, states ———, or accused (No., rank, name, unit), not sworn, hands in written statement marked ———, or accused (No., rank, name, unit) makes no statement.

In each of the three latter cases he can not be cross-examined by the prosecution or by the court, and throughout the proceedings, except when the accused is giving evidence on oath, the court should be very careful not to ask him questions about the facts of the case such as to draw from him statements to his disadvantage.

Second witness: (Number, rank, name, regiment, etc.) ——— (as in evidence for prosecution), or accused calls no witnesses.

42. *Evidence as to character before finding.*—The accused, if he wishes to do so, may call evidence of good character before the finding. He should also be permitted to produce testimonials, etc., to which the court should give such weight as they may think fit. Before accused decides to give or call evidence of good character it should be pointed out to him that this will entitle the prosecutor to cross-examine and to produce evidence of bad character. For this purpose the prosecutor may produce the field-conduct sheet with entries of previous offenses.

In no other circumstances can evidence of bad character be produced before finding.

43. *Plea of illness, etc.*—When a soldier, in his defense or in mitigation of punishment, urges a substantial plea, resting on medical grounds, a medical witness should invariably be called either to substantiate or to rebut this before the finding if it is in defense and after if it is urged in mitigation of punishment.

44. *Finding.*—(*a*) In the case of an equality of votes the finding is entered as one of "Not guilty." (S. 53 (8) A. A., M. M. L., p. 433.)

(*b*) The finding on each charge is entered in column 4 of page 2 of A. F. A. 3 simply as "Guilty" or "Not guilty."

(*c*) If the accused pleads "Guilty," a finding of "Guilty" is entered as well as the plea of "Guilty."

(*d*) If the court is in doubt on which of alternative charges to find accused guilty, he should be found guilty of the simpler offense or a special finding should be brought in, as to which *see* R. P. 44 and note, M. M. L., page 598.

(*e*) The only cases in which an accused can be found guilty of a lesser offense or of the same offense with variations in detail are given in S. 56 A. A.

(*f*) A special finding can not be recorded on a plea of "guilty."

(*g*) Except on a charge of attempting to desert, in no case can an accused be found guilty of a graver offense than that charged, nor can he be found guilty of an entirely different offense, even if there is evidence of such an offense.

45. *Honorable acquittal.*—A finding of honorable acquittal is incorrect in a case where the charge does not affect the honor of the accused. It is equally inappropriate unless the accused's conduct has been irreproachable throughout the transactions investigated by the court.

46. *After finding.*—If an accused is found not guilty, he will be so informed and will be released from arrest.

47. *Evidence of character after finding.*—(*a*) After a finding of guilty (whether after a plea of guilty or not guilty) the court will take and record such evidence of character and particulars of service of the accused as is available.

(*b*) As a general rule no evidence of bad character should be produced before the court, except the field conduct sheet, A. F. B. 122, which will be produced by a witness on oath after the finding, to guide the court as to sentence.

(*c*) The field-conduct sheet will not be attached in original, but either extracts recorded or a certified true copy attached.

(*d*) If evidence of character is not available at the trial, a not to this effect will be recorded.

(*e*) Any evidence of good character is admissible and will be recorded.

(*f*) If the accused is under a suspended sentence or a sentence of field punishment, the court will be informed of this after the finding, and the fact will be recorded.

(*g*) When recording evidence of character it should always be stated whether it is taken "before finding" or "after finding."

(*h*) Finally the accused will be asked if he wishes to say anything further, either as to character, in mitigation of punishment, or otherwise, and a record will be made of his statement, or of the fact that he declines to make one.

48. *Sentence.*—(*a*) Only one sentence is awarded whether the accused has been found guilty on one or more charges. This sentence may, however, where authorized by the army act, consist of more than one punishment, e. g., reduction to the ranks and £1 stoppages, or 28 days' F. P. No. 1 and three months' forfeiture of pay.

(*b*) Sentence is entered in column 4 of page 2 of A. F. A. 3, below the findings. It should be entered briefly, e. g., "60 days' F. P. No. 1," "2 years' I. H. L.," "3 years' P. S.," "Death," etc.

(*c*) The maximum punishment which can be awarded will be found laid down in the section under which the charge is laid.

(*d*) "Such less punishment" can be found by reference to section 44, A. A., M. M. L., page 416.

(*e*) To award death or P. S. a court must consist of three or more officers. S. 49 (1) (d), A. A., M. M. L., page 429.

(*f*) To award death the opinion of the court must be unanimous, and an entry to this effect will be made in the schedule. S. 49 (2), A. A., M. M. L., page 429.

(*g*) Other sentences are decided by a majority, the president, if necessary, having a casting vote. S. 53 (8), A. A., M. M. L., page 433; also R. P., 69, and notes, M. M. L., page 615.

(For sentence where an accused has elected trial, see Ch. V., par. 80, M. M. L., p. 50.)

49. *Recommendation to mercy.*—As to recommendation to mercy, see M. M. L., Ch. V., par. 88, page 51.

Care will be taken to see that a recommendation to mercy is consistent with the finding. For instance, on any charge a recommendation to mercy "on

the ground that the accused appears not to be responsible for his actions" would invalidate the conviction, as would also a recommendation "on the ground that the accused may not have known that he had no right to the goods" on a charge of theft.

50. *Notes on sentences.*—The following points should be especially noted:

(*a*) Imprisonment with or without hard labor can not be awarded for a term longer than two years, including any sentence which may be running at the time.

(*b*) Penal servitude can not be awarded for a term less than three years. Maximum is for life.

(*c*) Field punishment can not be awarded for a term longer than three (calendar) months, taking into account any sentence which the accused may already be undergoing. It should be awarded in days.

(*d*) Except on the lines of communication it is a rule for any punishment up to three months to be in terms of field punishment, and not imprisonment with hard labor.

(*e*) Detention and discharge with ignominy are not awarded on active service in the field.

(*f*) Forfeiture of pay not exceeding three months may be awarded on active service in addition to or without other punishment. S. 44 (6), A. A., M. M. L., p. 417.

As this forfeiture of pay commences on the day of award, if field punishment is also awarded (for which pay is ipso facto forfeited, A. A., S. 138 (i)) the two forfeitures of pay will run concurrently; consequently, a sentence of forfeiture of pay, to be effective, must be awarded for a longer period than any field punishment awarded. (See footnote to K. R., par. 494, as amended by Army Order 209, 1912.)

(*g*) A fine not exceeding £1 may be awarded in cases of drunkenness only, either in addition to or in substitution for any other punishment. S. 19, A. A., M. M. L., p. 398.

(*h*) *Stoppages.*—To enable a court-martial to sentence a soldier to stoppages of pay, the amount of damage, etc., must be stated in the charge and proved in evidence.

A definite sum must be mentioned in the sentence.

When damage or loss has been occasioned by the commission of an offense, stoppages ought always to be awarded.

(*i*) A court-martial has no power to award C. B., or reprimand or severe reprimand (except in the case of officers).

(*j*) N. C. O.s can be awarded the same punishment as private soldiers, but, before being sentenced to P. S., imprisonment, or F. P., they should be sentenced to reduction to the ranks.

(*k*) N. C. O. s can also be sentenced to forfeiture of seniority or to reduction to a lower grade or to the ranks.

(*See* S. 44 (h) to 44 (n), A. A., M. M. L., p. 416; S. 190 (6). A. A., M. M. L., p. 555; R. P., 47, M. M. L., p. 602.)

51. *Rank of N. C. O. s.*—In dealing with N. C. O. s, care will be taken to ascertain their permanent rank. An acting N. C. O. can not be deprived of his acting rank by sentence of court-martial. A court-martial can only deal with him in his permanent rank.

Thus a private (acting sergeant) can not be reduced by sentence of court-martial to the rank of acting corporal, nor can he be reduced to the ranks. A sergeant (acting C. S. M.), however, though he can not be reduced or reverted to the rank of sergeant, can be ordered to forfeit seniority in the rank of sergeant, or can be reduced to the rank of corporal or to the ranks. Any sentence involving loss of liberty, i. e., of one day's F. F. or upwards, will automatically reduce an N. C. O. "acting" or otherwise to the ranks.

Acting and lance ranks can only be dealt with by the man's C. O., but the probable loss of such rank as a consequence of the conviction should be taken into consideration by the court. (*See* G. R. O. 1025.)

52. *Completion of A. F. A. 3.*—After sentence has been recorded in column 4 of page 2 of A. F. A. 3, the president will sign page 2, and also the certificate on page 3. He need not sign the record of evidence.

53. *Documents.*—Only documents forming part of the proceedings will be attached inside A. F. A. 3.

All documents produced should be distinctively marked and initialed by the president. They should be attached as far as possible in the order of

their production, e. g., charge sheet, if any, record of evidence, exhibits. A. F. B. 122. Where the accused has pleaded "Not guilty," the summary of evidence need not be attached (unless it has been used during the trial in cross-examination of a witness, to point out discrepancies in his evidence. (*See* M. M. L., chap. 6, par. 58, p. 71.)

Any remark which the court may wish to make on the conduct of a witness or in connection with the trial should be attached to the proceedings in a separate minute to the convening officer.

54. *Adjournment.*—A court can always be adjourned, and in case of difficulty arising to adjourn and consult the convening officer is better than to go on and convict and eventually have the conviction quashed.

54A. *Death sentence.*—Whenever sentence of death has been passed by court-martial upon an officer or soldier the sentence is to be notified forthwith to the accused.

At the conclusion of the trial the president will cause to be forthwith transmitted to the accused under sealed cover A. F. W. 3996, duly completed and signed by himself.

In all courts-martial, therefore, the oath will be administered to members in the amended form contained in the cover of this book.

In the event of an accused being sentenced to death the president will attach to the proceedings a certificate in the following terms:

"I certify that A. F. W. 3996 has been handed to the accused under sealed cover in accordance with army council instruction 570 of 1918.

"Date ———.

"Signed ——— ———,
"*President.*"

The president must satisfy himself that the sealed over containing A. F. W. 3996 has actually been handed to the accused. Convening officers will insure that presidents of courts-martial are supplied with one copy of A. F. W. 3996 and one envelope for every accused who is charged with an offense for which sentence of death is likely to be awarded, and that they are informed of the terms of this order.

55. *Rules of evidence.*—A field general court-martial will observe the rules of evidence as strictly as any other court-martial. (*See* Army act, S. 128.) The admission of hearsay or other inadmissible evidence may invalidate the proceedings.

Great latitude, however, should be given to the defense both in cross-examination of witnesses for the prosecution and in the evidence produced by it, e. g., written statements, letters, and hearsay can be considered by the court for what they are worth, if tendered for the defense. (*See* also par. 6 (*c*).)

56. *Relevancy.*—Evidence should be excluded which does not tend, either directly or as circumstantial evidence, to prove the charge. Caution should be exercised in checking cross-examination by the defense; this may at the moment appear irrelevant, but may be intended to help in building up a defense to be disclosed later.

57. *Hearsay* and evidence of opinion are not generally admissible. For exceptions *see* M. M. L., Chapter VI, paragraphs 58–71, pages 71–73.

"Hearsay" may be taken to include any statement made not in the hearing of the accused, whether it was made by a third party or by the witness himself.

The following are example of hearsay:

(*a*) "The sergeant reported to me that accused was absent."

(*b*) "I was told by Sergt. A. that accused had struck him."

(*c*) "I spoke to the O. C. Company on the telephone and told him accused had come back to battalion headquarters and had told me he had been sent there. The O. C. Company said accused had had no such orders.

"I placed him under arrest."

(*d*) Accused said he had been in the field ambulance. "I made inquiries there, and found he had never been admitted there."

In the above examples:

(*a*) The sergeant must be called to prove the absence of accused.

(*b*) The sergeant must be called.

(*c*) The accused did not hear the conversation. The witness can only state what he did, and not what he said, i. e., "Accused told me he had been sent back to battalion headquarters by the O. C. Company. I spoke to the O. C. Company on the telephone. I then placed accused under arrest." The O. C. Company must be called to prove that he had given no such order.

(*d*) This is in effect only repeating an unsworn, uncross-examined statement made by somebody at the field ambulance. A witness must, therefore, be called from the filed ambulance to swear to the fact, from his own knowledge, that accused had not been admitted.

58. *Documentary evidence.*—(See generally M. M. L., Chap. VII., pars. 30–40, pp. 63–64.)

NOTE.—No document is admissible in evidence for the prosecution unless it has been produced by a witness on oath.

(*a*) Written statements by absent witnesses must not be put in by the prosecution as "documentary evidence," e. g., a report of an A. P. M. as to an arrest, a certificate of a M. O., a letter dealing with the facts of the case from some military authority or civilian in England. These are inadmissible for the prosecution, being "hearsay," though they may be considered if produced by the defense.

Written statements are generally inadmissible in evidence, unless it is proved that they have been written by the accused.

Certain exceptions to this rule will be found in S. 163, A. A., M. M. L., pp. 523–524, e. g., a "descriptive return" in cases of desertion (see S. 163 (1) (i) and ante p. 15), the finding of a court of inquiry on illegal absence (S. 163 (1) (g) and K. R., par. 1912); a certificate in the case of a deserter or absentee who has surrendered himself into custody (S. 163 (1) (j) and (k)).

(*b*) *Orders.*—In any case involving disobedience of written orders the prosecution must:

(i) Produce the original orders, if in existence, and if not, a certified true copy. (Verbal evidence as to their terms may only be given when it is proved that no better evidence is available.)

(ii) Show that the orders reached the accused, either directly, or by being read out on a parade that he can be proved to have attended, or by being posted in a place where in the ordinary course he should have seen them, or should, at any rate, have looked for them.

59. *Admissions and confessions.*—As to admissions and confessions by an accused, see M. M. L., Chapter VI, paragraph 74, page 74. An admission made by a soldier to an officer who is investigating a case should not, as a rule, be used against the soldier.

60. *Production of stolen and other articles.*—When a man is charged with theft, the subject of the charge should always, where possible, be produced and identified in court. If it is not produced, evidence must be given as to what has become of it.

A similar rule applies to all other articles referred to in evidence.

61. *Identification of documents, etc.*—All documents and goods, etc., material to the proceeding must be produced by one of the witnesses and identified by all witnesses who give evidence as to them.

PART III.—AFTER TRIAL.

CH. VII.—CONFIRMATION.

62. (*a*) The confirming officer is usually the officer who convened the court. (As to confirmation generally, see A. A., S. 54; as to field general courts-martial, see R. P. 120 M. M. L., p. 634.)

(*b*) Finding and sentence may be "confirmed," "reserved," or "not confirmed." These words, entered and initialed, in the case of field general courts-martial, in column 5 of p. 2 of A. F. A. 3, are sufficient. (For effect of nonconfirmation, see note 2 to A. A., S. 157, M. M. L., p. 519, and Ch. V., par. 5, p. 36. For variations see M. M. L., p. 698.)

As to cases of insanity, see G. R. O. 2030.

(*c*) In the case of finding and sentence being confirmed, Certificate C on p. 3 of A. F. A. 3 will also be signed.

(*d*) If there is any doubt about the legality of the finding or about any other point, a confirming officer may, before confirming, send proceedings up to army headquarters, or to the deputy judge advocate general direct, and they will be returned direct with a ruling on the point in doubt.

Many convictions have had to be quashed owing to defects which could have been cured by sending back the case to the court for revision before confirmation.

(*e*) An acquittal does not require confirmation.

(*f*) Reference may be made usefully to the following rules of procedure, etc.: Procedure, R. P. 51, M. M. L., p. 603; revision, R. P. 52, p. 604; mitt-

gation of sentence on partial confirmation, R. P. 54, p 605; confirmation of finding on alternative charges, R. P. 55, p. 605; confirmation notwithstanding informalities, etc., R. P. 56, p. 606; finding of guilty in spite of immaterial variation from the charge, note 2 to R. P. 44, p. 599; referring confirmation, A. A., S. 54 (5); withholding confirmation, A. A., S. 54 (6), and note 10, M. M. L., p. 437. Comment on sentences K. R., par. 589.

63. *Restitution of stolen property.*—Property proved to have been stolen, etc., should be restored to its owner by the confirming officer, and a note that this has been done should form part of the forwarding minute (see Army Act, S. 75, M. M. L., p. 450).

CH. VIII.—DEATH SENTENCES.

64. *Reservation.*—A death sentence will not be promulgated without the sanction of the commander in chief, to whom it will be forwarded through the usual channels. The confirming officer should enter the word "reserved" in the last column of the schedule of A. F. A. 3, and should sign Certificate "C." Neither finding nor sentence should be confirmed.

65. *Custody of the accused.*—The confirming officer will cause the accused to be handed over to an A. P. M., and will cause to be attached to the proceedings a certificate that this has been done.

66. *Recommendations as to death sentences.*—In such cases the recommendations of the reviewing officers will be given as to whether the sentence should be carried out or commuted, and the reasons for the recommendations will be given.

67. *Death sentences for desertion.*—In particular the fullest information on the following four points is to be forwarded with the proceedings in all cases where it is considered that the extreme penalty should be inflicted for desertion:

(i) The character (from a fighting point of view as well as from that of behavior) of the soldier concerned, his previous conduct in action, and the period of his service with the expeditionary force.

(ii) The state of discipline of the regiment, battalion, or unit concerned.

(iii) The commanding officer's opinion (based on his personal knowledge, or that of his officers, of the soldier's characteristics), as to whether the crime was deliberately committed. The reason for forming that opinion will be given.

(iv) The reasons why the various reviewing authorities recommend that the extreme penalty be inflicted, or otherwise.

In cases where the essential part of the offence is "to avoid a particular duty," by these reports the commander in chief hopes to assure himself that a good fighting man is not shot for absence arising from, for example, oversight or a drunken spree.

68. *Death sentence, certificate regarding.*—When a death sentence is carried out, a certificate that the proceedings have been promulgated and a certificate that the sentence has been duly executed, giving date and time, signed by the assistant provost marshal, are to be indorsed on or attached to the proceedings; a telegram is to be sent to army headquarters, by the division, etc., concerned, giving these particulars as regards the sentence, as soon as it is carried out.

CH. IX. REVIEW OF PROCEEDINGS AND EXECUTION OF SENTENCES GENERALLY.

69. *Detention.*—With reference "Field Service Regulations," part II, section 113 (4), soldiers sentenced to detention can not be committed to the military prison in the field, and such sentences will be commuted to field punishment.

70. *Field punishment.*—When a soldier under sentence of field punishment is not doing duty in the trenches or employed at work or fatigue, he will be treated as though he were undergoing imprisonment with hard labor, and, whenever possible, he will be confined; smoking will be prohibited, and no rum ration, wine, or beer allowed. If necessary he may be kept in "irons," i. e., fetters or handcuffs, in such a way as to prevent his escape; this applies to field punishment, both No. 1 and No. 2.

When awarded field punishment No. 1, the prisoner may be attached for certain periods to fixed objects, under the conditions laid down in paragraphs 2 (b) and 4 of the rules with respect to field punishment (vide p. 721, M.M.L., and G.R.O. 2103).

71. *Unnecessary documents.*—Such army forms as B, 116, "application for a court-martial"; copies of B, 296, "Statement as to character and particulars of service accused," and A 49, "Declaration of military exigencies, under rule of procedure 104" or list of witnesses are not required.

72. *K. R. 632.*—The brigade or other commander who remits any part of a sentence awarded by F. G. C. M. is responsible that D. A. G., base, is notified of such remission.

73. *Terms of commuted sentences.* A. A., S. 57 (*i*). —No punishment can be considered as less punishment within the meaning of S. 57 (i), army act, if the term during which it is to be inflicted is longer than the term of the original punishment; consequently, if it is desired to commute a term of imprisonment or detention to one of field punishment No. 1, the latter will not exceed in length the term of imprisonment or detention awarded by the court. Attention is also drawn to note 9 to S. 57 on p. 440 of M. M. L.

74. *Discharges with ignominy.*—As a general rule it is not considered desirable to carry such sentences into effect during the period of the war.

75. *Variations and recommendations.*—Remissions, commutations, or variations of the sentence of the court, by any of the reviewing officers, should be entered and signed in the schedule on page 2 of A. F. A. 3; and recommendations as to suspension, etc., should be made on a separate sheet.

76. *Alterations.*—Any alteration on page 1 of A. F. A. 3, or in the first and second columns of the schedule will be initialed by the convening officer.

77. *Committals to prison.*—Except on the lines of communication soldiers sentenced to penal servitude and imprisonment will not be committed to the military prison in the field until these sentences have been reviewed by the army commander or commander in chief. Divisions, etc., will be notified when such sentences are approved or if they are suspended. Special instructions are issued on the lines of communication.

78. *Insanity.*—If an accused is found guilty but insane, he will be evacuated in custody to the lines of communication and the proceedings will be forwarded to the deputy judge advocate general, G. H. Q. (See G. R. O. 2030.)

79. *Promulgation.*—Court-martial sentences, except those on officers involving death, penal servitude, imprisonment, cashiering and dismissal, and those on other ranks involving death sentences, should be promulgated before the proceedings are forwarded. If sentences are commuted, permitted, etc., after promulgation, the proceedings, after being forwarded to higher authority, will be returned to the unit for a certificate to be entered thereon that the commutation, etc., has been noted.

80. *Review.*—The proceedings of all court-martial, whether confirmed or not, and even if the trial was not completed, will be sent, through the usual channels, to army headquarters, H. Q., L. of C. Area, or to the D. J. A. G., as the case may be, for review.

81. *Quashing.*—After confirmation proceedings will not be quashed on purely legal grounds without reference to army H. Q., H. Q., L. of C. Area, or to the D. J. A. G.

82. *Expedition.*—Every effort should be made to expedite court-martial cases. They should, therefore, be disposed of with the utmost dispatch, and minor irregularities, whilst being noted, should be left for correction until after the case has been reviewed.

PART IV.—CH. X.—ARMY (SUSPENSION OF SENTENCES) ACT, 1915.

83. *Objects of act.*—The objects of the act are:

(1) To give men, who have committed serious military offenses through exhaustion or temporary loss of nerve, an opportunity of redeeming their character and earning the remission of their sentence.

(2) To prevent wastage of troops by the withdrawal from the front of men sentenced to penal servitude or imprisonment.

(2) To prevent wastage of troops by the withdrawal in order to avoid duty shall not attain their object.

84. *Disposal after sentence.*—Except on the lines of communication, when any man is sentenced by a court-martial to penal servitude or imprisonment, he will not be committed to prison but will be kept under arrest until the directions of the "superior military authority" under the act are received.

On the lines of communication the man, if he is available as a reinforcement, will not be committed to prison until the directions of superior military authority are obtained.

85. *Superior military authority.*—The powers of a "superior military authority" are exercised by the commander in chief, the army commanders, and the G. O. C. L. of C. area.

86. *Powers of confirming and reviewing officers.*—The act does not affect the rights of confirming and reviewing authorities to commute or remit the sentence of the court-martial.

87. *Recommendations.*—Where such authorities consider that sentences of imprisonment or penal serviture should be carried out, they will state this definitely in a separate minute when forwarding the proceedings, giving reasons for their recommendations.

88. *Notification.*—When a sentence has been suspended by a superior military authority, the unit concerned is at once notified by telegram stating the date of suspension, and the soldier under sentence is released from arrest. He thereupon becomes free from any disability in respect of the sentence which has been suspended.

89. *Competent military authority.*—The expression "Competent military authority" means any general or other officer not below the rank of field officer duly authorized by a superior military authority. The powers are usually delegated to brigade commanders and other officers holding equivalent or superior commands.

90. *Field punishment and suspended sentences.*—If a soldier while undergoing field punishment is sentenced to imprisonment or penal servitude and such imprisonment or penal servitude is suspended, the previous sentence of field punishment, subject to any remission that the competent military authority may think fit to make, will continue to be carried out, and will not affect the duration of the suspended sentence. But if a sentence of penal servitude or imprisonment is put into execution, any current sentence of field punishment will cease to be carried out.

91. *Suspended sentences and stoppages, etc.*—Any part of a sentence, which would have taken independent effect if no part of the sentence had been suspended, will take effect notwithstanding suspension, *e. g.*, reduction to the ranks, fines, and stoppages for damage or loss.

But a sentence of forfeiture of pay awarded conjointly with a longer term of imprisonment becomes inoperative when the sentence of imprisonment is confirmed, and can not, therefore, take effect if the sentence of imprisonment is subsequently suspended.

92. *Trial of soldiers under suspended sentences.*—A soldier under suspended sentence may be sentenced to field punishment.

If he is sentenced to imprisonment or penal servitude, A. F. W. 3104 should be forwarded to the superior military authority with the proceedings of the court-martial, Part VII of the form being filled in and signed by the competent military authority.

The confirming authority in such cases will direct that the soldier is not to be committed to prison. (See G. R. O. 1260.)

The superior military authority may suspend a second or any later sentence and will direct whether the sentences are to run concurrently or consecutively.

The following points as to his powers in this respect should be noted:

(1) Imprisonment and penal servitude will not be ordered to run consecutively, and if the first sentence was imprisonment it is "avoided" when the sentence of penal servitude is passed.

(2) If a soldier has two sentences of imprisonment (or of penal servitude) and both are put into execution, they can only be ordered to run concurrently. If, however, a second or further term is suspended, it can be made to run consecutively on the preceding term, provided that—

(3) No soldier may be ordered to serve continuously or consecutively a period of imprisonment exceeding two years.

93. *Penal servitude following imprisonment.*—Whenever a soldier while subject to a suspended sentence of imprisonment is sentenced by a court-martial to a term of penal servitude, the confirming officer *before confirming the proceedings* will submit them for direction:

(1) In the case of soldiers serving in an army, to army headquarters.

(2) In the lines of communication area, to headquarters, lines of communication area.

(3) In the case of soldiers serving elsewhere, to the deputy judge advocate general. (G. R. O. 2152.)

In all such cases the recommendations of the confirming and reviewing authorities will be attached in the form:

"assuming that the proceedings are in order, I recommend ———.

PART V.—MISCELLANEOUS

CH. XI.—TRIAL OF OFFICERS.

94. *Convening court.*—In the absence of special circumstances rendering such a course impracticable, officers will be tried by general court-martial. Divisional and superior commanders hold warrants for this purpose.

95. *Preparation for defense.*—At the earliest practicable moment after it has been decided to assemble a court-martial for the trial of an officer a staff officer will visit him for the purpose of ascertaining that he fully understands the nature of the charge and evidence. He will invite him to state his requirements for his defense and will take such action as may be necessary.

96. *Notification.*—As soon as the date of trial is fixed the convening officer will send a telegram to "Advocate," G. H. Q., giving date, time, and place of trial, name and regiment of the accused, and the section of the Army act under which the charge is laid.

97. *Charge sheets.*—(*a*) In the case of a general court-martial a charge sheet must be signed personally by the officer in actual command of the unit to which the accused belongs.

(*b*) It is also necessary that the order of the convening officer, or a staff officer for him, directing trial by general court-martial should be indorsed on the charge sheet below the signature of the commanding officer in accordance with the illustration appearing on page 659, M. M. L.

98. *Convening order.*—It is essential that the names of the members of the court should be inserted in the convening order, or, in the case of a general court-martial, that the unit (e. g., battalion, or, in the case of the Royal Artillery, the brigade) should be specified. A convening order directing officers (unnamed) to be detailed from such and such an infantry brigade is invalid, and the court would have no jurisdiction. (See K. R., par. 577, and R. P., 20.)

99. *Rules of procedure.*—It should be recollected that general courts-martial must be conducted strictly in accordance with the rules of procedure. If any of the rules mentioned in R. P. 104 can not be observed, a certificate in accordance with that rule must be attached to the proceedings.

100. *Record of service.*—After finding, all details of the accused's service which can be obtained should be produced. In every case it is at least possible to produce the army list for this purpose.

101. *Forfeiture of seniority.*—For purposes of forfeiture of seniority the "reserve of officers" and "general list" are not corps, and a sentence of forfeiture of seniority in such a case can only be in the form prescribed at the head of page 696, M. M. L.

102. *Confirmation—AA., s. 44 (f) and (g).*—Sentences of "forfeiture," "reprimand," and "severe reprimand" may be confirmed by all officers who hold warrants to confirm G. C. M., and should then be promulgated. When the other sentences mentioned in A. A., s. 44, are awarded the proceedings can only be confirmed by the commander in chief. In such cases all authorities in forwarding the proceedings will make their recommendations upon the case.

103. *Disposal.*—Officers sentenced to penal servitude, imprisonment, cashiering, or dismissal are to be handed over to the P. M. or A. P. M. of the formation immediately after promulgation, to whom special orders have been issued. (See G. R. O. 1807.)

104. *Charge sheet and summary.*—When practicable before a court is convened the charge sheet and summary of evidence will be forwarded to army headquarters or headquarters L. of C. area for approval, or, in the case of an officer belonging to some other formation, to the D. J. A. G., through the head of the formation.

Lieut. Col. RIGBY. I would like to call attention, in connection with what I was saying, to subparagraphs *b*, *c*, and *d*, of paragraph 12, which are short, and I will read them here, if I may [reading]:

(*b*) Specially qualified officers are stationed at convenient centers (usually corps headquarters or bases) whose whole time is devoted to sitting as members of courts-martial. No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers.

(*c*) A courts-martial officer will take no part in preparing for trial any case in which he may have to act as a member of the court.

(*d*) He will invariably make the record of evidence and will advise the court on all points of law and procedure. His opinion will have the same weight as that of a judge advocate. (See R. P. 103 F.)

Senator CHAMBERLAIN. I think that is a very good system.

Lieut. Col. RIGBY. Now, referring to this copy of proceedings which I have offered of two field general records, I was told by Judge Cassel that this is a complete, verbatim copy of the records, except that the names have been elided, and initials have been substituted in place of the names.

Senator CHAMBERLAIN. Is the evidence there, too?

Lieut. Col. RIGBY. The evidence is here, and it shows just the way they do it.

Senator WARREN. This is a photograph of the trials?

Lieut. Col. RIGBY. Yes, it is a photograph of these two trials, except that initials are substituted for names.

The first is the case of a man who was charged with desertion in the face of the enemy during the retreat from Mons. He was discovered at a quarter after 8 o'clock in the morning of September 6, 1914, hiding in civilian clothes in a house away from the line. A court was convened to try him that same day; he was tried that same day; he was sentenced to death that same day; the record was reviewed by the corps commander, Sir Horace Smith-Dorrien, that same day; it was also reviewed by, and confirmed by, Field Marshal French, the commander in chief, that same day; and the man was executed at 7 minutes after 7 a. m. on the morning of the 8th of September, a little less than 47 hours after the offense took place.

Senator WARREN. I am presuming that those officers who reviewed were nearby.

Lieut. Col. RIGBY. Yes; they were undoubtedly all together. It was during the retreat from Mons, and under unusually exigent circumstances. You will find something about this case in Gen. Childs' statement. He speaks of it there. He says that the man was shot and the Germans were marching over his grave within a few hours after his offense. That may be another case, which may be much stronger than this; or this may be the case he is talking about.

Senator CHAMBERLAIN. It was a very unusual case.

Senator WARREN. Yes, of course; very unusual.

Senator CHAMBERLAIN. That case did not go to the authorities in Great Britain?

Lieut. Col. RIGBY. No; it was reviewed by the Deputy Judge Advocate General attached to Marshal French's staff. But they were all there together, and of course any deterrent effect from the execution had to be then or never, and to have let that man go until after the retreat from Mons was ended, and until after the battle of the Marne, the situation would have been so much changed that there would have been no value in the execution of the death sentence, at all.

The other case is a case where the evidence shows that the offense took place in 1918. This was during the trench warfare, on September 2, 1918. That trial was had in October—October 6; and the sentence was confirmed by Field Marshal Haig on November 3, so that that took about two months to run it through. The whole proceedings are there, including all of the testimony. Those are photographs, really, of those two records; and it shows how they do it.

Senator CHAMBERLAIN. Are they typical of all the cases over there in the British army?

Lieut. Col. RIGBY. I think they are typical of the field general courts. The field general courts are intended to be, and are, very summary.

It is rather interesting, and perhaps it might be of interest to you, to put in a letter that was received by the Deputy Adjutant General's office, Gen. Childs' office, from the commander on the Rhine, in response to a request for permission to have me visit some of those field courts and have a stenographer present. The letter goes on to say that they doubt the wisdom of allowing us to visit and to have a stenographer there, because the field courts are intended to be, and are very summary, and they feared that if we had a stenographer present, the thing might not be carried on in exactly the same way, and we might not get a true picture of the way it is really done.

Senator CHAMBERLAIN. The field court is not very much different from our summary court is its procedure?

Lieut. Col. RIGBY. Their field court is very peremptory. The testimony is taken in the form of a narrative; it is written down by one member of the court, either the president or another member under the direction of the president, but it is simply summarized.

Senator WARREN. Could we act with the same haste under our Articles of War as in the particular case that you indicate there?

Lieut. Col. RIGBY. I do not see how we could. Take that first case. I do not know any way that we could grind a case through as promptly as that first case.

Senator WARREN. There are some liberties given to the accused under our rules. There is some time given to him to provide for his counsel or defense, is there not, in our law?

Lieut. Col. RIGBY. Of course many of those things can be waived, and it can be shortened by the direction of the commanding general in case of an emergency; but we always require the stenographic record, in practice, and in practice we always have a written review of the case afterwards; and we hold that there must be a reasonable opportunity for counsel, at least over night, to prepare; so in practice it would not be possible to do it as rapidly as that.

Senator WARREN. I say, it is more rapid than any way we have of handling a case under our law and practice?

Lieut. Col. RIGBY. I do not think there would be any way of getting a case investigated, referred for trial, tried, approved, and confirmed, all on the same day. I know there would not. We could not do anything like that.

Senator WARREN. I do not believe that in such a case as that the punishment was any too radical, because they were under the fire of the enemy all the time.

Lieut. Col. RIGBY. Yes, sir; it is an illustration of a class of cases where prompt punishment is necessary, and if it is not meted out promptly, it is of very little value at all, perhaps; and, as Gen. Childs says in one place in his interview, where it is necessary to take a man's life, you do not take his life because you want the man's life, but for its deterrent effect upon others; and for that purpose, in those cases action must be prompt, or it is valueless. The only other system I know of under which you could get as prompt action as that is the French system. They could, in their "special courts," waive everything.

Senator CHAMBERLAIN. In these English cases you refer to the field officer was not present, nor was the judge advocate present?

Lieut. Col. RIGBY. That first case was before the time when they appointed these "specially qualified" officers; because the date of this court-martial officer order is in September, 1916, two years later; and I do not see anything in the 1918 case, definitely showing the presence of a "specially qualified officer"; except the letters "C. M. O." following the name of "Capt. B. C.," the third member of the court, in the order convening the court, which probably stand for "Court Martial Officer."

I might, before leaving England, say something as to the other courts.

The district court does most of the work in time of peace, and the greater part of it, at home in the United Kingdom, in time of war. That court is composed wholly of officers of the army. It is composed of three or more officers, usually of three; and no judge advocate, in practice, attends that court in the great majority of cases. There is authority in the convening authority to appoint a judge advocate, if he chooses; but he almost never does. They have, however, since the creation of this body of "specially qualified officers," these court-martial officers, been using those officers sometimes as members of the districts courts. For instance, Maj. Du Plat Taylor has been sitting practically as permanent president of the London command district court for the past 18 months. The form of record of the district court is practically that shown in the form of record of the field general court. There is no stenographic record taken.

Its proceedings are confirmed by the authority that appoints the court or higher authority.

The French have, for ordinary purposes, one court, what they call the conseil de guerre, which tries all military cases. There were, during the war, some emergency courts appointed by presidential decree by the President of the Republic. They called them "special courts" ("conseils de guerre speciaux"), and sometimes in conversation referred to them as "courts-martial," as contradistinguished from their ordinary conseils de guerre.

The regular court—"conseil de guerre"—is primarily a territorial court. It is appointed for a territorial district of the army, and for a period of six months. It has no civilian members. It is composed of seven judges. In case of the trial of an enlisted man, a private, or a noncommissioned officer, one noncommissioned officer sits on the court. He must always be a noncommissioned officer. They can not appoint a private.

Senator WARREN. One out of a court of seven?

Lieut. Col. RIGBY. Yes, one out of a court of seven; and in practice, at least, they invariably use a regimental or battalion sergeant-major, what they call the "adjutant," which corresponds to our regimental or battalion sergeant-major—their highest noncommissioned officer; and he is rather closer to the status of an officer than is our sergeant-major. He wears a belt like an officer's belt, a Sam Browne belt, and he wears a uniform that looks like an officer's uniform, and a kepi that looks like an officer's kepi.

In the armies on active service—they make the distinction, not wholly between peace and war, but between the armies in the territorial districts, and the armies on active service or in a "state of

siege"; and I might say also that Great Britain in her military law makes the distinction, not between peace and war, but between "on active service" and "not on active service."

The "conseil de guerre," in the armies on active service, or in "a state of siege," consists of only five, instead of seven, judges. They are all military men. There is the same provision for one noncommissioned officer on the court on the trial of an enlisted man, whether private or noncommissioned officer. I talked with a good many French officials, military officers, and men connected with the administration of justice in their military courts, as to the plan of having the noncommissioned officer on the courts; and I tried to get their opinions; and I may say that in order to guard myself against reflecting my own ideas or thoughts in any way, in getting the information, and to be sure that I had it accurately in any event, I made a practice of taking with me two stenographers, an English-speaking stenographer and a French-speaking stenographer, and an interpreter; so that when I would ask the question in English, it would be taken down by the English-speaking stenographer in English, and then it would be translated into French, and then the French stenographer would get down the exact language of the officer interviewed, and afterwards at my office that was translated, so that I would get a picture, as near as possible, of the exact language. I did that as far as possible in every case in France.

Almost without exception the French officers think well of the plan of having a noncommissioned officer on the court. They say that, in effect, it does not make much difference one way or the other, they think, in the severity of the judgment. Some of them are inclined to think that the noncommissioned officer is a little more severe in his judgment of the men than the commissioned officers are. Some of them think that there is some advantage in getting the enlisted man's viewpoint on the court, in some cases. I think almost all of them agreed that they thought that the men were rather better pleased to feel that one of their grade was on the court; that, from their viewpoint, there was some value in it. I also asked in as many cases as I could what they would think of extending the plan so as to include private soldiers. Almost without exception they were opposed to that.

One or two were inclined to favor it. It had been proposed at one time in the French Chamber of Deputies, but was voted down. But almost everyone with whom I talked said that they felt that the private soldier would not have enough experience; so that his judgment would be of no value on the court; that they thought he would either be guided wholly by the officers on the court, or else would try in every case to let the man off. They feared that he would not be of any judicial value to the court.

I have, and could put into the record, if desired, copies of portions of interviews relating to that subject with quite a number of French officers from generals down.

Senator WARREN. I do not believe that would be necessary to put in.

Senator CHAMBERLAIN. I do not think it is necessary.

Lieut. Col. RIGBY. I also, after Senate bill 64 was introduced—a copy of it having been sent to me over there which I received some

time early in June—in the talks I had after that asked the opinions of the men I interviewed concerning the plan of having more than one enlisted man on the court. I think that with one exception everyone to whom I talked was opposed to increasing the number of enlisted men on the court. They thought that the one man on the court gave the viewpoint of the enlisted man sufficiently and that there could not be any advantage in increasing the number.

Senator WARREN. Did you find any adherence to the proposition of having a court of all enlisted men, excepting the officers conducting the trial?

Lieut. Col. RIGBY. No, sir; I found no one who favored that; and I know of no court anywhere so composed.

Senator WARREN. That has been suggested by some one.

Senator CHAMBERLAIN. I have not seen any suggestion of that.

Lieut. Col. RIGBY. I know of no court, anywhere, so composed.

Senator WARREN. No; I did not say so composed. I had understood that one quite prominent lawyer in this country had thought that better—that is, to make a jury, you might say, of the court, and make it all of enlisted men—and I wanted to know if that had been thought of over there?

Lieut. Col. RIGBY. I found no one who favored that; nor anyone, with one exception, who favored more than one enlisted man on the court, speaking from their experience, all around.

Senator CHAMBERLAIN. Then this court you speak of, the "conseil de guerre," considers cases of both enlisted men and officers?

Lieut. Col. RIGBY. It considers both, but its composition varies. In case an officer is the accused, there is no enlisted man on the court; and there is a rather elaborate table made up as to how the composition of the court has to be fixed, depending upon the rank of the accused. The higher the rank of the accused, the higher the rank of the men on the court; and it is rigidly fixed in that way.

Senator WARREN. The court is composed of men of higher rank than the officer to be tried?

Lieut. Col. RIGBY. Yes, sir; of his rank and higher, except when you get up to the provisions for the trial of a "general of division," or where a field marshal is the accused, then they have to make different provisions.

Senator WARREN. Yes, of course; but in the trial of a captain the court would be composed of officers all above the grade of captain?

Lieut. Col. RIGBY. Of the rank of captain and above; it is rigidly fixed in that way. For the trial of a captain, the court is: One colonel; one lieutenant colonel; three majors; and two captains (i. e., in the territorial armies).

Senator CHAMBERLAIN. Does the French system provide that the accussed may have counsel?

Lieut. Col. RIGBY. The French do, positively. The British do not. The British permit it. In the British courts, in the district courts, they very rarely have counsel. In the field general court they rarely have counsel. In the general court they almost invariably do have counsel. The British regulations do not permit counsel at the preliminary investigation, although as a matter of favor it is sometimes allowed at the preliminary investigation.

Senator CHAMBERLAIN. That is, the investigation before the charge is preferred?

Lieut. Col. RIGBY. During the investigation of the charge, before it is referred for trial.

The French provision is that in the regular "conseil de guerre" trial in time of peace, the charges must be read to the acused at least three days before the trial, and he must at that time be advised of his right to counsel, and that if he does not choose counsel for himself the president of the court will assign counsel to him at the trial.

In the armies on active service that three days provision may be disregarded; and in fact the whole preliminary investigation may be omitted, and the commanding general may direct, in the armies on active service, under section 156 of their code, that the accused be sent directly before the court for trial; that is, without any preliminary investigation whatever, by what they call "direct order." In that case he must be given 24 hours notice of the time that the court is to convene, and counsel for him must be named by the convening authority at the same time that he orders the case to trial. The accused may, if he chooses, then have his own independent counsel present also to assist him.

In case the three days' notice is given him, then it is not ne essary to name counsel for him in advance; the practice is then the same as in the territorial armies. In practice, in Paris, and I am told in the territorial armies generally, they very frequently have civilian advocates. They have a provision in their law by which the president of a military court has the same power as the judge of a civilian criminal court, to appoint a lawyer to appear for the accused, and if a lawyer is so appointed he must serve without any fee. That is a part of the obligation of his office as an advocate.

So that, not infrequently, lawyers are assigned in that way by the court in the territorial armies at home to defend the accused.

Senator CHAMBERLAIN. Is there any appeal procedure there?

Lieut. Col. RIGBY. Yes. Will you allow me to finish, just a moment, as to the composition of the court?

Senator CHAMBERLAIN. Yes; certainly.

Lieut. Col. RIGBY. I was going to say—about the practice there in Paris—of all those trials that I attended, I think probably half the cases were defended by civilian lawyers in their robes of office. I saw a woman defend one case. She did it very well, too.

In the armies on active service the counsel for the accused is almost invariably a military man, and almost invariably assigned by the president of the court, usually on the advice of the "commissaire-rapporteur," or judge advocate. They assign in practice private soldiers very frequently as counsel for the accused. They make no distinction at all between a soldier, an enlisted man, and an officer in assigning counsel; they pick a man who they think is capable of doing it, whether he is an army officer or a private soldier. If he is a private soldier, he will wear his advocate's robe over his uniform. If he is an officer, he does not.

I talked with quite a number of men as to the advisability, in their judgment, of appointing lieutenants and private soldiers as counsel for the accused, and they all of them failed to see any reason why any distinction should be made. How much the counsel for the accused may really amount to with them, particularly in the armies on active service, I think may be just a little bit doubtful. I have

a statement by one commissaire du gouvernement—a rather naïve statement—in which he says it does not make any difference, because the court make up their minds in the armies on active service, and are very rarely influenced in any event by anything that the counsel for the accused may say.

I ought to add to that that on the other hand I got statements by several officers who seemed to think that the counsel for the accused were of value. It depends, of course, upon the personnel of the court and of the counsel.

The other class of courts that they have, that were established under the presidential decree of September 6, 1914—or that they had during the war until they were abolished by an act early in 1918—the emergency courts, what they called "special courts," were composed of three judges—one officer of field rank, one other officer, and in case the accused was an enlisted man or a civilian, the third judge was a noncommissioned officer. In those courts there was no requirement of even 24 hours' notice before sending a man to trial. The commanding general could order him to trial instantly, without any preliminary investigation whatever, appointing a counsel for him at the same time. The court might be immediately convened, he might be immediately tried, and the sentence followed immediately, and was to be immediately executed, even though it should be a sentence of death; and no appeal of any kind was allowed from those sentences.

Senator CHAMBERLAIN. That was afterwards repealed?

Lieut. Col. RIGBY. They were abolished in 1918.

Senator CHAMBERLAIN. Why?

Lieut. Col. RIGBY. I think—now, I am only saying what I think; I got various kinds of information—there had been a great deal of outcry in France against the summary proceedings of those courts.

On the other hand, the reason for the appointment of those courts was stated by Marshal Joffre, on whose recommendation the decree was entered, in a letter of September 9, 1914, in which he promulgated the decree to the army, Circular Letter No. 4487.

Senator CHAMBERLAIN. That was without legislative authority?

Lieut. Col. RIGBY. That was without specific legislative authority. And he says that the reason for it was the "imperious necessity" for a more rapid procedure than was possible with the constituted forms in use for the regular courts.

Senator CHAMBERLAIN. It was that which the legislature, the Chamber of Deputies, finally repealed?

Lieut. Col. RIGBY. They abolished the courts. The decree was merely a presidential decree, and the courts were abolished in 1918. There were a great many trials by those courts during the war from which there was no appeal allowed.

Senator WARREN. You have spoken two or three times of active service. Of course, I assume you mean by "active service," service at the front? The reason that I ask that question is that with us active service is service at the front or anywhere else, if not retired or reserve service, and I wondered if your distinction was the same over there or whether otherwise you meant service at the front or in the war.

Lieut. Col. RIGBY. No; I was using it in their technical sense. Their distinction as to the footing or status is not wholly between

peace and war as ours is, but between "on active service" and "not on active service." Even during the war you may have troops governed in France by their territorial system at the same time that others are "on active service" and subject to the regulations pertaining to that status.

In Great Britain this war was the first time in some three centuries that all troops at home were regarded as being "on active service."

The distinction, as defined in section 189 of the British Army act, is:

> The expression "on active service," as applied to a person subject to military law, means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country.

The antithesis to that is "not on active service."

For Great Britain particularly, with her very many little wars all over the world, that plan has proven its value; because they do not want to have to have their military courts trying for murder in the United Kingdom just because there is war in Afghanistan.

I was going to say, as to the French "special courts," the only thing that operated in a kind of way as an appellate power, or power of revision, was the provision that the death sentence should not be carried into effect except upon the order of the commanding general, and the commanding general had the power, if he chose to do so, to suspend it, while consulting the pleasure of the President of the Republic.

Senator CHAMBERLAIN. There was no other appeal?

Lieut. Col. RIGBY. There was no other appeal.

Senator CHAMBERLAIN. Have you any idea how many court-martial sentences there were in France—how many trials

Lieut. Col. RIGBY. Senator, I have those figures here, as a matter of fact, but my memory is, and I will have to verify that, that those are among the papers given to me by Minister Ignace, subject to the same kind of confidential letter that the British Judge Advocate General gave to me. I will look his letter up. He reserved some things, and not others; and if it is not included, I will put that into the record, if I may.

Senator CHAMBERLAIN. That will be the total number of court-martial cases; and if possible, the average of sentences, or the aggregate of sentences.

Lieut. Col. RIGBY. Not the severity of sentences, and not the number of death sentences. Those figures we could not get. They were promising and promising, but they never gave them; and I think they felt that it was not wise to let us have them. But we got the total number of cases, and the total number of convictions, and the total number of acquittals, and divided up among the different kinds of offenses, so many for desertion, so many for this, so many for that; but we do not have the severity of sentences.

Senator WARREN. I think I ought to ask, right there, how the British and French sentences compared, as to severity of sentence, with the severity of sentences by the American Army?

Lieut. Col. RIGBY. As to the French, I can not speak by the card, because that was the one thing that, as I said a moment ago, they withheld. I know that they gave a great many severe sentences;

and they do not have the provision for detention barracks, as the British call it, or disciplinary barracks, as we call it; so that an imprisonment sentence with the French really means a sentence to imprisonment, and is a much more severe sentence than our disciplinary barracks sentence would be.

The French, however, had a plan, which they copied from the British during the war and put into force, I think, in the fall of 1917, of suspending sentences with the provision that after suspending, they might put them in force again.

Senator WARREN. Something like a parole?

Lieut. Col. RIGBY. In effect, a kind of parole. They suspended them, and the men went back and served with their units, and if they made good, the sentence was, after six months, to be canceled.

Senator WARREN. Along that line, what is the practice in our Army as to sentence; to undertake to carry out the full sentence or to make the term of imprisonment depend upon a man's conduct?

Lieut. Col. RIGBY. The latter, as I understand it, Senator. The purpose, as I understand the disciplinary barracks, is to reform the men and give them an opportunity for restoration to the colors, if they are worthy of it. It depends largely on the man himself.

Senator WARREN. Exactly. Now, do they sometimes give excessive sentences—for instance as to the length of time, a very long time—really with the expectation of reducing the time, not in the percentage by which in civil sentences they reduce it, but in proportion as the soldier deserves it by his conduct? How do you handle that? Do you follow the lines of our civil practice where there is a certain portion of time taken off the sentences for good conduct, or do you sometimes make very severe sentences with the expectation when they are made that they will be shortened, and to a much greater degree than a sentence under our civil law?

Lieut. Col. RIGBY. Of course, really both. There is a provision for shortening a sentence for good conduct; and then there is this other, also. I am told that Col. Rice, the commandant of the Leavenworth Barracks, says that it really does not make any difference to him, in recommending restoration to the colors, or putting a man in the way of restoration to the colors, what the nominal length of the sentence is, at all; it is up to the man to prove himself and make good; and if he does make good, a man under a nominal sentence of five years or ten years may be restored just as quickly as one with a nominal sentence of two years.

I think, perhaps, that two of the cases that Senator Chamberlain will remember, that were cited in the Senator's speech of December 30 of last year, were fair illustrations of that. I remember one of those cases where the man was sentenced, if I remember correctly, in June, to 15 years for absence without leave. He was released from the barracks, in the normal course of the operation of Col. Rice's plan, and restored to the colors on the 23d of December following, as a Christmas gift, so that his nominal 15 years' sentence really amounted to less than seven months. Another of the cases that was cited, I think, in the same speech, was a 10-year sentence in March; and that man went to Fort Jay and was released on the same day that the other man was released, the second day before the Christmas following, after being in the barracks just about nine months.

Senator WARREN. You would consider those as fair representations of what might be the outcome of long sentences?

Lieut. Col. RIGBY. Yes; as I understand it, Senator; certainly. Those releases were made, of course, before the special clemency board came up—before any of that controversy.

(At this point the statement of Lieut. Col. Rigby was suspended in order that the committee might hear Gen. Parker.)

STATEMENT OF BRIG. GEN. FRANK PARKER, UNITED STATES ARMY, COMMANDING THE FIRST DIVISION.

Senator WARREN. Will you please state your name and rank to the stenographer?

Gen. PARKER. Frank Parker; brigadier general, United States Army; at present commanding the First Division.

Senator WARREN. That division is now being demobilized?

Gen. PARKER. Yes, sir; it is just completing its demobilization. It will be demobilized within the next few days.

Senator WARREN. You have had duty abroad?

Gen. PARKER. Yes; I have been abroad practically for the last four years, first with the French Army, and then with our own Army.

Senator WARREN. You were with the French Army?

Gen. PARKER. I was an observer with the French Army practically throughout the war.

Senator WARREN. By appointment from the War Department here?

Gen. PARKER. Yes; by order of the War Department.

Senator WARREN. What were your duties over there? I am speaking of your duties as observer while with the French Army. What did that develop into?

Gen. PARKER. When we declared war the military mission of the United States sent me to the French general headquarters as chief of our mission at those headquarters. When Gen. Pershing arrived with his staff, in June, he maintained me between himself and the French general headquarters as his chief of mission until December of 1917, when I was given command of the Eighteenth Infantry, of the First Division.

Senator WARREN. You, of course, with your service with the French, probably speak French fluently?

Gen. PARKER. Yes; I speak French fluently. I have been with the French on a good many occasions.

I subsequently commanded the Eighteenth Infantry, and the First Infantry brigade, and the First Division throughout the hostilities.

Senator WARREN. Now, in your service has there come under your notice quite vividly the operation of courts-martial, general or special, so that you would like to express an opinion upon our present laws, our present Articles of War, as compared with the bill which is now before us and which I presume you have examined?

Gen. PARKER. Yes; I have read it over. No, sir; I am not qualified to pass upon the matters involved, because my contact with military law, certainly the last four years, has not been such as to qualify me for that purpose; but there is one point that I would like to touch upon, and that is the lack of speed in the working of

the Judge Advocate General's department during active operations of an infantry division, especially with reference to the death sentence.

Senator WARREN. Are you distinguishing Infantry service from other service?

Gen. PARKER. I am speaking only of my own unit. I commanded an Infantry unit, and I am speaking of the operation of the military law in that division during the hostilities.

Senator WARREN. Just so. Please proceed.

Gen. PARKER. I think that the greatest element in connection with military success is speed, and it is just as necessary in one department as it is in another, and I think we can improve the speed with which our military justice is meted out on the front and in a division. To make my point clear by a particular case, we will suppose that the division is about to attack to-morrow morning. We know that we are going into a bloody fight; that we shall probably lose 60 per cent of our officers and men, which happened on occasions—on one occasion with my command. Certain men deliberately go absent. They know what is in front of them; they have had it all explained to them by careful talk, what they will have to do on the following day, and they know full well what is going to happen, and they deliberately absent themselves, and later are rounded up by the military police and are brought in under guard and turned back to their companies. It seems to me that at such a time there should be some speedy method of punishing those men adequately as the military law prescribes, and promptly, not so much for the punishment to the individual as for the moral effect produced upon the unit in general. That is what I wish to see provided.

Senator WARREN. Now, we get that idea, but is that a matter of regulation or of law? Is not that possible under the law now; or is it?

Gen. PARKER. That I am not qualified to say, whether that is or not.

Senator WARREN. You are speaking of the practice?

Gen. PARKER. I am speaking of the practice as it obtained during this war under my immediate observation. We found the general court-martial as at present organized and administered very heavy and cumbersome; slow in its action; so much so that I can not recall a case of a man being shot, of the American Army, for flagrant desertion in the face of the enemy.

Senator WARREN. Along that line, what is your observation as to the general severity or lack of severity in court-martial proceedings?

Gen. PARKER. In the First Division?

Senator WARREN. You are speaking now entirely of matters at the front?

Gen. PARKER. I am speaking entirely of those matters, for I have had no other experience except when I was serving between Gen. Pershing and Gen., at present Marshal, Petain.

Senator WARREN. You were in the Regular Army?

Gen. PARKER. Yes; I was graduated at West Point, and from the French Cavalry School.

Senator WARREN. That is at Sumieres?

Gen. PARKER. At Sumieres.

Senator CHAMBERLAIN. It would be well, in your view, at the front, in cases such as you put, that these men who deliberately absent themselves just before a battle and who are brought in before the battle—

Gen. PARKER. No, sir; after the battle.

Senator CHAMBERLAIN. After the battle?

Gen. PARKER. Yes.

Senator CHAMBERLAIN. You would have it so that they could be tried at once, and executed, without the formalities that are now required?

Gen. PARKER. Without the form; not formalities. We shall always need formalities where the death sentence is to be imposed, and the person who inflicts the death penalty will at all times be responsible for it, and must explain his responsibility to the higher authorities; that, of course. But there are so many cases where the offense is so clear that I, as a colonel of a regiment, for instance, would not hesitate to order that man shot. I have told my men when they have been brought back. We have very few men of that kind. We have very few men in the American Army that do that sort of thing; I am proud to say that we have not had many, and it is just those cases that should have been made examples of.

Senator WARREN. For the benefit of the rest of the Army?

Gen. PARKER. For the benefit of the others who felt that they were going in and doing their full duty and dying, while another man was running away and escaping the death that his friend met, by his side.

Senator WARREN. Would you say there were any differences in nationalities, as to that?

Gen. PARKER. No, sir. I have served in the field with every sort of men. I spent three years with the Cubans.

Senator WARREN. That might happen with men of any nationality?

Gen. PARKER. No, sir. Courage is not the privilege of any particular nationality. I have found that one man is like another. It is the manner in which it is explained to him and the manner in which he has lived that determines the kind of man that he is going to be. We had men from 46 States in my division.

Senator WARREN. Have you not known men who have seemed for a moment to be arrant cowards, but afterwards proved to be brave men?

Gen. PARKER. Yes, sir; but not——

Senator WARREN. I am not applying that to flagrant desertion in the face of the enemy.

Gen. PARKER. Yes; you mean a man that is capable of a moment's weakness in the face of imminent danger. But I think the man that runs away from the fight before the fight, is hopeless. I think he will do that again.

Senator WARREN. We are very glad to have your opinion on that.

Gen. PARKER. Thank you, Senator.

(Thereupon, at 12.30 o'clock p. m., the subcommittee took a recess until 2.30 o'clock p. m.)

AFTER RECESS.

The subcommittee met at 2.30 o'clock p. m., pursuant to the taking of the recess.

STATEMENT OF MAJ. GEN. F. J. KERNAN, UNITED STATES ARMY.

Senator WARREN. I see you have had considerable service on the other side.

Gen. KERNAN. I was over 18 or 19 months.

Senator WARREN. I assume you know quite well what is before this subcommittee, since you were one, I believe, of the board that the Secretary called upon to make a report with reference to the Chamberlain bill as compared with the present law, and the committee would like to hear anything additional to what you gave in that report, or any changes that may have suggested themselves since you made the report, and you may allude to it as you see fit and proceed in your own way, if you will.

Gen. KERNAN. Really, Senator, the report has my signature, and the concurrence in it expresses pretty fully the general views that I entertain upon the subject of courts-martial, their functions in the governmental system and the modifications which would go at present to make a distinct improvement in that system. You gentlemen, I take it, have seen the report.

Senator WARREN. Oh, yes; and I have read it very carefully, and I think the other Senators have.

Gen. KERNAN. I may say that there might arise a little misconception about the membership of that board, as I see a fourth member is put down. The board consists of three members. The fourth man is a recorder, whose business is to take care of the papers and look after the correspondence, etc. The convening order expressly states that it is to be a board of three members.

Senator WARREN. I have forgotten about the signatures. Is it not signed by three?

Gen. KERNAN. No, the recorder signed it afterwards. It is an inadvertence.

Senator CHAMBERLAIN. That is so understood.

Senator WARREN. I so understood it. There was no misunderstanding about it. Gen. O'Ryan was before the committee, and while I think he very generally followed the lines of the report, he mentioned incidentally that there was some argument on some of the points, and there might be or might not be some difference of opinion, but not enough to prevent them all signing the report.

Gen. KERNAN. Well, the report, the general discussion, was acquiesced in by everybody. There was in three cases I think only a difference of opinion indicated as to specific recommendations in relation to the modification of certain articles. Gen. O'Ryan dissented from the majority in one case, namely, I think, as to the one hundred and fifth article of war, and I dissented twice from the other two officers and noted my dissent in each case. One of my dissents was as to the proposition of having peremptory challenges introduced into the court-martial system, and the other was as to the proposed departure from deciding questions in general by majority vote. The board adopted the two-thirds rule in lieu of the existing majority rule for deciding all questions except questions involving the death penalty. We concurred, however, in making a change by which we substituted a three-fourths vote for a two-thirds vote

in matters involving the death penalty. With those three exceptions, as far as I recollect, the report is unanimous.

Senator WARREN. Senator Chamberlain, since you are so conversant with the bill you introduced, and as you are conversant with the other, would you like to ask the general some questions about the differences?

Senator CHAMBERLAIN. General, how many changes in the present Articles of War did your board recommend, if you remember now?

Gen. KERNAN. I think we recommended something like 30 or 32 changes; that is, we recommended amendments on about 32 of the articles, and we proposed a new article, 50½.

Senator CHAMBERLAIN. You do not suggest any change in the composition of the courts as now established, or any change in the Articles of War with reference to the composition of courts as now established?

Gen. KERNAN. No, sir.

Senator CHAMBERLAIN. What is your idea about an appellate tribunal of any kind?

Gen. KERNAN. We have undertaken to provide that in article 50½.

Senator CHAMBERLAIN. That was the proposed amendment offered by Gen. Crowder to the Military Committee in January, 1918?

Gen. KERNAN. In substance it may be, but its wording I think is ours.

Senator CHAMBERLAIN. But it does not take the power out of the hands of the military authorities in any way or form?

Gen. KERNAN. No, sir; it does not put the power in civilian hands. It provides, as you will see, that each case that comes to the Judge Advocate General's Office for file and examination under the existing law shall be so examined; and if that examination discloses anything that seems to call either for clemency as now, or for a complete setting aside because of irregularities or a substantial failure of justice, that in such a case the Judge Advocate General shall make a memorandum pointing out the defects that he finds in the case and shall submit his memorandum with the record of the case to the Secretary of War for the action of the President.

Senator CHAMBERLAIN. In the last analysis, it really leaves the whole question on appeal to the Judge Advocate General, does it not?

Gen. KERNAN. It does in so far as everything except the final substantial action, which will have to be the President's.

Senator CHAMBERLAIN. But you know from your own contact with the department, with the Secretary of War, the Commander in Chief of the Army in ninety-nine cases out of a hundred follows the recommendation of the military authorities?

Gen. KERNAN. Oh, I think so.

Senator CHAMBERLAIN. Yes. So that in the last analysis the whole business would be in the Judge Advocate General's Office?

Gen. KERNAN. Very largely; yes, sir; as to recommendations.

Senator CHAMBERLAIN. Now, I am frank to say that this feature of it I do not like. I think there ought to be some appellate tribunal of some kind, or some advisory tribunal, if you please, that would have jurisdiction over these appeals.

I notice in your report—and I think that is the essential difference between those of us who are quarreling over these Articles of War, some believing that the whole system ought to be administered

within the military and others that there ought to be some civilian court of appeals to hear these mooted questions—I notice in your report here that on page 6 you question the right of Congress really to take certain functions away from the Commander in Chief of the Army.

Gen. KERNAN. Well, we put an interrogation mark at the end of each of those sentences.

Senator CHAMBERLAIN. I am glad you did, because it is a remarkable thing to say that the President as Commander in Chief of the Army inherited any of the rights which the King of England formerly exercised.

Gen. KERNAN. The thought that mainly underlies those six or seven pages is this: I think that when the Constitution declared the President should be the Commander in Chief of the land and naval forces, and so forth, the words "commander in chief" had to have read into them some definite meaning, and to find out what they mean you naturally go to contemporaneous history and to usage in the Continental armies and in the English Army to see what powers should fall under that designation, and one of the powers was to convene courts-martial and to act officially on their proceedings.

Senator CHAMBERLAIN. Do you look upon a court-martial as a judicial body or its judgment as judicial in nature or executive, merely?

Gen. KERNAN. Well, I should say they were both. I really am not a lawyer, Senator, of course, but it does seem to me that when you get down to the final analysis all courts are in aid of the executive power, are they not?

Senator CHAMBERLAIN. Well, no; I would follow the decision of the Supreme Court and say that the decisions of these military tribunals are distinctly judicial.

Gen. KERNAN. I do not feel qualified really to make fine distinctions, certainly not offhand, as to whether the particular function is executive or judicial; but I can not see why it should not be both, myself. A great many things have two aspects; are looked at in several ways.

Senator CHAMBERLAIN. I was astounded at that finding of your committee practically denying to Congress the right to legislate away from the Commander in Chief certain functions that you claimed that he inherited from the King.

Gen. KERNAN. Of course, he did not get them exclusively by inheritance. Whatever he has he got by the affirmative declaration of the Constitution that he should be the Commander in Chief.

Senator CHAMBERLAIN. Here is the way it reads [reading]:

> The rules governing armies had their beginnings not in legislative bodies, but in commanders, whether called kings or chiefs or generals, and in early times those who formulated the rules carried them out. With the evolution of Governments the right of prescribing the most important or fundamental rules has lodged in legislative bodies, but the execution of those rules, their practical administration, has heretofore been left to commanders and their assistants down through the hierarchy of command to the very bottom. Courts-martial have always been agencies for creating and maintaining the discipline of armies, and in earlier times, and certainly until the adoption of our Constitution, were provided and administered by commanders as of inherent right.

Now, I claim that they had no right except as that right is conferred by the Constitution and by Congress.

Gen. KERNAN. We were talking about early times, before the adoption of the Constitution.

Senator CHAMBERLAIN. Following that up you say:

The King of England had and exercised this inherent right. The Continental Congress took over some of the duties of government in the rebellious Colonies, but Washington as Commander in Chief appointed courts-martial as of right inherent in that office without the express authority of that Congress. So that when our Constitution was adopted and the powers of the Federal Government were distributed among three great departments, and the President was made by the organic law Commander in Chief, the power to appoint courts-martial, by virtue of that office, was well understood. The power to make rules for the government of the land forces was at the same time confided to Congress. The earlier Articles of War continued or created under that grant of power did not expressly confer upon the President the right or authority to appoint courts-martial, but actually he exercised the power, and the validity of that action is well established. It appears, therefore, that before our Constitution was established a Commander in Chief was inherently competent to appoint courts-martial as incident to his office; that under the Constitution this right has been exercised and upheld, and further, that the rules made for the Army by Congress have extended to subordinate commanders (who are in fact assistants to the President in his special capacity as Commander in Chief) the right to appoint and to make use of this agency.

You question then in the next paragraph, which I have not read, the power of Congress to make changes.

Gen. KERNAN. Well, not all changes; not any changes. What is questioned there, Senator, is the power of the Congress to derogate from the authority conferred by the Constitution on the Commander in Chief, and the question is, what are those powers thus conferred? What does the term "Commander in Chief" connote and carry with it by necessary implication? It must mean something. Does it stop with the power merely to issue commands and then hope, please Heaven, that they will be obeyed? Or does it necessarily imply that the power to enforce obedience to the command goes with it? Now, if it does, then when you take courts-martial from the President you take away from him as Commander in Chief the weapon which is the last resort to make his commands effective?

Senator CHAMBERLAIN. Do you think Congress has not the power to change the court-martial in any way it sees fit?

Gen. KERNAN. Oh, yes, indeed; in composition, membership, name, etc. I have seen it done since I have been in the service.

Senator CHAMBERLAIN. They might change the whole function of the Commander in Chief with respect to courts-martial.

Gen. KERNAN. I do not question at all the right to install new courts-martial, or change the composition and the membership of the old ones. It is very much like this in my mind, Senator: You can create in Congress a new arm to-morrow. Call it what you please, a tank corps, something nonexistent before in our Government. But when it is created as a part of the Army of the United States it passes of necessity under the command of the President, and you would not attempt, in creating a new arm, to say that it should be commanded by the governor of a State or somebody not of the Army of the United States.

Senator CHAMBERLAIN. I think that is true.

Gen. KERNAN. Very well. In the same way, to my way of thinking, you can create all the new tribunals to enforce discipline you please, change their jurisdiction or change their composition and the way they proceed to do their work; but when you make a court-martial which is intended to be an adjunct of the Army to enforce discipline,

by the same reasoning it seems to me the use of this disciplinary weapon passes into the President's hands as a part of the function of command.

Senator CHAMBERLAIN. Do you think Congress could pass a law making the Judge Advocate General a civilian and creating a court of appeals entirely of civilians in connection with the Judge Advocate General?

Gen. KERNAN. I do not doubt its power to create new offices.

Senator CHAMBERLAIN. Do you think Congress would have the power to provide by amended Articles of War that the Judge Advocate General, when appointed, should be a civilian, appointed by the President and confirmed by the Senate? Do you think Congress would have that power?

Gen. KERNAN. Please remember that I have disclaimed being a lawyer, and in answering that question I should say that it is competent for Congress to create any new office it wants to and give it any title it pleases. The question of whether or not that office would function as you intended, it seems to me, would depend upon the duties you indertake to assign to the office.

Senator CHAMBERLAIN. You think then that the present law could be changed so that the Judge Advocate General could be appointed by the President out of civilian life—a lawyer out of civilian life?

Gen. KERNAN. I think it can be done now under existing law.

Senator CHAMBERLAIN. That of course would necessitate a change of the Article of War, because that provides for the appointment of a Judge Advocate General.

Gen. KERNAN. I think he could be appointed. I think that if the President wanted to, and Gen. Crowder's office was vacant, he could appoint a civilian to the office, and if you gentlemen confirmed him, he would be there, but transformed from a civilian into an Army officer.

Senator CHAMBERLAIN. Do you not think that Congress could pass a law creating an appellate tribunal, to which tribunal appeals from military conviction might be had, composed entirely of civilian lawyers, for instance?

Gen. KERNAN. With what functions, Senator?

Senator CHAMBERLAIN. With any functions Congress might see fit to confer upon them.

Gen. KERNAN. I think you could undertake to confer upon such a tribunal functions which would be in derogation of the Constitutional authority of the President as Commander in Chief, and if you did so, why, I should say that the attempt to do that would fail.

Senator CHAMBERLAIN. Well, then, you would question the authority of Congress to do that legally?

Gen. KERNAN. Yes, sir; constitutionally.

Senator CHAMBERLAIN. Here is what I am getting at, General—

Gen. KERNAN. Mind you, I do not say that you can not create any tribunal you please. The question is whether it is going to function or not, and that depends on the duties you place in its hands. It is possible that those duties might be taking something from another office, which is constitutionally guarded, and therefore you can not take it.

Senator CHAMBERLAIN. Suppose a man is convicted by a general court-martial in France. The court has jurisdiction and the

trial has been regular, and the only appellate tribunal that has jurisdiction is the commanding officer. Is not that true?

Gen. KERNAN. Yes, sir; now in the general case; in some cases confirmation is required.

Senator CHAMBERLAIN. That I do not think ought to be the case. There ought to be some higher tribunal to which that man might appeal. Now, I differ from Gen. Crowder in this: Gen. Crowder holds that under section 1199 of the Revised Statutes he has no power more than to revise the proceedings, to examine the proceedings, and if he finds that the court had jurisdiction and that there were no substantial irregularities in the trial, evidently he has no other function than to send it back in an advisory capacity. I think there ought to be some right of appeal, and there are a great many lawyers who think there ought to be some right of appeal; that there ought to be a power somewhere to reverse a decision which was wrong. Do you see any objection to that?

Gen. KERNAN. Oh, yes, sir; I have endeavored to set forth the objections as they appeared to me, in the report that you gentlemen have before you; and in a brief way, to repeat it in substance, the objection is that you set up an independent civilian tribunal with power to nullify the efforts of the Commander in Chief and his subordinates down through the steps of command in the exercise of what is a part of the function of command.

Senator CHAMBERLAIN. That is a strictly military view of the situation.

Senator WARREN. Let me see if I get this. I confess that I do not know much about law. The General and you want some review and the power to lessen, to quash and so forth, and as the General answers, perhaps he thinks it is to be entirely civilian, and when it goes through there is no power then either in the army or the Commander in Chief of the army, the President, to change what that tribunal may decide upon. Now as I understand the General—correct me if I am wrong—it is that whatever tribunal is established, the President of the United States is Commander in Chief of the Army, and as Commander nothing can be taken away from him in the way of the handling of the military forces, but what he has ultimately the right and duty of a commander to perform. In other words, it must in a sense be subservient to the command of the Commander in Chief all the way through. I do not know but I am stumbling, but I was wondering whether that is not the difference, since the General says there may be a civilian appointed as Judge Advocate General.

Senator CHAMBERLAIN. Let us put this kind of a case to you, General, by way of illustration. We will say that a private soldier—or so far as that is concerned, he may be a commissioned officer—is tried in France for desertion. He is found guilty. It goes up to the commanding officer, and the commanding officer approves the sentence. Now the commanding officer may not be a lawyer, he may be strictly a military man, and ever so good a man, and the trial court might be composed of men none of whom are lawyers. The approval of that sentence by the commanding officer if the court had jurisdiction and the trial was regular, ends it, although there may have been prejudicial error in the trial because of lack of knowledge on the part of the court or the commanding officer. Now

there is a man who has been convicted, and his sentence approved, and he has been ordered to the penitentiary and dishonorably discharged from the Army, and yet he has no right of appeal anywhere. Do you not think that under a democracy such as ours there ought to be an appeal somewhere, in order that justice may be done to the man who has been improperly convicted and his conviction approved by the commanding officer?

Gen. KERNAN. Yes; and I evidenced my desire by endeavoring to draft an article here which would create that sort of a court of appeals.

Senator CHAMBERLAIN. I know you have, but that is strictly within the military. Now let me put this case to you.

Gen. KERNAN. Before you leave that question, Senator, though, I want to point out that the case you have supposed could not happen. There may be no lawyer on the court, but there is always an adviser to the reviewing authority who is a lawyer, and who looks over these cases as to whether or not there has occurred prejudicial error, before the commanding general takes action thereon.

Senator CHAMBERLAIN. That is, a lawyer?

Gen. KERNAN. A judge advocate on the general's staff, invariably.

Senator CHAMBERLAIN. Have you known of many cases where the commanding officer has reversed the judgment of the court below?

Gen. KERNAN. It is not uncommom to have the reviewing authority disapprove the findings and sentences of courts-martial. It is not at all uncommom.

Senator CHAMBERLAIN. But you practically concede that there ought to be a right of appeal to some tribunal, because you recommend it.

Gen. KERNAN. Yes, sir.

Senator CHAMBERLAIN. Why recommend it if those errors are cured by the commanding officer or by his adviser?

Gen. KERNAN. In the first place, these judge advocates that I speak of on the staff of the reviewing authority, being human are liable to err, and if they do, since all these cases automatically go to the Judge Advocate General's office, they are again looked over by lawyers in that office. If there they discover something which through inadvertence was overlooked or misunderstood by the reviewing officer and his staff judge advocate, there arises a situation in which now the only cure for the defect is the exercise of clemency by the President; and that is not sufficient. It does not cover the whole needs. To make the system really complete, then, you want lodged somewhere the power to set aside as void *ab initio* those proceedings, and to restore the party to his rights as if those defective proceedings had not taken place. And we have, in this article 50½, endeavored to provide for these rare but possible cases. I say rare because it is a fact that the law applicable to courts-martial is so relatively simple that in the great majority of cases they present no matter of complexity, so that the judge advocate on the staff of the commanding general is almost certain to discover anything of a radically wrong nature; and when that happens he draws it to the attention of the reviewing officer; and that officer, unless he is incompetent, will see the point and disapprove the proceedings himself, if that is the only remedy.

Senator CHAMBERLAIN. My insistence has been, and other lawyers agree with me on that, that the Judge Advocate General has had that power under the law as it is now, but that he has not exercised it.

Gen. KERNAN. I have read the briefs submitted by Gen. Ansell and Gen. Crowder, and vice versa, on that question. Of course they have both said a great deal.

Senator LENROOT. General, in your objection to the court of appeals, is it your construction of Senator Chamberlain's bill that this proposed court would have a right to substitute its judgment upon the facts for the judgment of the court-martial?

Gen. KERNAN. Is that my objection?

Senator LENROOT. Is that your construction of the bill?

Gen. KERNAN. Well, I would have to look at it again.

Senator LENROOT. I wish you would, because I think it is quite important. I call your attention to the top of page 31, article 52. In line 22, page 30, it reads:

> Said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial.

Up to that time they would be limited to the correction of prejudicial errors of law. Then it goes on [reading]:

> And such power of review shall include the power—(*a*) to disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

And so on with the different subdivisions. In your opinion does the language, "such power of review," include the power and in your judgment all the power of this court-martial, power to pass upon facts as well as on judicial errors of law? Do I make myself plain, General?

Gen. KERNAN. I think so, Senator. I think I see what you are driving at. If I understand you, you want to know whether my objection to this article——

Senator LENROOT. I was getting your construction first, whether the power to include these other powers must all be based upon prejudicial errors of law, or would the court of appeals substitute its judgment if they came to the wrong conclusion?

Senator WARREN. Have jurisdiction of all matters respecting the case?

Senator LENROOT. Yes, practically. In other words, under this language could the court of appeals deal with the case in any way that it saw fit, that it thought the evidence of the record warranted?

Gen. KERNAN. It seems to me, Senator, that it is exceedingly difficult in practice to have anybody undertake to consider in a record exclusively and purely questions of law. To my mind questions of law are so intermingled and interwoven and bound up with and dependent upon the questions of fact that are in the same record that it is almost humanly impossible for a body to review the law as a thing apart in that particular case without also going into and reviewing or construing in some degree the facts.

Senator LENROOT. But that is true of appellate courts in civil jurisdictions, General. They review for errors of law. Of course

the facts may have a bearing to show whether an error of law has been committed, but an appellate civil tribunal does not attempt to substitute its judgment for the judgment of the jury of the lower court.

Gen. KERNAN. I imagine, however, in the civil practice the judges who are reviewing exclusively questions of law presented in a case are as well qualified as the trial judge or the jury to understand all the facts and the bearings of those facts and the implications of those facts, and so forth.

Senator LENROOT. They may be, but they are never permitted to substitute their judgment for that of the lower court upon the facts. Now what I am getting at, General, is, I am wondering whether you would have objection to such a court as is here provided if the court was limited in its jurisdiction to passing upon errors of law prejudicial to the accused, but not permitting it to revise the finding, or substitute its judgment upon the record for that of the court-martial.

Gen. KERNAN. In such a case, Senator, how would you propose to make the views of the reviewing tribunal effective?

Senator LENROOT. Exactly as we do in civil tribunals. It would be sent back if there were errors of law prejudicial to the accused, and give him the opportunity to get a fair trial, and if there were no such errors of law, whatever the appellate court might think as to the justice of the verdict, they would have no jurisdiction to pass upon that.

Gen. KERNAN. Certainly if you are going to make an innovation of the kind suggested here in this article, I should much prefer to see it limited as you say, Senator, to a review of the errors of law exclusively. .

Senator LENROOT. I am inclined to the construction of this bill that the words "such power of review shall include the power," together with these subdivisions, give this court of appeals the right to pass upon its view of what the evidence justified, although there may have been no prejudicial error committed by the court-martial.

Senator WARREN. That is your construction of the proposition in this bill?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. I think the General has so fully embodied in the Kernan report his views on this, that I do not think it is necessary to interrogate him further.

Senator WARREN. You stand now as when you made the report, as not wishing to make any change, addition to or subtraction from it?

Gen. KERNAN. Yes, sir.

If I could be of any use at all it seems to me it might be in taking up these concrete propositions which we have embodied here in the appendix.

Senator LENROOT. Of your proposed revision? You comment on each of them in the report?

Gen. KERNAN. Yes, sir.

Senator LENROOT. Are there any of those that you would like to enlarge upon?

Gen. KERNAN. There are several which I regard as of very considerable importance, and based on a great deal of court-martial experience. I have been 38 years a commissioned officer, I have been a department judge advocate, for instance, for four years, and

I have been on many courts in all capacities and what I have reported here in some of these matters represents a great deal of experience and reflection, and for that reason I believe that perhaps if I were——

Senator WARREN. Feel free to take up any one of them and explain further and make any comment that you wish. We are seeking light; the more the better.

Gen. KERNAN. The first that I want to refer to is our proposed amendment to article 4. There we undertook when possible to exclude officers of less than two years' experience from sitting on a court-martial except as a minority.

Senator WARREN. In extremity what would you do?

Gen. KERNAN. We have proposed an absolute rule in time of peace, but not in time of war, when you have got to do what the occasion calls for or do nothing. Now I think that that is a very useful provision, because a great many of the more or less absurd sentences and perhaps unjustifiable findings that are arrived at by courts-martial are due to inexperience and lack of knowledge, not of law chiefly, but of the service, of the relations that the acts of the men under trial really have to the service. Why, in the first two years of the service a man appointed from civil life is hardly familiar with the terminology of the Army, and hardly knows what the terms mean, and he is therefore not qualified by experience or by acquired knowledge to really sit and judge of the relation which the deeds committed bear to the Army. At the same time those young men have got to learn sometime. Therefore it is highly advisable to give them an opportunity to get experience and to see how courts work in practice, so that we ought to have them sit on courts. But not in sufficient numbers to have a decisive voice in the results.

Senator WARREN. I take it you know that there have been absurd sentences?

Gen. KERNAN. Oh, undoubtedly.

Senator WARREN. And others with excessive penalties, you might say? Now, as I remember it, you gave your idea of the percentage of those, that they were not a large percentage of the whole. Did those things occur because of immature officers, do you think—immature in their judgment upon law and upon the practice of courts-martial?

Gen. KERNAN. Very largely, Senator: not entirely due to that, but I believe in the few cases that I have actually looked over, the courts were composed of officers of very small average experience.

Senator WARREN, You have been abroad a good deal of the time. Was that as true over there as here in this country; or, if not, what was the percentage?

Gen. KERNAN. I could not undertake to give percentages, Senator.

Senator WARREN. Approximately, that is all.

Gen. KERNAN. The few cases that I looked at were nearly all cases in this country at small stations relatively, where the choice of membership for the courts was much limited. Convening authorities had to put on the court the material they had, and it was inexperienced material, because the more experienced officers were elsewhere, on the other side or in Washington, where the duties were more important.

Now, another thing that we have suggested is the appointment on every court, by the convening authority, of counsel for the defense. The real trouble in courts-martial, apart from the immature member-

ship to which I have just referred, comes from a poor presentation of the case on the one side by the judge advocate who is prosecuting the case, and on the other side by no counsel at all or counsel of no experience.

Senator WARREN. The accused has the benefit of having counsel, does he not?

Gen. KERNAN. Yes.

Senator WARREN. Suppose he chooses his counsel from privates or noncommissioned officers?

Gen. KERNAN. The practice is to always allow him to select counsel if available, or to hire civilian counsel. Failing that, the commanding officer may appoint counsel to defend him as a matter of course.

Senator WARREN. Is there any distinction made as to the accused's selection, whether it may be of a commissioned officer, or a noncommissioned officer or private, or a civilian?

Gen. KERNAN. No; that feature remains the same so far as anything we propose to do.

Senator WARREN. That is the practice as well as the law?

Gen. KERNAN. Yes; it has always been so to the best of my knowledge. Now, to cure that radical defect we have proposed in one of these articles to authorize the Secretary of War to appoint acting judge advocates who shall be available to the reviewing authorities for detail as judge advocates and as defense counsel in important cases, and for other work, judicial or near judicial, which shall arise in the command. You have now and have had since 1884 an authority for appointing acting judge advocates. Gen. Crowder served a tour in that capacity and was appointed at the end of it in the regular corps. I, myself, served a tour of that kind. Many lieutenants have had an apprenticeship as acting judge advocate, on a four-year detail; and it is a highly useful detail to a youngster, because it gives him a special class of work and some additional pay. He gets the rank, pay, and emoluments of a mounted captain.

Senator WARREN. Has it been the practice to have more of those apprentices than were expected to be taken permanently into the service, in order to have some selection?

Gen. KERNAN. The original thought, Senator, was that there were not enough judge advocates in the regular corps to provide the staff judge advocates; therefore that provision originated through that necessity. It has been modified once or twice since as to the number of officers detailed to these headquarters having general court-martial jurisdiction, and it became necessary to increase the number of these acting judge advocates. Originally they were limited to one for each general court-martial jurisdiction.

Senator WARREN. Well, I do not know as you understood my question. I seem to remember that in some of our appropriation bills we provided that there should be a sort of cadet service, you might say; that certain officers should be detailed to study and be used for a term in the judge advocate's office with the intention of selecting from them so many of them as they wanted to make general use of. Am I right about that or not?

Gen. KERNAN. Yes, sir, since 1884 you have had acting judge advocates detailed by the Secretary of War for four years or less.

Senator WARREN. That means they can be taken into the service or not?

Gen. KERNAN. If there were vacancies in the Judge Advocate General's Department they generally went in as I say; but if there were not vacancies to take them in, some remained in the line of the Army, just as I have done. Now, if you take the limit off and allow a sufficient number of these to be detailed, you will have a corps of students to be available for these special duties of counsel and judge advocates.

Senator LENROOT. May I ask you in that connection, at the time of the appointment of these acting judge advocates, what is, as a rule, their knowledge of law?

Gen. KERNAN. Only those who have made a study of law and have evinced a special interest in it are so detailed, and it is only because of that fact that they are detailed as acting judge advocates. To illustrate, in Gen. Crowder's case, he had been detailed to a college in Missouri, and while on duty as professor of military science there he studied law and was admitted to the bar, and after that, by reason of that fact, he was made an acting judge advocate. I did the same thing when I was instructor at West Point. I studied law at an office in New York and was admitted to the bar of New York, and as soon as available thereafter was detailed as an acting judge advocate.

Senator LENROOT. My point was, is the selection of acting judge advocate limited to those who have studied law?

Gen. KERNAN. Not by law.

Senator LENROOT. In practice?

Gen. KERNAN. In practice, I think, yes; they endeavor to get men who have envinced a special aptitude for law and have shown qualifications.

Senator WARREN. Let me state a case. Gen. Ansell was at a point in Wyoming when he was a lieutenant. A man under a serious accusation was being tried in a local court, I think it was the police court—and he happened to be passing by, so the story goes. I did did not hear the trial, but they told me the next day about the excellence of the young officer who had volunteered to defend the man in a very serious case. And his ability was such that his reputation preceded him here to Washington, and when some of our friends from the Southern States asked a little later on that he be taken into the Judge Advocate General's office, that was done. I think I was one of those who testified to Gen. Davis, then Judge Advocate General, about the case. While I did not know what the case was about, it had been reported stenographically, I think; and I believe that incident led to his appointment. It was due to the observance of what he had done.

Gen. KERNAN. I think that is the general history of nearly all the officers who are appointed.

Senator WARREN. I know that Gen. Davis at that time, in speaking of it, said he wanted to hear of all those cases in order that he might have a large number from which to select from time to time. That seemed to be at that time the idea—to have the best they could get.

Gen. KERNAN. In article 12 we have undertaken to really enlarge in many cases the jurisdiction of the present court-martial by conferring discretion on the officer who might appoint a general court-martial in the case by the exercise of which discretion he could remit it to a special or even a summary court for disposition.

Senator CHAMBERLAIN. All of your proposed changes are proposed to be made in the present law, not the so-called Chamberlain bill. I think that is what is indicated here. The proposed law is given in the left-hand column.

Gen. KERNAN. That is our proposition.

Senator CHAMBERLAIN. Take on page 18 for instance, that italicized portion. There is your proposed change of the existing law?

Gen. KERNAN. Yes, sir.

Senator CHAMBERLAIN. You are not proposing changes in the law I have proposed?

Gen. KERNAN. No; our changes are proposed in the existing statutes.

Senator WARREN. That is the way I understood the report.

Gen. KERNAN. We propose to change the oath a little so as to permit the court to dispose of some matters in open court which are now disposed of in closed court. That is to endeavor to save time. Courts are cleared, and the people have to get out many times in order to settle merely trivial matters which could be disposed of offhand, subject to objection by any member who might have a different view.

Senator. WARREN. That is with a view of expediting matters?

Gen. KERNAN. Yes, sir. All we propose to keep secret relates to challenges, to the findings and the sentence

Senator WARREN. General, we thank you for appearing as a witness.

(Thereupon, at 3.25 o'clock p. m., the committee adjourned until to-morrow, September 25, at 10.30 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

THURSDAY, SEPTEMBER 25, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m., in the room of the Committee on Appropriations in the Capitol, Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Chamberlain.

STATEMENT OF LIEUT. COL. W. C. RIGBY—Resumed.

Senator WARREN. We shall proceed, Colonel, and take up the matter where you left off yesterday.

Lieut. Col. RIGBY. I will formally offer at this time, if it meets the approval of the committee, a copy of the statement of which I spoke yesterday of Maj. Gen. Childs, of the British Army.

Senator WARREN. That will be printed in the record.

(The document is as follows:)

APPENDIX.

68 GOLDEN HOUSE, LONDON, ENGLAND,
——— ———.

Memorandum for Maj. Gen. CHILDS:

Before leaving for America it is desired to obtain the following papers and documents to take with me to be submitted to the War Department, to wit:

1. Verification, over your signature, of transcript of interview heretofore had with you, with such revision and corrections, if any, as you desire to make.

2. Copies of statements of commanding generals with reference to field punishment No. 1, mentioned in your above-referred-to interview to be furnished to us. Maj. Chichester informed Col. Rigby that he had mailed this document to our office at 68 Golden House Monday last, a week ago, but it has never been received, hence a duplicate of same is requested.

W. CALVIN WELLS,
Major, Judge Advocate, United States Army.

WAR OFFICE, WHITEHALL, S. W. 1.,
August 9, 1919.

DEAR MAJ. WELLS: I return to you as promised the typescript, as also the copy reports which you desired.

In regard to the interview, it is difficult to exactly reconstruct the conversation which took place, and the report is, of course, somewhat disjointed, as some of my remarks are obviously in reply to questions put to me by Col. Rigby, such questions being left out. It can not, therefore, be considered an accurate report of what I said, but I expect it will be near enough for Col. Rigby's purposes.

Please convey my kind regards to Col. Rigby.

Yours, sincerely,

B. B. W. CHILDS.

Maj. W. C. WELLS,
Judge Advocate, United States Army,
68 Golden House.

July 10, 1919, at 10.45 a. m., Lieut. Col. William C. Rigby, judge advocate, accompanied by Maj. W. C. Wells and stenographer, visited the War Office, London, England, and had the following interview with Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B., deputy adjutant general, British Army:

Lieut. Col. RIGBY. I desire a recorded interview with you, getting your advice as to certain matters of court-martial procedure based upon your experience, especially in this war. If agreeable, I would like to know your views on the practicability of having noncommissioned officers and privates on courts-martial for the trial of soldiers, as has been proposed in a bill introduced in Congress by Senator Chamberlain.

Gen. CHILDS. My view of that subject is this: I admit that I do not know the army as I knew it before the war. I do not know the new one, but we are now rapidly going back to the conditions of the old one, the one we had before we went to France. I therefore do not know the rank and file of the new army, as I have never served with it and it has not been under the same conditions absolutely. I say, therefore, when I give my views, they must be accepted with the knowledge that I am speaking without experience in the new army. I do feel, though, that my previous experience teaches me this: A soldier's life is very intimate with his fellow soldiers; and sometimes in a company there is a man that gives trouble, and that is most unfortunate. My experience with soldiers is that in a well-run company there is an understanding between officers and men and you do not have trouble. As I was saying, in a well-run company the feeling of comradeship is so great, and regimental feeling so great, the affection between all ranks so great, that the man who gives trouble or commits crime is very unpopular, whatever the rank of the man may be, whether a noncommissioned officer or a private soldier. So if noncommissioned officers sat on courts-martial and there was a conviction of a popular soldier, it might be considered unjust and would be unpopular, and this man on the court would never want to be on the court again. The men—the old soldiers—had ways in which they made their displeasure felt, and in the interests of the army I would be opposed to a court-martial being composed of anything else but officers. The officers do not live in the barracks with the men but live by themselves, and there you have the dividing line between the officers and private soldiers.

There is no association between the two, except the associations in our army in sports, games. It is a sort of an unwritten law. Of course, to go out shooting you take your servant. I do not mean that. So it is anywhere. But even in the games and sports played, I mean, there is that line between them. But answering your question, I do not think it wise to have any other than officers on the courts, because, as I said, the noncommissioned officers are constantly in association with the men, and, except the sergeant in our army, they sleep in the same barracks. Corporals and lance corporals sleep bed by bed with the rank and file, and, as I say, they would strongly object to mixing up with the punishment of their fellow men.

Lieut. Col. RIGBY. Has the practice of having soldiers on the courts ever been in vogue in Great Britain?

Gen CHILDS. No; not to my knowledge. I think it would be most unpopular in this army. I mean the men would hate to mix up with the administering of punishment. They would not like it. It would not appeal to them. If a fellow was convicted, the soldier member of the court would be unpopular in the regiment. He would be asked why he did not stick it out. He might have voted for an acquittal, but to keep his oath he could not tell it, and so on.

Lieut. Col. RIGBY. Do you think it might have an effect on the severity of the sentences to have soldiers as members of the court? What do you think on the subject?

Gen. CHILDS. It entirely depends on the nature of the affair. If a man who commits an offense is a damned nuisance all around, he goes into the guardhouse, and men of his own regiment have to guard him, and feed him, take him under escort to the latrine, and so on, and have to parade him. He is a damned nuisance. A man in the guardhouse takes another man for a guard, a soldier, perhaps, who has his week-end pass. A fellow gets into trouble and he is taken as a guard. The man is damned unpopular amongst the men. Not with the officers, but with the rank and file. I think myself you would get very severe sentences if you put noncommissioned officers and soldiers on a court.

Lieut. Col. RIGBY. And you think it would make sentences very severe?

Gen. CHILDS. Yes; I think that to have soldiers as members of the courts would cause the sentences to be (1) very severe, (2) would make the life of men who sat on courts unbearable, and (3) that the men would strongly object to mixing up with punishments. They would like to play football rather than sit as a member of a court.

Lieut. Col. RIGBY. Another thing, your practice as to preliminary investigations prior to trials is set out in detail——

Gen CHILDS. In the rules of procedure?

Lieut. Col. RIGBY. Yes; a careful investigation is required, but what I want to ask is whether in practice this investigation is cumbersome and delays the administration of justice so as to impair rather than promote the same.

Gen. CHILDS. No; I have conducted very many of them. The commanding officer has the adjutant to take down the summary, to take the evidence in the case, and I informed the accused of his right to introduce testimony. It was very simple. A summary of the evidence for a field general court-martial is not necessary. It depends of the surrounding circumstances. There was one man shot during the retreat from Mons. He was tried and shot in a half hour. The Germans were walking over his grave in an hour. Later in trench warfare the investigations were made in a more leisurely manner. Do you follow me? Field general courts-martial are most expeditious in the administration of justice. We merely take down what happens. Sergeant ——— saw this, and Sergeant ——— said so and so.

Lieut. Col. RIGBY. In general courts do you get a complete stenographic report?

Gen. CHILDS. Not always. It is recorded by the president, but to have a stenographer is most convenient. But you want two working—it is better to have two or three. Your evidence is taken and typed, and then have another chap for the next, and so on. If you have only the one, you do not see the thing for a couple of days.

Lieut. Col. RIGBY. You do not try in district and field courts to take a stenographic report?

Gen. CHILDS. It is most convenient in any form of court to have shorthand typists. Our district courts-martial are so simple, so short, the evidence so clear, it does not take long.

Lieut. Col. RIGBY. You use district courts in peace times for most of the military offenses?

Gen. CHILDS. Yes; this court can only award up to two years' imprisonment. In peace time it was scarcely ever necessary to award more than that. It can not try an officer. But in peace times we had few trials of officers.

Lieut. Col. RIGBY. Only a few as shown in the statistics furnished me.

Gen. CHILDS. Oh, yes; during the war we had a most satisfactory plan of suspending sentences which worked very well indeed. Under the Army suspension of sentences act a man might never be committed to prison. For example, a sergeant in my regiment was tried by court-martial, but he never went to prison and, afterwards got a D. C. medal.

Lieut. Col. RIGBY. Is that the case you told about the other day? Please repeat it.

Gen. CHILDS. Yes; this man was tried by court-martial, under what offense, for the moment, I forget, but I think it was cowardice. He lost his nerve, but was not a bad man. The sentence of death was commuted to a long sentence—possibly the original sentence may have been penal servitude. But he never went to prison. The sentence was suspended and was subsequently remitted for gallantry in action and the man got a D. C. M. and subsequently was killed in action as a sergeant.

Lieut. Col. RIGBY. That act, providing for suspension of sentences, you drew yourself?

Gen. CHILDS. I did.

Lieut. Col. RIGBY. Tell me something again as to how it works. I understand it resulted in the suspension of a great many sentences, so you told me the other day.

Gen. CHILDS. The way it has worked during the war has been this: But for this act we should have committed to prison and lost the services of between 30,000 and 40,000 men. The whole object of the act was to prevent wastage from the front and to give the men an opportunity to make good. In France—it must have been in December, 1914—I saw about 120 men going to prison under escort, shouting, singing, and happy. It made me think. I also had in mind the case of a man named Richardson, who was condemned to death for desertion. I knew this man could not do such a thing. The facts were he went

down to see a draft. A draft had come up to the regiment. He went down to see the draft, about a half mile back, and got drunk and lost the battalion. I sent back an inquiry to the commanding officer of the man's battalion. Whether it was a deliberate act, whether he was the sort of a man to desert and as to his demeanor in action and previous behavior. I got an answer that he was the best man in the company, best of fighters. Without it, that fellow would have gone to prison, and a fighting man would have been lost for the whole period of the war. The two facts made me draft that act. The dual purposes are to give a man the opportunity for making good and save fighting men for service. It is worthy of consideration. Perhaps a man lost his nerve for a moment. Also, there were soldiers of a bad type who would prefer penal servitude to the possibility of losing their life. But the act was drafted so that a man never knew his fate. A man got 10 years and went to a military prison in the field, and without the slightest warning, say after three months, he was again drafted and sent to the front with an organization, so that those guilty of crime to evade duty lived a time in prison in the field and never away from the prospects of going to the front. That act thus prevents crime. No man will risk days of imprisonment to find himself drafted again say after six months in prison. On the other hand, there were hundreds of cases where you had good soldiers gone. That was something stupid. The act alone prevented lots of crime, and saved hundreds of men who might have been shot. When I left France—I had been in France 20 months—only two men ever came back to the prison. After suspension of their imprisonment, out of about 1,500 men only 2 ever came back. They had enough of that prison. It was meant to be a nasty place in which to stay. Only two came back. I returned from France in January, 1916.

Lieut. Col. RIGBY. Maj. Wells suggests that you tell us the services they had to perform in prison.

Gen. CHILDS. I never went through one of these prisons myself. They are put at hard labor—damned hard work.

Col. RIGBY. Are they kept in good physical training?

Gen. CHILDS. Yes; as hard as nails. They are punished by restrictions of food, solitary confinement, and, if necessary, a court-martial again.

Lieut. Col. RIGBY. Will you tell us something of your opinion on the advantages and disadvantages of your field punishment?

Gen. CHILDS. Only yesterday I got in reports from C. O. Cs. I asked them two questions—whether they recommended the continuance of such punishments, and, if not, what they recommended as a substitute.

(Col Rigby asked for a copy of these reports containing the views of Field Marshal Haig and other commanders, and Gen. Childs promised to furnish copies within a week or 10 days, and when received it is to be filed as Exhibit 1 to this interview.

Lieut. Col. RIGBY. Another radical change proposed to be made in our practice by the bill in Congress is that instead of having cases reviewed by the Judge Advocate General, according to our present practice, there is to be a Court of Appeals, its members to be appointed for life, appeals to be taken just as in civil trials.

Gen. CHILDS. When that point was proposed by certain members of Parliament this court-martial committee, of which I am a member, considered it, and has considered other changes of that nature. In our courts of appeal in this country we do not have the attendance of witnesses. They merely refer to and have before them the written testimony sent up from the inferior court. Your court of appeal would be reviewing paper, not men. Here is the point. There are certain essentials as to courts-martial in time of war which do not apply in time of peace. In time of peace I should not see the slightest objection to any form of appeals.

In peace times all civilian offenses are tried before civil courts, and it is a fact that under our law after I am tried by a civil court and convicted or acquitted I can not be tried by a military court. In war time most offenses are military offenses, and therefore a court of appeal should and must be a court of soldiers. No civilian can appreciate the charge of striking a superior officer. A man in civilian life is struck by another and is fined 10 shillings. In military life a soldier strikes his superior officer and gets 5 years. Any military court in peace times must be a court of military officers. In war time and on active service, as in France, these offenses which are civil offenses have to be tried by a military court. The civil powers try men for forgery, embezzlement, and acts of indecency, which military courts are not at all qualified to try. Before I was a soldier I was a lawyer. Not one soldier

out of a hundred knows or can tell you the difference between embezzlement or larceny. In the service outside of this country you have to try soldiers by military courts, courts sitting for expediting military justice. In regard to civil offenses, have you had a court of appeals ever to accompany an army in the field? I would not object to any court of appeal on civil offenses. No court of appeal for military offenses for which the death penalty has been awarded is necessary, because you do not take a man's life because you want it, but for the disciplinary effect it has. In Australia, under their army act, you can not inflict the death penalty for desertion. The result has been deplorable. The fact remains that the situation in the Australian forces as to absences and desertion was wretched many times. The Australians do not want the death penalty. They can fight without it it is true, but those deserters were not the men who won the war. The Australian officers themselves sought the right of imposing the death sentence, but it was not permitted. A death penalty inflicted for desertion in the field is for the effect that it will have, and if the discretion of the Commander in Chief was to be upset by a court of appeal in this country or in France the result would be intolerable. Take the field marshal in France—suppose he confirms a death penalty. If you are going to set up a court of appeals, there you would have to find three field marshals who thus would be of equal rank with a field marshal to determine for the G. O. C. as to whether he should shoot a man for desertion.

Lieut. Col. RIGBY. Was extensive use made of the power to shoot a man down for misconduct in line of battle without any court-martial?

Gen. CHILDS. That is the unwritten law of the soldier. I have never heard of a case, but it has doubtless happened. I know a case of a fellow deserting to the enemy. They got him as he was going over the top.

Lieut. Col. RIGBY. Were there rather more in the French Army?

Gen. CHILDS. I think so. I have heard that there were cases of officers being put against the wall and shot.

Lieut. Col. RIGBY. Under their customs which give commander in chief more control?

Gen. CHILDS. I do not know anything of their code. In our job in military courts we must never forget that behind all that there is the necessity of maintaining discipline in the fighting service. Above all things one has to advise whether to shoot a man or not. It is a beastly job. You do not want the fellow's life, but for certain offenses the death penalty must be awarded or the Army would become an armed rabble.

Lieut. Col. RIGBY. Another thing—I am jumping from point to point. Will you tell me a little more about the powers of your Judge Advocate General?

Gen. CHILDS. Our Judge Advocate General has no executive powers whatever. He is the legal adviser of the Secretary of State for War. He merely advises as to the legality of proceedings, before trial in certain cases, and advises and assists prior to trial, and after trial. He has no executive power whatever. In the old days, 15 or 20 years ago, the Judge Advocate General had such power, and exercised that power to quash proceedings.

Lieut. Col. RIGBY. The change was made about 1905?

Gen. CHILDS. About 15 years ago, yes.

Lieut. Col. RIGBY. What was the reason for the change?

Gen. CHILDS. I do not know. Probably there was a strong objection to the Judge Advocate General having executive power to quash proceedings.

Lieut. Col. RIGBY. You stated the other day the high opinion you hold of Judge Cassel.

Gen. CHILDS. Yes; he is a lawyer, a most brilliant man.

Lieut. Col. RIGBY. Why are the records of cases referred by the Secretary of State for War, then, to the Attorney General for opinion, after he has been advised by the Judge Advocate General, Judge Cassel?

Gen. CHILDS. That is purely a departmental arrangement. If I do not agree with the Judge Advocate General, it goes to the Secretary of State for War—in a direct sense of the word it goes to the Attorney General who either supports the Judge Advocate General or myself on behalf of the Secretary of State for War, and directs that they be approved or quashed.

Lieut. Col. RIGBY. You do not then consider yourself bound to follow his recommendation; that is, the Judge Advocate General's?

Gen. CHILDS. That is all a working arrangement between Cassel and I. I will give you an example of the way we work together. [Getting two folders.] Here are two court-martial records which came to me in connection with certain offenses. I did not like it at all. I wrote to the Judge Advocate General

a private note, that I did not feel the proceedings could be sustained. I wrote him a personal note. These proceedings had been reviewed by him. They were held last May.

Lieut. Col. RIGBY. Did he recommend confirmation?

Gen. CHILDS. They had been confirmed and also reviewed by him and he did not advise quashing. I wrote a personal note. He then wrote a minute or review, as you call it, in which he raised the point whether the procedings can be sustained. I am going to send that minute to the Secretary of State for War and they will be quashed. That is the way we work together. If we see things wrong we give him the tip. If my advice was not worth having he would not take it, and I would not worry. I have very rarely disagreed with Cassel; but when I do, I put it back to him. If he says "no," the Attorney General settles it. I have not worked with anyone more charming. He is a brilliant lawyer. The law is that the Judge Advocate General on paper is the legal adviser of the Secretary of State for War. The Secretary can take other advice. The Judge Advocate General never quashes a sentence: that is for the consideration of the military authorities. The legality of the sentence is what he is to advise about.

Lieut. Col. RIGBY. He has nothing to do with clemency?

Gen. CHILDS. No. If he thinks a sentence is too severe, I expect him to draw my attention to any such sentence. That is the way we work.

Lieut. Col. RIGBY. Then, personally, you feel it to be your own duty, sir, to examine carefully all proceedings?

Gen. CHILDS. Yes; there are two reasons. I must know the pulse of the Army, and there is no better stethoscope than court-martial proceedings. I want to see everything going on. I read them on Sunday. If I do not think the sentence is too severe—one has to insure that a man does not suffer injustice—I merely return them to the Judge Advocate General. Centralization is bad. Carry it too far and it is bad.

Lieut. Col. RIGBY. May I ask further: In case of your disagreeing with the Judge Advocate General and the matter is referred to the Attorney General, would the Secretary of State for War feel bound to follow the Attorney General's decision?

Gen. CHILDS. It is purely, as I say, a personal arrangement. But if he did not agree, nothing would make him. The Secretary might be merely a signing machine. In fact, since I have held my present appointment he could not possibly personally review all the proceedings. The Attorney General relieves him and the Secretary signs blind.

Lieut. Col. RIGBY. Has the Attorney General any official responsibility?

Gen. CHILDS. No responsibility, except by working arrangement. The responsibility under the law is in the Secretary of State for War. During the war the Attorney General acts on behalf of the Secretary. Our courts-martial get extraordinary review. Take a simple case. It goes down below. Cassel sees it, and then it comes to me. It gets a most exhaustive review.

Lieut. Col. RIGBY. It is practically an automatic appeal?

Gen. CHILDS. Yes. Here is the record of a trial before a court-martial held in Cologne, for drunkenness. It was confirmed in France on advice of Judge Advocate General.

Maj. WELLS. What is the charge—drunkenness?

Gen. CHILDS. No. Conduct unbecoming an officer. It was reviewed in France and again reviewed by Cassel on this side. Now, the case comes to me. I will read the proceedings. If I think dismissal is too severe, although confirmed in France, I never let it go. It is wrong to let it go. I know how much drunkenness is going on in Cologne. By scrutinizing all courts-martial records I found it necessary to draw a letter, which I am going to send out.

(Copy of the letter furnished and is attached, marked, "Exhibit 2.")

Gen. CHILDS. As a matter of fact, I spoke to the commander in chief's adjutant general himself when he was here the other day. He realizes that there is too much of drunkennes going on. I am calling attention to the courts that sentences are too lenient. I can only publish it in orders. I can not direct any court to punish more severely.

Lieut. Col. RIGBY. Do you ever in approving a sentence or an acquittal, or too light a sentence as in the cases referred to, put any memorandum or note in the action that it was regretted that it was not more severe, or calling attention?

Gen. CHILDS. No; our regulations as laid down forbid that. If an officer desires to comment on any court-martial, he is only permitted to write to the Army council.

Lieut. Col. RIGBY. Are you not permitted to put in the action any comment?

Gen. CHILDS. No; if the convening authority desires to comment on any court-martial he addresses a note to the Army council. The court does not even know that he did it. If a court-martial has previously failed in its duty in the manner of trial in displaying ignorance, it would be proper for me to direct the court's attention to it, and perhaps to say that the president should be detailed for preliminary instruction in a number of courts-martial, but never in any other way.

Lieut. Col. RIGBY. Is it permissible to take any action that may be considered as a personal rebuke to the court?

Gen. CHILDS. No; if they acquit, they acquit. We never ask why. If the taking of evidence was bad, and the rules of proceedure were disregarded so as to necessitate the proceedings being quashed, or confirmation being refused, we have furnished directions, directing attention of the court to the rules of procedure, purely, though as a matter of education. Never a word is said to the court on their decision.

Lieut. Col. RIGBY. Do you ever discharge a court and appoint a new one if you are not getting severe enough sentences?

Gen. CHILDS. No. You use the expression "discharging a court." Our system is that in peac times a court, until discharged, is avaliable to try cases. But we never keep a court-martial beyond a few days. We want them to get training. We never keep a standing court.

Lieut. Col. RIGBY. Then you never allow a court to run along for any considerable length of time?

Gen. CHILDS. No. Suppose in peace times I had a court-martial sitting to-day, and I had two more men to try. I would order the same court to assemble to-morrow.

Lieut. Col. RIGBY. I believe the requirements are that an officer must be commissioned three years before he is appointed on a general court?

Gen. CHILDS. Yes; that is the law.

Lieut. Col. RIGBY. The Army act?

Gen. CHILDS. Yes.

Lieut. Col. RIGBY. That, I suppose, you find a great help in peace times?

Gen. CHILDS. Yes. On active service it is different. In peace times we did not have many general courts-martial. Two or three a year since I have been here, in peace times. I had been here four years before the war.

Lieut. Col. RIGBY. Your statistics show 12 in nine years. I remember, an average of 1½ per annum.

Gen. CHILDS. Yes; that is probably right—about one a year.

Lieut. Col. RAGBY. You have been using lawyers as court-martial officers, on field and general courts-martial. About how many men are required?

Gen. CHILDS. I do not know how many. It worked down to one court-martial officer per brigade, I think.

Lieut. Col. RIGBY. Would he be appointed to membership in several courts?

Gen. CHILDS. Yes; but we use those fellows for anything—for any legal work, sometimes as members of court, sometimes as prosecutor. They are used to assist in every way.

Lieut. Col. RIGBY. Please state whether it required a personnel which caused embarrassment to get the number of men.

Gen. CHILDS. We managed it easily during the war. We had a list of officers who were lawyers in civil life, and they were used. There was no embarrassment in getting plenty. Under the territorial system, lawyers and barristers always seem to join the territorial forces, and we had scores of qualified men before the war, qualified as line officers in the territorial forces.

Lieut. Col. RIGBY. Did you have to take enough away from the line to feel the lack of officers in the line?

Gen. CHILDS. We did not start this system until later on in the war. There were also lots of fellows unfit for the front who had been wounded. We never found any difficulty. I set up the same system when I came to this country. The commander in chief is delighted to have these people at headquarters to advise him on legal questions.

Lieut. Col. RIGBY. Did you have judge advocates for district courts sometimes?

Gen. CHILDS. No; we do not have judge advocates on district courts.

Lieut. Col. RIGBY. Is it permissible?

Gen. CHILDS. Yes; but they are only used in difficult cases.

Lieut. Col. RIGBY. The "specially qualified member" of your field general court-martial becomes an additional member of the court. Does he sum up in open court as to the law or the facts of the case?

Gen. CHILDS. No; he is a member of the court. I have no doubt that when the court is closed to consider, the president says: "Mr. Lawyer, what is your view?" But that is not on record. If a member of the court happens to be a lawyer, no doubt on the inside when considering he is consulted. I know if I were on a court, I would say, "Mr. Lawyer, what do you think?"

Lieut. Col. RIGBY. How are they appointed?

Gen. CHILDS. Why, I call for a list of lawyers who are officers and select them and appoint them after an investigation. I followed the same procedure in France. I simply called for a return of officers available and qualified. I never have any difficulty.

Lieut. Col. RIGBY. What about the counsel for the accused?

Gen. CHILDS. That always is easy.

Lieut. Col. RIGBY. Some criticized us because some used in our courts were second lieutenants.

Gen. CHILDS. Even though qualified men?

Lieut. Col. RIGBY. Yes; because it was charged that their low rank embarrassed them in defending the accused. Has that been your experience as to the low rank of any officer defending proving embarrassing in any way?

Gen. CHILDS. None whatever. I do not know from personal experience. I know enough to warrant me thinking that a barrister and lawyer is a person of formed ideas who would not feel embarrassed. Courts are always very careful how they deal with men who know the law, and who could not be for that reason embarrassed.

Lieut. Col. RIGBY. Did it ever appear to you in your work that counsel for the accused of low rank were in any way embarrassed?

Gen. CHILDS. Not on the document.

Lieut. Col. RIGBY. Outside of the document?

Gen. CHILDS. I never heard of it. It was suggested at the court-martial committee hearing that he should be of high rank, same rank as the president. This witness who suggested this though was a person of very low intelligence and failed to convince us that there was anything in the suggestion.

Lieut. Col. RIGBY. In France they seem to have frequently used private soldiers.

Gen. CHILDS. In France.

Maj. WELLS. In Belgium, too.

Lieut. Col. RIGBY. One of the propositions made in this new bill in Congress is that the penalty for assaulting a superior officer in the execution of his office be confinement for not over one year in addition to the usual punishment for a simple assault. Heretofore our Articles of War have provided that for that kind of offense the punishment shall be in discretion of the court-martial.

Gen. CHILDS. Can the court award the death penalty?

Lieut. Col. RIGBY. Yes; in time of war. In time of peace anything up to the death penalty. Here is a limitation to one year's imprisonment.

Maj. WELLS. In addition to the other penalty authorized for assault or striking.

Gen. CHILDS. Surely no soldier advocates such a law. Still during the war we inflicted only one death penalty for striking an officer. In my experience, it is essential to retain it (the death penalty). Otherwise an Army will degenerate into a mob. A soldier hits an officer over the head with a rifle. A person not familiar with military law does not understand why a man who assaults another on the street is only fined 10 shillings, while an assault on a superior officer should be punished so severely. You can not maintain an Army under those conditions. It is an explicit offense. Otherwise you can not win a war.

Lieut. Col. RIGBY. How do you punish by imprisonment?

Gen. CHILDS. In this country we have detention camps. Got men in civil prisons in this country for civil offenses, not for military offenses. Men were transported from France for civil offenses committed in France. For other offenses committeed in France they were put in military prisons in the field. Our policy is this—never permit a soldier to go to prison and then go back to the ranks. We believed that he became contaminated and not fit to wear the uniform. There is no contamination in a detention camp, which is only for military offenses. Fifty-four thousand trained men have left these shores from detenion barracks in this country. They were intensively militarily trained

men. I never have seen a man rejected from a draft who came from a detention camp. A man was sent to a detention camp and kept there until trained. I kept them in not to undergo sentence but to make them fit for the front. Our offenses were frequently absences without leave or desertion. We sent them to a detention barracks. Before the war a man went to prison and was discharged from the Army. All discharges, except for ill health, were held up during the war. No soldier that I permit to remain in prison is allowed to stay in the Army. Any sentence which should be commuted to detention is commuted. If I do not commute, I discharge. I am weeding out the undesirables from the Army.

Lieut. Col. RIGBY. Have you determined what sentences or punishment would be sufficient to send him to detention barracks? When you transfer him from prison to detention camps you do not discharge him?

Gen. CHILDS. I never discharge. He serves as a soldier.

Lieut. Col. RIGBY. Are you transferring quite a number?

Gen. CHILDS. About as fast as I can get them out.

Lieut. Col. RIGBY. What proportion? Are you transferring one-fourth or one-half?

Gen. CHILDS. I never kept tab. The point is this. I am not commuting many for this reason. The class of men coming through from France to prison is the scum of the army who have committed looting, assaults. The class of men that should go to the detention camps is not coming through. The class of men getting detention is the class whose sentences are suspended in France, unless he is a hardened fellow, not in the commuted class at all.

I think that you must be suffering from the same thing we are. The people feel that the army is unfair, unjust, do not give consideration to cases. The truth is that no case in court receives so much consideration as the review a court-martial coming up before me gets. Take these three case [indicating]. The men have not appealed. Still there is always somebody looking after them. Privates tried in Ireland, tried, and the paper come up here. The cases are investigated. There is no appeal, but they are investigated. They do not need a court of appeals, the power here is so great. The people do not understand, do not realize. If you take a court-martial in France, whether it is a soldier or an officer, who has been tried, there is a court-martial officer that handles the case, then another one, the legal advisor for the confirming officer, then the confirming officer. It goes through division, corps, and army, through their legal officers, then to G. H. Q., to the commander in chief, and so on through channels here to Cassel, then to me. It is scrutinized 20 times. The people do not know that. What court in civil life gives care like that?

Then I give the commandants of the detention barracks power to send me the names of men to be released. I ask for no facts, just direct them to send the names. They can tell a man when he goes in, "You got nine months; if you play the fool, you do nine; if you play the man, you get out in three."

EXHIBITS ATTACHED TO GEN. CHILDS'S STATEMENT.

DRAFT LETTER.

I am commanded by the Army Council to say that their attention has been drawn to the large number of courts-martial which have been held on officers for offenses of drunkenness, improper conduct, and against the inhabitants of occupied territory, and they note with regret that in the very large majority of cases the offenses have been dealt with by the court by an award of forfeiture of seniority and even lesser punishments.

The council consider that offenses of these descriptions should, in the absence of very extenuating circumstances, be dealt with by an award of cashiering or dismissal, as the honor of the British Army is sullied by such behavior and it can not fail to give the enemy just cause to bring forward such incidents as a set-off against the irregularities and atrocities committed by German troops in France and other theaters of war.

WAR OFFICE,
London, S. W., April 15, 1919.

SIR: I am commanded by the Army Council to inform you that during the debate on the army (annual) bill an amendment was moved to insert in section 44 of the army act a proviso to the effect that field punishment should not be

of the character of personal restraint in the sense that a soldier could be kept in irons or other fetters, but rather should be of the character of hard labor; and arising out of the amendment the secretary of state for war gave an undertaking in the following words:

"I will give an undertaking that we will institute forthwith a series of inquiries to obtain the opinion of the military authorities in France, here, and in other theaters, with a view to seeing if a substitute can be devised for this form of punishment without impairing the means by which discipline is maintained, and without leaving us with possibly the danger of being drawn, under certain circumstances in another war, into a more free infliction of the death penalty than has been the case in this war. I would suggest that there is no reason why there should be any delay. I will make these inquiries, and see what amendments can be made to the rules of procedure."

I am to say also that in reply to questions in the course of the debate the secretary of state undertook to secure the opinions of officers, noncommissioned officers, and men on the subject, and to this end I am now to request that you will render a report to this department, with your recommendations on the following points:

(*a*) Whether that portion of field punishment which involves confinement in irons (i. e., fetters or handcuffs, or straps or ropes) should be maintained; and

(*b*) In the event of it being recommended that this portion of field punishment should be abolished, what form of punishment is suggested in substitution therefor.

I am to request that a very early reply be furnished.

I am, sir,

Your obedient servant,

——— ———.

The General Officer Commanding in Chief.

C. R. 5081-P. S. 2.

From Lieut. Gen. Sir J. J. Aaser, K. C. M. G., K. C. V. O., C. B., general officer commanding British troops in France and Flanders.

To: The Secretary, War Office, London, S. W. 1.

Headquarters, British Troops in France and Flanders.
June 26, 1919.

Sir: With reference to War Office letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, I have the honor to report that I have caused very extensive inquiries to be made with a view to obtaining the opinion of commanders of every grade as well as of regimental officers, noncommissioned officers, and men, on the desirability or otherwise of retaining that portion of field punishment which involves confinement in irons, straps, or rope .

The balance of opinion amongst commanders is heavily in favor of the retention of this form of punishment for the following reasons:

(*a*) It has a great effect as a deterrent.

(*b*) The only substitute appears to be imprisonment with hard labor, which enables the offender to escape the danger and hardships of the fighting area.

(*c*) It can be put into operation immediately and is therefore specially effective as a quick, sharp punishment.

(*d*) Its removal from the scale of punishments which can be awarded by a commanding officer would increase the number of courts-martial, thus causing delay in disposing of offenses.

The opinion of noncommissioned officers and men is about equally divided as regards retention or abolition.

The older soldiers are usually in favor of field punishment No. 1, and the younger ones against it.

I attach for the information of the Army Council reports of interviews with various noncommissioned officers and men.

After a careful revision of all the reports submitted to me, I am of opinion that, in the interests of discipline on active service, it is essential that commanding officers should have the power to inflict upon persistent offenders a degree of punishment in excess of field punishment No. 2, which in actual practice is little more than confinement to barracks with the added penalty of forfeiture of pay.

The punishment of "tying-up" is not a satisfactory one, but there does not appear to be any other less objectionable which, in the field, can be substituted for it, and in these circumstances I consider it should be maintained.

I recommend, however, that the punishment of field punishment No. 1 be restricted as follows:

(*a*) A commanding officer should be allowed to award it only to a soldier who has committed an offense whilst undergoing imprisonment in a military prison in the field, or whilst undergoing field punishment No. 2.

(*b*) The "tying-up" of a British soldier should never be carried out in view of civilians, natives, or allied troops.

I consider it essential that the provisions of paragraph 2 (*a*), (*c*), and (*d*) of the rules for field punishment (par. 721 M. M. L.) should still hold good. On active service, especially when on the line of march, it is of the greatest importance that an effective method of securing prisoners against escape shall be at the command of those responsible for their safe custody. I have the honor to be, sir,

Your obedient servant,

——— ———,

Lieutenant General, Commanding British Troops in France and Flanders.

[Rhine Army No. A. H. 8095. 105 Gen. No. 2767.]

From: General Sir William R. Robertson, G. C. B., K. C. V. O., D. S. O., A. D. C., Commanding in Chief, British Army of the Rhine.

To: The Secretary, War Office, London, S. W. 1.

COLOGNE, *June 10, 1919.*

SIR: In reply to your letter No. 105, Gen. No. 2767 (A. G. 3) of 18/4/1919, I have the honor to report that the whole question of punishments in the field is one of considerable difficulty. It is undoubtedly desirable to keep offenders in or near the front line, and not to allow their offenses to procure them safety and perhaps relative comfort. It is equally desirable in many cases that the soldier should not receive the taint of imprisonment for a military offense.

On the whole I am of the opinion that "Personal restraint" should not be abolished as part of field punishment No 1 under active service conditions. Some form of punishment which can be readily and quickly administered is necessary. It must be possible to carry it out without the employment of much personnel or elaborate accommodation, and it must be at the same time sufficiently distasteful to those undergoing it to act as a deterrent. I have the honor to be, sir,

Your obedient servant,

——— ———,

General, Commanding in Chief, British Army of the Rhine.

FORCES IN GREAT BRITAIN,
HORSE GUARDS,
Whitehall, London, S. W. 1.

SIR: With reference to War Office letter 103, General Number 2767 (AG3) dated April 18, 1919, I have the honor to report that I have asked various officers for their opinions on this subject, including officers of the Regular and New Armies and Territorial Force, who have commanded a battalion or brigade with distinction in the field.

2. The consensus of opinion is that field punishment No. 1 involving confinement in irons (i. e., fetters or handcuffs or straps or ropes) forms a valuable aid to discipline, and as such should be maintained. A few officers, from a sentimental point of view, wish that it could be dispensed with, but are unable to find a substitute other than a flogging, and are generally in agreement that its abolition would result in an increase of death sentences.

3. No complaints have been brought to my notice of any soldier experiencing hardships in any way approximating to torture due to the nature of the appli-

cation of field punishment No. 1, and personal inspection of men undergoing this form of punishment on numerous occasions has convinced me that no serious exception can be taken thereto.

4. I am quite certain that it would not have been possible to maintain the high standards of discipline in the British Army in France if field punishment No. 1 had been nonexistent, and it is not beside the point to recall the effect on discipline in the Australian Corps of the absence of capital punishment for desertion.

5. I would call the attention of the Army Council to my letter from General Headquarters British Expeditionary Force, dated December 4, 1916, on this subject, in which the case is put very fully and clearly. After a lapse of three years I am unable to modify the views expressed in that letter or to suggest any substitute for that portion of field punishment referred to above, and as it fulfills its object, whilst being in no sense torture, I am of opinion that it should be maintained. I have the honor to be, sir,

Your obedient servant,

D. HAIG,
Field Marshal, Commanding in Chief, Great Britain.

The SECRETARY, WAR OFFICE,
Whitehall, London, S. W. 1.

HEADQUARTERS, *June 20, 1918.*

From: The Commander in Chief Egyptian Expeditionary Force.
To: The Secretary War Office, London, S. W. 1.

SIR: In accordance with war office letter No. 165, G. N. 2767 (A. G. 3) of April 18, 1919, relative to the question of the retention or abolition of that portion of field punishment which involves confinement in irons, I have the honor to report that I have obtained the opinions of the officers, noncommissioned officers, and men under my command and find that the majority of officers advocate the retention of the present rules with the exception of that portion involving attachment to a fixed object, while the majority of the noncommissioned officers and men favor the abolition of field punishment altogether.

The general opinion amongst corps and divisional commanders is that field punishment should be retained as it is, but should be employed only for offences of a grave or disgraceful character.

The alternative to field punishment recommended by those who favor its abolition is hard labor, pack drill, or other forms of rigorous physical fatigue.

My opinion is that the retention of field punishment is desirable as being a deterrent to many constant offenders to whom a prison presents no terrors and because its abolition would result in an increase in the number of men committed to prison and thus temporarily lost to their unit. I recommend therefore that field punishment No. 2 be retained, but that field punishment No. 1 be abolished. I have the honor to be, sir.

Your obedient servant,

E. M. ALLENBY,
General, Commander in Chief Egyptian Expeditionary Force.

From: Gen. Sir George F. Milne, K. C. B., K. C. M. G.,D. S. O., Commander in Chief British Army of the Black Sea.
To: The Secretary War Office, London, S. W.

GENERAL HEADQUARTERS,
Constantinople, May 13, 1919.

SIR: I have the honor to acknowledge receipt of your letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, and in reply beg to state that I have caused inquiries to be made to secure the opinions of my officers, noncommissioned officers, and men upon the subject therein referred to.

As a result of the inquiry, I find that that portion of field punishment No. 1, which involves confinement in irons or being tied to a fixed object, is, in general, objected to, and I entirely agree that this procedure should be abolished as degrading. On the other hand, I can not find that any really effective substitute has been suggested.

It would appear to be the general opinion that the greatest deterrent punishment is "pack drill," which is disliked more than hard labor of any kind, and should it be decided to discontinue that portion of field punishment above referred to, I would recommend that a period of, say, two hours per day of pack drill be substituted.

Two other suggestions have been made, which I forward for your consideration:

1. That commanding officers who have awarded sentences of field punishment No. 1 should have the power, subject to review by superior military authority, for suspending a sentence awarded on the march or whilst fighting is going on until after the arrival of the unit at a place where the punishment can be performed; and

2. That the commanding officers' powers of forfeiture of pay should be extended, and that the forfeiture of pay under an award of field punishment shall not be dependent upon the fact that the man is in custody, but shall be automatic to the award.

I have the honor to be, sir,
Your obedient servant,

G. F. MILNE,
General, Commanding in Chief
British Army of the Black Sea.

Subject: Field punishments. Confidential.

GENERAL HEADQUARTERS, IRELAND,
Parkgate, Dublin, May 20, 1919.

SIR: With reference to war office letter No. 105, Gen. No. 2767 (A. G. 3), dated April 18, 1919, I have the honor to state that all formation commanders and O. C. units and representatives of W. Os. N. C. Os. and men of all units have been consulted, and that the majority (W. Os. N. C. Os. and men almost unanimously) are of opinion that that portion of field punishment which involves tying in a fixed position in public should be abolished.

They can not, however, suggest a suitable substitute, and many commanding officers, therefore, advocate the retention of the tying up in a fixed position.

Personally, I am of opinion, after consultation with other officers who have had experience of command of units in the field:

(*a*) That "tying up" in a public spot as a portion of field punishment should be abolished.

This punishment is undoubtedly degrading and is, in the majority of cases, awarded for offenses such as insubordination, which do not call for a punishment of a degrading character.

I think that the infliction of this punishment is calculated to make a man lose his self-respect, the retention of which is vital to him as a soldier, and the fact that the safety of the nation may depend on the morale of each individual man makes it, in my opinion, more desirable to eliminate any such form of punishment.

(*b*) It is not clear that any substitute is really necessary, and it is very difficult to suggest one for what is, after all, only a portion of field punishment No. 1.

The main consideration is that any form of field punishment should be equal in its incidence, and that the delinquent should not escape the risks suffered by his comrades by reason of his bad behavior. In a large army, such as the British Army in France, it was found in practice very difficult to secure these conditions.

The only method of doing so was to send men behind the line, and, therefore, out of immediate danger. Consequently many men preferred to do severe field punishment well behind the line than to run the risks attendant upon the so-called period of "rest" in close support of the trench line, where long and arduous night-working parties under fire caused the soldier to prefer his tour of duties in the trenches to that of his short tour of "rest."

I think a solution might be found in the formation of penal companies or battalions, to which all men with sentences of 14 days' field punishment or upward would be sent.

These penal units could be used for working parties in the dangerous zone, and, moreover, could be given a special diet without luxuries of any description. As long as a man remains with his unit a special diet is impracticable.

I consider that if a penal company formed part of each division it would be possible to adopt the system for any form of warfare.

I have the honor to be, sir,

Your obedient servant,

F. SHAW,
Lieutenant General, Commanding in Chief, Ireland.

The SECRETARY,
War Office, London, S. W. 1.

GENERAL HEADQUARTERS, *April 27, 1919.*

From: Maj. Gen. H. B. Walker, K. C. B., D. S. O., commanding the British force in Italy.

To: The Secretary, War Office, London S. W. 1.

SIR: In reply to your No. 105 Gen. No. 2767 (A. G. 3), dated April 18, I have the honor to make the following recommendation:

That there be only one field punishment;

That commanding officers may award as heretofore 28 days and a court martial three months of such field punishment;

That the wording of paragraph 2 should be:

(*a*) "He may be kept in irons, i e., fetters or handcuffs, or both fetters and handcuffs, so as to prevent his escape or in the event of his being violent, but not as a means of punishment.

(*b*) Strike out.

(*c*) As before.

(*d*) As before.

For offences requiring a more serious award the sentences should be as heretofore, imprisonment with H. L., penal servitude, death, according to the gravity of the offence.

I have the honor to be, sir,

Your obedient servant,

H. B. WALKER.
Major General, Commanding the British force in Italy.

Senator CHAMBERLAIN. Have you also a copy of the interview with Judge Cassel, judge advocate general of the British Army?

Lieut. Col. RIGBY. I was about to offer that also. There should be attached to that, to make it complete, a copy of my questionnaire and a copy of Judge Advocate General Cassel's formal answer to my questionnaire, upon which this interview was based. I will furnish those, to make some parts of the interview intelligible. And also a statement by Capt. Eastwood, court-martial officer to the London command, in a portion of which Maj. Du Plat Taylor, the other court-martial officer of that command—and so-called "permanent" president of its district court martial—joined.

(The documents referred to are as follows:)

INTERVIEW HAD BY LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, OFFICE OF JUDGE ADVOCATE GENERAL, WITH FELIX CASSEL, ESQ., K. C., JUDGE ADVOCATE GENERAL, BRITISH ARMY, AT 68 VICTORIA STREET, LONDON, ENGLAND, JULY 17, 1919.

Under date of June 14, 1919, Lieut. Col. Rigby submitted a questionnaire to Judge Cassel (copy attached) requesting, on behalf of the United States Government, information concerning the administration of military law in the British armies, so far as practicable to furnish it.

On July 17, 1919, at 4 o'clock, p. m., Lieut. Col. Rigby called at Judge Cassel's office, by appointment, and received the answers to his questionnaire (copy of memorandum of Judge Cassel attached); also had the following interview:

Lieut. Col. RIGBY (reading from questionnaire):

"On behalf of the United States Government, the following information concerning the administration of military law in the British armies is respectfully requested, so far as it may be practicable to furnish it: 1. (*a*) Results of preliminary investigation and trial."

Judge CASSEL (reading, from his memorandum):

"1. (*a*) No statistics are available as to the number of charges investigated by commanding officers, nor as to the proportion of such charges which are dismissed, remanded for trial by court-martial, or dealt with summarily."

No record of proceedings of commanding officers reach the judge advocate general's office.

Lieut. Col. RIGBY. Have you any way of approximating or estimating the relative proportion of charges that are dismissed as a result of the preliminary investigation or disposed of otherwise than by being sent to a court-martial?

Judge CASSEL. No, I really have not. The records do not reach me at all. I could make a guess, but it would not be reliable.

Lieut. Col. RIGBY. If you could give an estimate from your general information.

Judge CASSEL. I do not think I could give an estimate that would be of any value. I do not think that the war office or the adjutant general's department could give it.

Lieut. Col. RIGBY. Could some of the court-martial officers give it, say out of several individual commands so as to get a rough view?

Judge CASSEL. I think the people that would be most likely to know would be the record office. I will make further inquiries. But, as I said, I do not think it is possible. Make a note of that, please [speaking to assistant].

Lieut. Col. RIGBY. Will you give me some kind of a line on the effectiveness of your preliminary examination in weeding out trivial and unfounded charges?

Judge CASSEL. I think you may take it that it is effective. But it is difficult to get any exact figures.

Lieu. Col. RIGBY. Could not approximate figures be obtained from one or two commands through the court-martial and record officers?

Judge CASSEL. What you really want is the number of cases dismissed, summarily dealt with, or sent for trial to court-martial?

Lieut. Col. RIGBY. Yes; If I could get that for two or three commands.

Judge CASSEL. I do not think it would be possible, but I will make inquiries.

Lieut. Col. RIGBY (reading next question):

"1. (*b*) How the investigation is actually carried on in practice."

Judge CASSEL:

"1. (*b*) In the case of a N. C. O. or man, a charge is first investigated by his company (battery or squadron) commander, whose powers of punishment are very restricted. (See King's Regulations, 501.) If the company commander can not, or thinks that he ought not to deal with the case, he sends it on to be dealt with by the commanding officer. The latter after the charge has been read to the accused hears the witnesses. The accused may cross-examine the witnesses called against him, and may make a statement (or give evidence) in his defense, and may call witnesses. If the accused so requires, the evidence must be taken on oath; but it is only very rarely that such a request is preferred. The accused has no right to be represented by counsel or by an officer before the commanding officer."

The commanding officer then takes one of the following courses:

"(I) He dismisses the charge.

"(II) He disposes of it summarily, if he can do so without reference to superior authority. The charges that may be so disposed of are set out in King's Regulations, 487. The punishments which a commanding officer can award to a N. C. O. or man are set out in section 46 (2) of the army act and King's Regulations, 493.

"(III) If he thinks that the case is one which may be dealt with summarily, but he is not empowered to so deal with it without sanction from superior authority, he refers it to such authority. He will then either be authorized to deal with it summarily, or be directed to send it to a court-martial.

"(IV) He adjourns it in order that the evidence may be reduced to writing, with a view to a court-martial.

"In every case where the award or finding involves a forfeiture of pay, and in every other case unless one of the minor punishments referred to in army act, section 46 (9) and King's Regulations, 493, is awarded, the commanding officer must give the accused the option of being tried by court-martial. (Army acts 46 (8).)

"Where a case is adjourned for the evidence to be reduced to writing, this is (as a rule) done by the adjutant, though any officer may be detailed by the commanding officer for the purpose. The witnesses attend again, give

their evidence, and are cross-examined as before; the accused makes any statement or gives any evidence that he wishes, after being cautioned that he need not say anything, and calls witnesses if he wishes. The whole evidence is taken down in writing by the adjutant or other officer detailed for the purpose. Each witness signs the evidence given by him, and the evidence so taken is called the 'summary of evidence.' The evidence is generally not taken on oath, and the accused has no right to be represented. This has, however, sometimes been allowed in cases of exceptional difficulty or importance."

Lieut. Col. RIGBY (interrupting). No representation at the taking of the evidence?

Judge CASSEL. It is not considered that the accused has the right to it [continuing reading]:

"The commanding officer then reconsiders the written record, and finally decides whether to apply for a court-martial, or whether to dispose of the case summarily (assuming that he has the power to do so and that the accused has not elected trial by court-martial).

"If he decides upon a court-martial, he prepares and signs a charge sheet and formal application for trial, which he forwards with the summary of evidence and conduct sheets of the accused to an officer having power to convene a court-martial for the trial of the accused. That officer considers whether the summary of evidence justifies trial, and, if he comes to the conclusion that it does, makes an order accordingly."

So far, I am dealing with noncommissioned officers and men. [Continuing reading:]

"In the case of an officer, the case goes at once to the commanding officer without the intervention of the company (battery or squadron) commander. The commanding officer has no power to punish an officer. He can either dismiss the case, or apply for a court-martial, or, if the accused officer is below field rank, can refer the case to a superior officer, not under the rank of general. The latter, in the case of an officer below field rank, can award certain minor punishment, or can direct trial by court-martial. (See Army act, sec. 46A.) Where a court-martial is decided upon, a written 'summary of evidence' must be taken as in the case of a soldier if the accused so requires, otherwise a summary may be dispensed with, and an "abstract" of the evidence given to the accused."

In the case of an officer, it is not obligatory to take a summary, but the accused may require it, and if he does not require it, it is obligatory to give him an "abstract."

Lieut. Col. RIGBY. But in the case of an enlisted man, it is obligatory?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. In taking the summary, it is taken in writing. Does that mean that the testimony is taken down verbatim, or just a summary, a condensation of it made?

Judge CASSEL. It is taken in narrative form.

Lieut. Col. RIGBY. Not in the form of questions and answers?

Judge CASSEL. No, only subject matters.

Lieut. Col. RIGBY. Does the accused have the right to be present at the examination of each of the witnesses?

Judge CASSEL. He must be present.

Lieut. Col. RIGBY. He has the right to cross-examine witnesses?

Judge CASSEL. Certainly.

Lieut. Col. RIGBY. What right does the accused, if any, have to see the summary before it is forwarded to the commanding officer?

Judge CASSEL. No specific provision in the rules of procedure entitles the accused to a copy of the summary until the order for trial is made by the convening authority, but, in practice, if he applied for a copy of the summary, it would probably be given to him. Sometimes the convening officer may direct that additional evidence be taken. The rules of procedure do provide that the accused must be supplied with a copy of the summary when ordered for trial. It is then served upon him. To give it to him earlier, there is no provision, strictly speaking, under the rules, but it would be accorded in practice if the accused called for it.

Lieut. Col. RIGBY. If, after the summary is taken, additional witnesses are found, must they be examined in the presence of the accused?

Judge CASSEL. In precisely the same way.

Lieut. Col. RIGBY. At the trial can witnesses be called who were not called at the time that the summary was taken?

Judge CASSEL. They may be called, but the accused must be asked whether he wishes for an adjournment in order to give him an opportunity to prepare for their cross-examination.

Lieut. Col. RIGBY. He has the right to ask for an adjournment?

Judge CASSEL. Unless a reasonable notice of the intention to call additional evidence has been given him before the trial.

Lieut. Col. RIGBY. Must that notice include a statement of the character of the evidence, the name of the witness——

Judge CASSEL. Yes; if that has not been done, the accused is not only within his right to adjournment, but must be informed of that right.

Lieut. Col. RIGBY. In the case of officers—unless he requires it, testimony can be taken out of his presence and written in an "abstract"?

Judge CASSEL. Only in the case of an officer, but an officer can always require it to be taken in the same way as an enlisted man.

Lieut. Col. RIGBY. In practice, can you tell me what percentage of the cases are disposed of by the award of the commanding officer without resorting to court-martial?

Judge CASSEL. That comes back to the same question upon which I said that I had no statistics available. It is the same question.

Lieut. Col. RIGBY. You told me that you could not tell me how many were disposed of without any punishment being given—dismissed—but will your statistics show the number of cases punished, disposed of by the award of the commanding officer?

Judge CASSEL. No records of commanding officers reach my office—only proceedings of courts-martial.

Lieut. Col. RIGBY. Don't go through you?

Judge CASSEL. No.

Lieut. Col. RIGBY. If statistics are available, where can I find them?

Judge CASSEL. I think probably the only place would be the record office. That is one of the points under the first head—going back to the inquiry you made. My office is not concerned with commanding officers' punishment or their dealing with a case unless it eventually results in a court-martial. Any irregularity in conduct of a preliminary proceeding before a commanding officer which might have affected the subsequent court-martial trial, that would come to my notice, but it would not come to my notice if a court-martial had not resulted, unless I was especially consulted whether a particular award by a commanding officer was legal or not. Sometimes a general in going through the awards of a commanding officer finds an award, as to the legality of which he is doubtful. He then writes to me for an opinion. Apart from that, unless a commanding officer consults me about a case, it rarely would come under my notice.

Lieut. Col. RIGBY. What I would like to get is the number of awards by commanding officers during the war, so that we may compare these—the percentage—with the number of court-martial trials, to get at the efficiency of the system in cutting down the number of trials by the right of commanding officers to make awards.

Judge CASSEL. That would mean the number, the total of all cases disposed of by commanding officers during the war. Very doubtful if I can get that, but I will do the best I can.

Lieut. Col. RIGBY. To give us a view of its efficiency—a system which we do not have, and we are greatly interested.

Judge CASSEL. I will tell you this—I can not give you any definite figures, but it is very effective and very valuable, but when you ask me to give you statistics, percentages, and figures, I can not do it. I have no reason for seeing and do not see the records of commanding officers.

Lieut. Col. RIGBY. We do not want to burden you unduly, but if you can refer us to the place to go——

Judge CASSEL. I will let you know the best way to find out what can be found out. But you may take it that I am satisfied that it is on the whole a very valuable and efficient procedure. It depends in a large measure on the particular commanding officer; that is to say, whether the commanding officer is a man of experience and capacity, and where he is it does work very well.

Lieut. Col. RIGBY. From your experience, has the present powers given under Army orders of 1910 extending the commanding officers' powers from, I think, awards of 14 to 28 days—what has been the effect of that compared to the former?

Judge CASSEL. These increased powers of commanding officers have had the result of practically doing away with regimental courts-martial. We have, as you know, a form of court-martial called regimental court-martial, which is convened and confirmed by the commanding officer himself, and which is composed entirely of officers under his command. The extension of the powers of the commanding officers has very largely reduced the number of regimental courts-martial. Regimental courts-martial are now very rare indeed, because a commanding officer's powers so nearly approximate to those of a regimental court-martial. In fact, regimental courts-martial are now only resorted to in special cases.

Lieut. Col. RIGBY. They correspond to our summary courts.

Judge CASSEL. On the whole, I think it has been an advantage. I think the commanding officers have dealt satisfactorily with the cases, but there is always some feeling against a court convened by the commanding officer, consisting entirely of officers under his command and confirmed by the commanding officer—all in the same regiment. There is a feeling that it is not the judgment of an independent court, but regimental courts-martial practically cease to exist through this extension of power.

Lieut. Col. RIGBY. The 14 days' power was not sufficient?

Judge CASSEL. It was not sufficient; but on the other hand, if you go to increasing the power largely beyond what it is at present, I think the result will be that soldiers will be more frequently electing a trial by court-martial, and not run the risk to be tried by commanding officer. Twenty-eight days is, I think, about a proper power of punishment for a commanding officer to possess. Suggestions have been made for increasing it still further, but those are under consideration. If you increase it very much you do run the risk of increasing the number of cases in which soldiers would elect trial where they now abide by the commanding officer's award. I do not think the powers to deal with a case summarily should be increased beyond what they are now.

Lieut. Col. RIGBY. After a summary is taken, is it forwarded to the commanding general of the unit to appoint the court?

Judge CASSEL. We have no general commanding a unit. District courts-martial would generally be appointed by commander of a brigade; general courts-martial in the United Kingdom by commander in chief of the command——

Lieut. Col. RIGBY. I was not using the word in a technical sense, but only referring to any organization or body of troops whose commander is empowered to appoint a court-martial. When it goes to his office—the general's office—what practically is done with it? Does it go to him personally or to some court-martial officer?

Judge CASSEL. Always goes to the staff officer who is skilled in military law or court-martial officer who advises the general as to the legal aspects of the case. The general sometimes uses his own judgment. On the legal aspects he has a legal adviser. Since the war we have had special court-martial officers; before the war, some staff officer having special legal training. The convening officer, which is the name I give to the officer who has power to convene courts-martial, examines with much care the summary of evidence, and on the legal advice which is given him determines whether it is a case which should go to a court-martial.

Lieut. Col. RIGBY. These court-martial officers appointed under War Office instructions of September, 1916—I saw a copy of the circular—and as I remember there was nothing in that requiring that they be men necessarily of legal training.

Judge CASSEL. Originally this may have been the case, but it is now universally a general rule that they must be barristers or solicitors.

Lieut. Col. RIGBY. Any regulation requiring that the summary or evidence be submitted to them?

Judge CASSEL. Simply a matter of practice.

Lieut. Col. RIGBY. Is that practice universal?

Judge CASSEL. I think you may take it as being practically universal. As I said before, if the staff officer or court-martial officer concerned feels any difficulty on any point of law which is raised on the charge, or if the general does not agree with the advice which is tendered to him, the matter is referred to the Judge Advocate General in the United Kingdom—referred to me—abroad it would be referred to my deputy. My deputy in any part of the world always has the right to consult me if he himself has any doubt or difficulty.

Lieut. Col. RIGBY. In practice, then, the convening authorities feel themselves bound to act in accordance with the advice given by the staff officer or court-martial officer, or else have it referred to you or your deputy?

Judge CASSEL. So far as legal questions are concerned. In case of any difference from a disciplinary as distinct from a legal point of view, he would exercise his own discretion. As regards aspects of the case other than legal, he would not in practice feel himself bound to follow the advice of a skilled legal authority.

Lieut. Col. RIGBY. Although a court-martial officer had advised him that a case was legally sufficient, he might nevertheless decide, from a disciplinary standpoint, not to send a case to trial.

Judge CASSEL. He might, for example, decide that the commanding officer should himself dispose of it. In the case of an officer now, he would summarily dispose of it himself. The powers of disposing summarily of officers' cases are given by the Army act of 1919.

Lieut. Col. RIGBY. On the other hand, would he decide to order a case to trial, although the court-martial officer advised him that it was not legally sufficient?

Judge CASSEL. No provision of the Army act which prevents him from doing so, but in practice he does not do it. I think if in such circumstances he sent it to a court-martial, and it resulted in an acquittal and the army council heard of it, they might intimate their disapproval of the line he had taken, but I do not think I can remember a case of that kind. It might be that the officer would write to the army council to indicate to them the difficulties, from a point of view of discipline, that had been created by the fact that he had been prevented from bringing a case to trial on the legal grounds of the court-martial officer.

Lieut. Col. RIGBY. In practice, if the summary of evidence contains any testimony which in the opinion of the court-martial officer should not come before the court, he simply blue-pencils it or marks it out—that portion of the evidence that appears to be irrelevant or immaterial?

Judge CASSEL. The practice is that the court-martial or staff officer ought to strike out that part of the evidence in such a way that it is completely obliterated. In the case of a general court-martial, every case is referred to the judge advocate general before it goes to trial. In these cases the obliteration of the inadmissible evidence would be done in this office. General courts-martial are always referred to the judge advocate general before trial——

Lieut. Col. RIGBY. Or to deputy?

Judge CASSEL. Outside of the United Kingdom, always in practice referred to deputy. In the United Kingdom the regulations specifically require that the proceedings should be refered to the judge advocate general. We examine the charge and evidence and advise whether legally sufficient to try on the charge, whether the charge is in order, whether laid under the correct section of the Army act.

Lieut. Col. RIGBY. Do you ever have occasion to advise that further testimony ought to be taken on any case? What procedure is followed?

Judge CASSEL. If further evidence is available, additional summary of evidence would be taken by the commanding officer, who would detail the same officer to take the additional summary who had already taken the summary.

Lieut. Col. RIGBY. The accused must again be present and be given an opportunity to cross-examine those witneses?

Judge CASSEL. Exactly.

Lieut. Col. RIGBY. In practice does that result in any embarrassment on the part of the Army authorities; too much delay; any disadvantage of that kind?

Judge CASSEL. I have not heard of any complaints on that score. There have been one or two cases where we have allowed counsel to appear at the summary where there has been a complaint of the cross-examination of the time it has taken?

Lieut. Col. RIGBY. It really amounts to two hearings or trials, in a way?

Judge CASSEL. There have been complaints that witnesses have to go twice, once to attend before the commanding officer and again to attend at the trial. The complaints on that ground have been chiefly from police and other civilian witnesses.

Lieut. Col. RIGBY. What about the feeling in general—what do officers think of it—are there any complaints about having practically two trials?

Judge CASSEL. No complaints on that score excepting those which I have just referred to from witnesses about having to attend twice.

Lieut. Col. RIGBY. The commanding officers themselves, so far as you know, do not feel unduly encumbered by the necessity of having all that care taken—the taking of the summary?

Judge CASSEL. They generally deputize their adjutant. A case comes before a commanding officer in the morning. Before he begins his day's work. He deputizes the adjutant, and the adjutant does it in the afternoon.

Lieut. Col. RIGBY. Does it result in delay in the examination or the investigation?

Judge CASSEL. That depends on the commander of the particular units concerned. With efficient units I do not think it does lead to any great delay. It is analogous in a way to civil procedure before a magistrate; the case is committed to trial and the witnesses have to come again.

Lieut. Col. RIGBY. Yes; practically given a hearing before a magistrate. The objection has been made in some quarters that it will impose undue delay; that it really means a second hearing—second trial. In ordinary military cases it would appear to be unnecessary. Our manual requires that the commanding officer make a careful investigation and leaves it to his discretion as to how the examination should be made.

Judge CASSEL. I think that documentary evidence should be very largely allowed at the summary to prove facts which are more or less formal in their nature, such as the proof of arrest by a policeman. It does seem to me unnecessary that you have to bring a policeman twice to give evidence upon which in ninety-eight cases out of a hundred there is no cross-examination at all—no dispute. It is really an unnecessary waste of that man's time, and a waste of the people's money in bringing him twice to get his evidence. In proving formal facts, documentary evidence should be offered largely at these preliminary investigations. In fact, it is very largely used because if the accused does not ask a cross-examination or raise any objection ot it, documentary evidence is in fact very largely accepted.

Lieut. Col. RIGBY. This circular of August 1, 1918, as to field general courts, provides for that kind of testimony, not necessary to bring such witnesses to testify.

Judge CASSEL. In the case of field general courts-martial, rules as to preliminary investigation do not strictly apply, although they are in practice observed. There is greater latitude in cases of field general courts-martial than in general and district courts.

Lieut. Col. RIGBY. I would like to get a copy of that circular memorandum of August 1. In practice then they did find it best in the army at the front to carry out substantially the procedure as to taking a summary?

Judge CASSEL. Documentary evidence was more largely used than it would be here.

Lieut. Col. RIGBY. From your experience, was it an essential advantage to the accused to have the opportunity to confront the witnesses and cross examine at the preliminary hearing?

Judge CASSEL. Yes. First, advantage in the preparation of the defense; second, not infrequently it has led to the case being dismissed; third, very often material has been secured to cross examine at the trial on something that a witness said at the summary. It enables the commanding officer and convening officer to decide whether the case ought to go to a court-martial.

Lieut. Col. RIGBY. It is for that purpose, a real value.

Judge CASSEL. It is.

Lieut. Col. RIGBY. And in the taking of this summary the accused is not represented.

Judge CASSEL. He is not strictly represented by some one else; he is there himself But the preliminary hearing is a value in this way, the accused knows the case that he is to meet at the trial.

Lieut. Col. RIGBY. And there are no disadvantages?

Judge CASSEL. Disadvantages—the chief one is having to bring witnesses twice to be examined. To a certain extent, in some cases that may cause delay.

Lieut. Col. RIGBY. That is what I was thinking of—the question of delay?

Judge CASSEL. In practice, in the great majority of cases as against the delay caused in some cases you have a considerable number of cases dismissed.

Lieut. Col. RIGBY. It works very well with your plan of summary disciplinary punishment. Gives the commanding officer a summary of the case on which to exercise his power of award.

Judge CASSEL. Or whether to dismiss a case, refer to superior authority or send to court martial. I think it would be very difficult for a commanding officer to deal with a case without it.

Lieut. Col. RIGBY. The alternative plan—the commanding officer in a mere informal way to have the officer whom he detailed to get the summary, examine

the witnesses, have them called before him without the formality of confronting the accused with them.

Judge CASSEL. If that procedure were adopted it would be very difficult for the commanding officer to exercise any powers of punishment. You must give the accused the opportunity of confronting and cross-examining those on whose evidence he will be convicted. If you do away with the necessity of giving opportunity to the accused to cross-examine witnesses themselves, we would have to alter our system of summary punishments. The present system places the commanding officer in a position to handle cases in any of the ways I have mentioned. That would not be practical in any system where the accused did not have an opportunity to cross-examine. It seems to me hardly consistent with justice to the accused to say that a commanding officer could punish him summarily without giving him an opportunity of being present at the evidence given against him.

Lieut. Col. RIGBY. That may be why the preliminary hearing with us does not give much power to the commanding officer.

Judge CASSEL. That must be the reason—the two things hang together so closely.

Lieut. Col. RIGBY. Largely for giving the commanding officer that authority.

Judge CASSEL. Yes.

Lieut. Col. RIGBY. Aside from that, in other words, if the commanding officer did not have that power of summary disciplinary punishment, would you think it wise to have a summary hearing as you do? Our commanding officers have some summary powers——

Judge CASSEL. Can he dismiss cases?

Lieut. Col. RIGBY. Yes.

Judge CASSEL. I still think it would be of value. I feel it to be contrary to justice to take evidence and not to give the accused an opportunity of being there.

Lieut. Col. RIGBY. It is interesting to get your point of view. Because of your experience and practice in actually carrying it on, do you think that consideration would forbear any objection that would be made against any encumbrance or delay in requiring the accused to be confronted with the witnesses?

Judge CASSEL. Yes; I still think so. But in that case it would be very advantageous to more largely allow documentary evidence where witnesses were at a great distance, accepting the commanding officer's certificate as to the great difficulty in obtaining the testimony of the witnesses.

Lieut. Col. RIGBY. Do you suggest to allow them to certify as to the difficulty of obtaining witnesses, and that a written statement be accepted, to prove formal facts not under dispute?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. Would you have any personal suggestions as to changes that should be made if we decided embodying your practice?

Judge CASSEL. With regard to the commanding officer?

Lieut. Col. RIGBY. The preliminary examination and the commanding officer's award. They usually go together.

Judge CASSEL. I have already indicated that. I should more largely allow proof of formal facts by documentary evidence. A defect in our system is that there is no power to compel civil witnesses to attend at the preliminary investigation. I think that ought to exist. That is a real difficulty at present. That could be improved.

Lieut. Col. RIGBY. Would you advise allowing the accused to have a "military friend" or a counsel to advise him at the preliminary examination, if he wanted it?

Judge CASSEL. I am not disposed to advise that. From the moment that you do it you would have to have a prosecutor, and the inquiry would take up very much more time than it does now. You would probably have to have another officer than the adjutant to take the summary. We do not want to make it an encumbrance. In special cases counsel has been allowed.

Lieut. Col. RIGBY. In the discretion of the commanding officer?

Judge CASSEL. In the discretion of the convening officer.

Lieut. Col. RIGBY. (reading questionnaire):

"(2) How far convening authorities are, in fact, governed by recommendations of law officers as to ordering cases to trial."

Judge CASSEL (reading):

"(2) On legal points, e. g., as to whether the acts alleged constitute an offense against the Army act or whether the evidence is sufficient to justify

trial, the advice of a qualified officer is taken; but questions of difficulty would generally be referred to the Judge Advocate General or his deputy, whose advice is almost invariably taken."

Lieut. Col. RIGBY (reading).

"(3) Summary disciplinary punishment."

Judge CASSEL. This details what the punishments are [reading]:

"(3) A commanding officer can not punish an officer or warrant officer. A general officer holding a general court-martial warrant and a general officer commanding in chief in the field, and any officer (not under the rank of major general) appointed by him or by the Army council can award the following to an officer below field rank:

"Forfeiture of seniority of rank (subject to right of accused to elect trial by generti court-martial.)

"Severe reprimand or reprimand (without such option to elect).

"This power was only conferred in 1919 by the annual Army act of that year."

Lieut. Col. RIGBY. That, of course, as you stated is still experimental. What was the reason for that enactment?

Judge CASSEL. I will give the reason, for Gen. Childs and I are largely responsible for it. We had a great many general courts-martial taking place for comparatively slight offenses by officers; for instance, conduct to the prejudice of good order, in borrowing money from soldiers or absence for a few hours. For all these small offences the "sledge-hammer process" of a general court-martial had to be resorted to. All the ceremony of a general court-martial had to be gone through for every offense, however trivial. The period of arrest awaiting trial by general court-martial was, in some cases, in my judgment, itself a more severe punishment than the offense merited. So that this conclusion was arrived at, that some more summary procedure ought to be devised in dealing with these comparatively slight offenses by officers. This clause is the outcome of our deliberations in that respect. I hope that it will be very valuable and beneficial to officers. You can not pass over these offenses if they are occurring frequently. The difficulty with us was that previously we had no power to punish officers except by court-martial.

Lieut. Col. RIGBY. Was a formal memorandum submitted proposing that enactment?

Judge CASSEL. Yes, I think so. There was a discussion before the Army council. I can remember writing some minutes on it myself; Gen. Childs wrote some. We felt no doubt about its advantages.

Lieut. Col. RIGBY. Wondering if we might have a copy of the correspondence, any form of correspondence going into the reasons for it. That is a thing that interests us. We have the same difficulty in having to deal with an officer by general court.

Judge CASSEL. I do not think there would be any memorandum other than what I have stated. I have stated exactly the reasons. I should have gone further myself if I could.

Lieut. Col. RIGBY. What is your opinion and present advice on that point?

Judge CASSEL. I am not prepared, without further consideration, to say how much further this could be carried.

Lieut. Col. RIGBY. Did your memorandum recommend further power?

Judge CASSEL. No.

Lieut. Col. RIGBY. You drafted the act?

Judge CASSEL. Parliamentary counsel drafted the act but it was submitted to me for approval.

Lieut. Col. RIGBY. It went through in the form in which you advised.

Judge CASSEL. Yes, substantially.

Lieut. Col. RIGBY. Your advice would have been for arbitrary power. What I am trying to get at it, what you would advise us to do—our problem is the same?

Judge CASSEL. I would carry it further, but I am not prepared to furnish precise limits without further consideration.

Lieut. Col. RIGBY. Is the Army Act of 1919 available in printed form?

Judge CASSEL. I will try to get you one if it is [continuing reading]:

"A noncommissioned officer may be severely reprimanded, reprimanded or admonished; also, if holding 'acting' or 'lance' rank, may be ordered to revert to his permanent rank.

"In the case of privates, the 'summary' punishments awardable by a commanding officer are: Detention up to 28 days; for drunkenness a fine not ex-

ceeding 10/—, in addition to or with detention; authorized deductions from pay (e. g., to make good damages done, or loss of arms and kit); on active service only, field punishment up to 28 days; on active service only (in addition to or without any other punishment), forfeiture of ordinary pay up to 28 days.

"The following minor punishments may also be awarded: Confinement to barracks up to 14 days; extra guards or picquets; admonition (see King's Regulations 493).

"If the commanding officer is not of field rank, his powers in respect of detention are limited to 7 days (except in cases of absence).

"A company (squadron or battery) commander can award normally: Confinement to barracks up to 7 days; extra guards and picquets; fines for drunkenness; he can deal with cases of absence, which entail automatic forfeiture of pay; his awards can be reduced by the commanding officer; and, if he has not 3 years' service, his powers may be limited by the commanding officer (see King's Regulations 501).

"A commanding officer must give a soldier the option of claiming a trial by court-martial in every case where the awdard or finding involves a forfeiture of pay, and in every other case unless he awards one of the 'minor' punishments (Army act S. 46 (8)).

"Subject to this option, a commanding officer can in law deal summarily with any offense, if he considers that his powers of punishment are sufficient; but King's Regulations (Par. 487) require him to first refer certain of the more serious offenses to superior authority for directions as to whether they shall be dealt with summarily or whether a court-martial shall be held."

Lieut. Col. RIGBY. In practice does a man usually demand a court-martial; in what proportion of cases does he demand a court-martial?

Judge CASSEL. As a rule he accepts his commanding officer's award in cases where the commanding officer himself thinks it is a proper case to deal with.

Lieut. Col. RIGBY. There is a value, do you believe, in giving him the option to demand a court-martial? For instance, under the French system no such option is given to him.

Judge CASSEL. I think there is a value, because the commanding officer has necessarily to deal with cases somewhat hurriedly, and it is a great safeguard. There are, of course, some commanding officers who are not so well qualified as others to deal with cases.

Lieut. Col. RIGBY. What is the value of field punishment which you have and which is unknown to our practice?

Judge CASSEL. The value of field punishment is this: On active service you really want some punishment which will not take a man out of the line for a long period or necessitate sending others with him out of the line. Long periods of imprisonment are for many cases not suitable punishments when on active service. Field punishment has created a great deal of discontent on two grounds (1) because it is considered to be degrading to the soldier, (2) on the ground that it may be administered with such varying degrees of severity. But it is difficult to find any other punishment to take its place. Long imprisonment on active service may not be an effective deterrent. A man who does not want to be in the line gets a long term of imprisonment. That may be exactly what he wants, and it necessitates sending other soldiers back with him. Imprisonment is very difficult to apply when troops are on the move in a war of movement. In a war of movement you want some punishment which can be quickly applied without sending a man back from the front, but if some punishment could be devised other than field punishment which would be effective, then let field punishment go. It is necessary first to devise some other punishment to take its place. Unless this was done it might be that the death penalty would be more frequently inflicted. I think that field punishment is open to objection. But at present no effective substitute has been devised. I would be glad to see some substitute take its place, something that does not involve any prolonged absence from the fighting line is, I think, necessary. [Referring to book.] I have here the report of a select committee on punishments on active service. Very glad to loan it to you to read and make such extracts from it as you like. This committee was appointed after the South African war, and contains a good many records about punishments awarded during the South African war. It may interest you.

Lieut. Col. RIGBY. It will.

Judge CASSEL. It deals particularly with the question of field punishments.

Lieut. Col. RIGBY (interrupting). The next question.

"4. Information and statistics relating to the impartial judge advocate attached to a general court-martial (and to what extent in practice assigned to district court-martial)."

Judge CASSEL (reading):

"4. A judge advocate is always appointed for a general court-martial; he is generally an officer with legal knowledge, but may be a civilian."

Lieut. Col. RIGBY. If a civilian, is he a barrister in practice?

Judge CASSEL. Always. [Continuing reading:]

"The appointment in the United Kingdom is made by the judge advocate general; abroad, by the general officer commanding in chief. A judge advocate is at present only rarely appointed in the case district courts-martial. No statistics are available."

Lieut. Col. RIGBY. What rule is followed in the appointment of court-martial officers?

Judge CASSEL. The adjutant general's office of the war office in the United Kingdom have frequently consulted the judge advocate general as to whether an officer concerned is a fit and proper person to be appointed as a court-martial officer, but the actual appointment is made, in the United Kingdom by the adjutant general's department at the war office; abroad, by the adjutant general's branch of the commander in chief's headquarters, upon the recommendation of the deputy judge advocate general. I think abroad they always consult my deputy before appointing.

Lieut. Col. RIGBY. Does a court-martial officer have direct access to you or to your deputy abroad, or must he go through military channels?

Judge CASSEL. Technically, he ought to go through military channels, but I have on occasions had direct communication with court-martial officers, but technically they should go through military channels.

Lieut. Col. RIGBY. In practice does a judge advocate of a general court-martial in ruling on evidence or in summing up do it as a judge, as though his ruling should govern with the court? What form would the judge advocate use in advising the court that such and such evidence was not admissible? How far does he govern in ruling the court; how far advisory?

Judge CASSEL. In actual practice his advice is almost invariably followed. If the court did not take his advice it would be a serious responsibility, and it would be reported by the judge advocate himself to the convening authority. The judge advocate would be justified in that case to inform me that his ruling had not been followed by the court. I would take that into account in reviewing the case and in considering whether or not to recommend confirmation and in advising whether the conviction should be quashed. The form in which the judge advocate sums up in open court is much the same as that in which a judge would sum up to a jury, but a judge advocate's summing up is much shorter generally, and it is not necessary for the judge advocate to sum up at all if the court and the judge advocate agree that a summing up is not required.

Lieut. Col. RIGBY. And does the court close to consider his advice?

Judge CASSEL. It closes on points of importance.

Lieut. Col. RIGBY. And the court almost invariably accept the ruling of the judge advocate?

Judge CASSEL. If not they would incur a very grave responsibility, and the judge advocate would have the right, as he is my representative on the court, to inform me directly that his advice has not been accepted. It might lead to the proceedings being not confirmed or quashed.

Lieut. Col. RIGBY. Does his advice and summing up become a part of the record?

Judge CASSEL. Yes; it becomes a part of the record unless both the court and the judge advocate think it unnecessary to record it.

Lieut. Col. RIGBY. It is necessary to record his ruling on the admissibility of testimony?

Judge CASSEL. It is necessary to record the decision of the court, but not necessarily the ruling of the judge advocate.

Lieut. Col. RIGBY. In practice is his summing up usually recorded or not?

Judge CASSEL. It is usually recorded where he does sum up. In many cases the court and the judge advocate both agree that a summing up is not necessary.

Lieut. Col. RIGBY. The summing up and ruling by the judge advocate—whether it points out defects in the record—whether it does cause an undue number of disapprovals on account of legal questions in any way?

CASSEL. There have been a certain number of appeals against the ıp of the judge advocate on the ground that there was misdirection r of law in them, but on the whole the number of cases on which the ıgs have been quashed on that ground have not been numerous. What r in dealing with questions of that kind is really the substance of the whether the court has in fact been misled on the matter of law sub- ı the summing up by the judge advocate. If I come to that conclusion ider that a miscarriage of justice has resulted, I would advise quash- proceedings. The fact that every point in the evidence has not been out, or that something has been omitted by the judge advocate would not be a ground for quashing or not confirming proceedings, provided no reason for supposing that there has been any substantial injustice.

Col. RIGBY. You do not find it necessary to quash a large number of ause of what you have stated?

CASSEL. Very few have been quashed on that ground.

Col. RIGBY. The alternative plan as to summing up is followed in your eral courts, where a specially qualified member of the court gives ad- he court in closed session. Between the two plans, what are the dis- ges?

CASSEL. There is a good deal to be said on both sides of the question. e advantages and disadvantages in both alternatives. My opinion on le inclines toward the judge advocate rather than the special member ourt. A judge advocate is the recognized representative of the judge general with a definite position laid down in the rules of procedure ı all of the other members of the court are required to conform. On e, I think it is an advantage that the actual finding and sentence should of regimental officers in close touch with regimental life, and acquainted actual conditions of fighting. The actual findings and sentence should ı, and on points of law they should be guided by a legal expert.

Col. RIGBY. One proposal that has been given us is to make the spe- alified member to be president of the court. What would your thought at be, being that you prefer a judge advocate?

CASSEL. I lean to the judge advocate, though I think it would be better ave a special officer, that he should be the president rather than an member.

Col. RIGBY. In practice, has the need of a judge advocate on district artial been shown?

CASSEL. I think myself they should be appointed more frequently on courts, especially on cases of fraud and for civil offenses. I find that ı of courts-martial which most frequently have to be quashed on legal are district courts-martial for the trial of cases of stealing, fraud, and nses where there is no judge advocate. On that ground I am personally of more frequently appointing judge advocates on district courts. I hink you want them on every district court, not for instance for ordi- es of absence or drunkenness.

Col. RIGBY. What would be your views as to how it should be deter- ı that case; what cases they should be appointed on?

CASSEL. By the convening authority acting on the advice of his staff r court-martial officer. It might be possible to lay down some general ıch as that judge advocates should usually be appointed where the ı one of fraud, stealing, or some other civil offense.

Col. RIGBY. I noticed in attending some of your district courts, in the ıf the summary of evidence or record of evidence, the president does ıire the recording of questions and answers that may have been pro- ı cross-examination by the accused, which the president has ruled out vant or immaterial, so that no note is made of the fact that the ques- asked and was ruled out. Is there any reason for the protection of the that a legal adviser should be present? Is any harm done the accused here be carelessness in making up the record?

CASSEL. That is not my ground for thinking it desirable to more fre- have a judge advocate on districts courts. The accused is entitled to y question recorded to which objection is put.

Col. RIGBY. But if not represented by counsel, no note is made of it. ıestion is ruled out, perhaps properly ruled out, but no record is it.

CASSEL. A record ought to be made.

Col. RIGBY (reading next question):

"(5) The 'specially qualified member' of the Brtish general field court-martial—

"(*a*) How many officers are required for this service?

"(*b*) From what department are they drawn?

"(*c*) By whom and how are they chosen?

"(*d*) Are they in practice required to have legal training?

"(*e*) What qualifications are required for this 'specially qualified member'?

"(*f*) How many courts can one such officer conveniently serve?

"(*g*) Do they in practice sum up the case as to the facts, as well as the law, like the judge advocate of the British general court-martial?

"(*h*) And, if so, how does such summing up (by an officer who is himself a member of the court and required to vote as one of the merbers) work in practice?

"(*i*) How much deference is in practice paid to the opinions of the 'specially qualified member' of the court?

"(*k*) How does the whole system actually work out?"

Judge CASSEL (reading):

"(5) It must be remembered that the 'specially qualified member' of a field general court-martial, generally called a court-martial officer, was unknown before, and in the early stages of the war. The first court-martial officers were appointed in August, 1915."

Lieut. Col. RIGBY (interrupting). Was there a general order or an army council letter?

Judge CASSEL. No; not abroad. At home there were army council instructions some time about September, 1916, but abroad it was done experimentally at first. I am not aware that there was any actual order issued on the subject abroad, but I will have inquiry made. The little green book which I am going to give you has in it a reference to court-martial officers abroad. [Continuing reading:]

"(*a*) The general rule was to have one attached to each corps of not more than two divisions. If there were more than two divisions in the corps, there were two court-martial officers. In addition, there were one or more court-martial officers attached to each army. There were special appointments for lines of communication."

There would be a court-martial officer at corps headquarters, with a corps consisting of not more than two divisions, but if there were more than two divisions in the corps, say three or four divisions, there would be two court-martial officers at corps headquarters. The court-martial officers attached to the army would be at the army headquarters. [Continuing reading:]

"(*b*) From the army as a whole, in which a great many barristers and solicitors were serving.

"(*c*) By the adjutant general's department, after inquiry as to applicant's ability and professional standing, on the recommendation of the judge advocate general or his deputy.

"(*d*) (*e*) They were all fully qualified barristers or solicitors.

"(*f*) The answer to this question depends on the local conditions and the length and difficulty of the cases; the number of officers referred to under (*a*) were found sufficient to do the work required."

That answers your question?

Lieut. Col. RIGBY. These court-martial officers would be appointed to membership in several courts?

Judge CASSEL. He would go from one court to the other. One would suffice for a corps with not more than two divisions. [Continuing reading:]

"(*g*) They do not formally sum up (either on fact or law) in open court. When the court retires, they give their views both on law and on fact."

Lieut. Col. RIGBY (interrupting). That is not made part of the record.

Judge CASSEL. No; nothing which is not in open court is recorded. [Continuing reading:]

"(*h*) This does not arise.

"(*i*) On questions of law their opinion was generally followed; on a question of fact it had considerable weight, though not so much as on questions of law. But the obligation of secrecy imposed by the oath renders it difficult to speak with certainty.

"(*k*) It is considered that the system has in the emergency worked extremely well. There is, however, a difference of opinion as to whether it would not be better that the court-martial officer should sit either as judge advocate or president, and not merely as a member of the court."

that I have not expressed a view as to which is best. The balance of opinion is, as I have already stated, on the whole in favor of judge cate.

eut. Col. RIGBY (reading from questionnaire):

6) What have been the results in practice of British Army Orders 110 111 of March 17, 1917 (analagous to General Orders Nos. 7 and 94, U. S. Department, 1918)?

(a) Upon what considerations were these British orders based?

(b) Just how far has their application been extended?

(c) How uniformly have the recommendations of the judge advocate gen- been followed by confirming authorities?"

idge CASSEL (reading):

(6) Before Army Orders 110 and 111 of 1917, in the United Kingdom judge advocate at the trial forwarded the proceedings of general courts- tial direct to the judge advocate general.

Under the new system introduced by Army Orders 110 and 111 the pro- ings in such cases, instead of going direct to the judge advocate general, to him through the convening officer who adds his remarks and recom- dations.

(1) If confirmation by His Majesty was required the judge advocate ral transmitted them to the secretary of state for submission to His esty.

(2) If confirmation by His Majesty was not required the judge advocate ral returned them with his advice to the convening officer (who was also confirming officer)."

hat was explaining what the position was before. Now [continuing read- :

(a) The object of the Army Orders 110 and 111 was to insure that the ge advocate general in reviewing the proceedings, and the secretary of e for war or air tendering the advice to His Majesty should have before n the views of the convening officer.

(b) The orders extend to all general courts-martial held in the United gdom.

(c) The recommendations of the judge advocate general as to confirma- have almost invariably been followed."

can not remember a case as to confirmation that has not been followed e I have been judge advocate general.

ieut. Col. RIGBY. Referring to (b), is there any analagous order for field eral courts-martial—field courts at home?

udge CASSEL. No; it only deals with general courts-martial at home.

ieut. Col. RIGBY. We will come to quashing later on. So, in speaking of formity in following your recommendations in confirmation, you mean now mmendations where you have advised confirmation and they have followed ?

udge CASSEL. Yes; confirmation or nonconfirmation. I have been trying recall a case where they have not acted on my advice as to confirmation nonconfirmation. With regard to quashing, I will come to that later.

ieut. Col. RIGBY (reading questionnaire):

(7) To what relative extent during the war has the British Army made of its several disciplinary agencies?

(a) General courts-martial.

(b) District courts-martial.

(c) Field general courts-martial.

(d) Summary disciplinary punishment.

(8) What about the length and severity of sentences during the war in British Army for—

(a) Military offenses?

(b) Civil offenses?

(9) Statistics for the purposes of throwing light on all of the above ques- s, and others that may arise, as to—

(a) Total number of court-martial trials, segregated among the different rts—

1. General courts-martial.
2. District courts-martial.
3. Field general courts-martial.

(b) Annual percentage of court-martial trial to total strength.

(c) Number (and percentage) of acquittals.

"(*d*) Number and percentage of cases reviewed, disapproved, modified, etc., and by what agencies (that is, confirming authority or recommendation of judge advocate general, or otherwise).

"(10) Number and length of sentences for principal military offenses and principal civil offenses; collated and tabulated separately.

"(11) Number of sentences reduced in severity by the confirming authority or on the recommendation of the judge advocate general—

"1. Classified according to the character of the offense; and

"2. With figures as to the aggregate of such reductions and the percentage of such reductions to the number and length of original sentences.

"3. Classified to show separately those so reduced on recommendation of judge advocate general.

"(12) Death sentences, classified as to—

"1. Offenses for which imposed.

"2. How many carried into execution.

"3. Statistics as to commutation.

"(13) Detention barracks statistics: Number of such sentences, classified as to—

"1. Character of offense and length of sentence.

"2. Figures as to the restoration of men to duty.

"3. Number of men who, having served detention barracks sentences, were again sentenced to the barracks, or to severer punishment.

"(14) Summary disciplinary punishment statistics.

"1. Number and character of sentences and for what kind of offenses.

"2. Number of men so sentenced a second, third, or more times.

"3. Number of men so sentenced who were thereafter sentenced to the detention barracks or to severer punishment."

Judge CASSEL. These paragraphs have been grouped together in my answer:

"(7), (8), (9), (10), (11), (12), (13), and (14). All the statistics available in this office have been supplied. Possibly the adjutant general's department may be able to supply further information as to strength of army, detention barracks, and punishments. There are no statistics of summary punishments by commanding officers, no record of such punishments reaches the office of the judge advocate general."

Our statistics, as I told you before, during the war were improvised. When I was appointed I found no statistics at all, so our statistics previous to my appointment have been made up subsequently and they are not perhaps as full as we should like them to be.

Lieut. Col. RIGBY. These statistics have been given to me in confidence and not to be submitted to Congress.

Judge CASSEL. When submitted to the British House of Commons, I may be able to authorize you to submit them to Congress. I have communicated with the secretary of state. But I would not be justified in authorizing you to disclose to Congress what has not yet been made public in our own house.

Lieut. Col. RIGBY. Any conclusions we may draw from them—percentages—that you may tell me. For instance, I have in mind the percentage of your acquittals before the war, which I gather from examination of the statistics. Can you tell me anything in this form—percentage of disapprovals and acquittals for the purpose of comparison with our own in times of peace. I could make up a little table of conclusions which I have drawn and submit it to you.

Judge CASSEL. I will tell you what I will do. Submit it to me and I will submit it to the secretary of state, but I do not think I would feel justified in authorizing the furnishing of statistics for Congress without having his special permission. If you will submit it to me, I will submit it to him, and if he assents I will let you know.

Lieut. Col. RIGBY. The next question is (15).

"(15) Average length of time elapsed between the offense and final disposition of cases:

"1. By summary disciplinary punishment.

"2. By courts-martial (classified so far as possible by the different kinds of courts-martial).

"3. Final confirmation or other disposition."

Judge CASSEL (reading):

"(15) 1. An offense would ordinarily be disposed of by summary punishment on the day following arrest, but there may be delay owing to a number of causes, such as difficulty in obtaining evidence, reference to superior authority, etc."

I will take an ordinary case—a soldier commits an offense this afternoon, y he strikes a superior officer; he is put in the guardhouse this afternoon; a rule, he goes before the commanding officer the next morning. First, be-re the company commander, as I explained. The company commander if he sposes of it summarily would probably do so that morning. If it goes to the ommanding officer, he would also ordinarily deal with it this morning; that is say, the morning after the arrest. There may, however, be a number of asons which cause delay. [Continuing reading:]

"(2) The times which would elapse between commission of the offense and onfirmation of the sentence in the case of each of the four kinds of courts-artial if every step were taken as promptly as possible and no difficulty arose connection with the obtaining of evidence or otherwise are shown in the able annexed to the evidence of the judge advocate general before the commit-e on courts-martial. (Appendix III, p. 27, copy attached.)

"(3) No statistics as to the actual times which elapse have been kept."

That table (referring to book) you need not regard as confidential, not reated as confidential. The table appears marked in blue pencil, pages 30 nd 31. That table really does give you the information, each step, every and through which a case passes.

Lieut. Col. RIGBY. What particularly interests us is how long it takes you to un a case through, taking into consideration the delay that you do neet?

Judge CASSEL. During the war, delays have frequently arisen particularly lue to the exigencies of the war, the fact that officers had to be constantly on he move or had other more important work to be attended to. District courts-nartial do not cause much undue delay in peace time. District courts-martial ought to be tried within a fortnight or thereabouts and from inquiries which have made I think that before the war that period was not, as a rule, much ex-eeded. In the case of general courts-martial there is more delay. Three weeks, I think, is the minimum time that is requisite, but especially during he war there have been very long delays.

Lieut. Col. RIGBY. Have you had experience during the war with delays in a case going to 30 or 40 days?

Judge CASSEL. More than that, I am sorry to say—even three, four, or five months in exceptional cases. I have made it a rule to send in to the war office all the cases where I think there has been undue delay. The war office investigate the reasons for the delay, and if it is not satisfactorily accounted for, the officers concerned hear of it. We have constantly had this question of delay under our notice during the war. If an accused is convicted, the general rule is that the court should take the delay into account in awarding sentence, but that only holds redresses to hardships where there is a conviction or if the sentence admits of it. If the accused is acquitted or if the proceedings are not confirmed, or if a light sentence is awarded, it is not possible to remedy the hardship in that way. We are meeting that by a larger use of "open arrest," and more frequently releasing the accused without prejudice to his trial; in fact by more closely approximating to the practice in civil courts in granting bail to the accused.

Lieut. Col. RIGBY. That is a thing we have been interested in and have kept statistics for several years.

Judge CASSEL. I think it is very desirable, and when we get back to normal conditions we shall certainly keep statistics ourselves as to the periods of arrest awaiting trial.

Lieut. Col. RIGBY. How long have you found it necessary to get a case through this office?

Judge CASSEL. In cases before trial we make it a point to try and send the papers back on the same day; if not possible, within 48 hours after their receipt. That is the standard we work up to; to have them passed the same day. Any case involving liberty is given precedence and is dealt with first; I mean if the liberty of the soldier would be affected by the papers being kept here. In advising before trial, we return papers generally on the same day; always within 48 hours. Of course, in reviewing proceedings it takes longer. The accused is already under sentence of a competent court. Where we particularly make a point of expedition is where the liberty of the accused is affected, and he is not yet proven guilty. Of course, asking for additional evidence and additional information may take time.

Lieut. Col. RIGBY. In reviewing cases, how long does it take?

Judge CASSEL. We do it as quickly as we can—with proceedings coming from all parts of the world; all cases are reviewed here except cases tried in India. There is a separate judge advocate general for India. Sometimes we get a

very large number per week; during the war as many as 2,000 in a week, and we have only a very small staff of officers to deal with them. Considerable delay sometimes takes place before proceedings reach us. This was especially the case with proceedings from France while heavy fighting was going on.

Lieut. Col. RIGBY. Cases of death sentences, how are they handled? In what way?

Judge CASSEL. In the United Kingdom not a single death sentence on an officer or soldier in the British Army has been carried out during the war, either for any strictly military or for any civil offense.

Lieut. Col. RIGBY. For strictly military offenses?

Judge CASSEL. By court-martial, none at all in the United Kingdom as regards officers or soldiers of the British Army. Abroad the death sentence has to be confirmed by the commander in chief. Before he confirms the proceedings he has the advice of the deputy judge advocate general, who can always refer to the judge advocate general at home if there is any question of doubt or difficulty. In addition to that the commander in chief has before him the recommendations of the commanding officer of the accused, the brigade commander, the divisional commander, the corps commander, and the army commander as to whether the requirements of discipline are such that the sentence should be carried out or whether clemency should be extended.

Lieut. Col. RIGBY. Are these recommendations required?

Judge CASSEL. There is no law which requires it, but it is a universal practice. Orders have been issued that these recommendations should be forwarded to the commander in chief. He has these before him, and on legal questions he has the advice of the judge advocate general or his deputy. If there is any question as to a man's mind having been affected, through shell shock or in any other way, a special examination by medical board is ordered.

Lieut. Col. RIGBY. Is the advice of the deputy judge advocate general in written form or review?

Judge CASSEL. It takes the form of submitting the proceedings to the adjutant general to place them before the commander in chief, and if the deputy judge advocate general considers that they are in order, his minute would merely be submitted to the adjutant general to place before the commander in chief. If he has grounds for thinking that the proceedings should not be confirmed, he would give his reasons. The position of the deputy judge advocate general is laid down in our field service regulations. What I have been telling you is the practice.

Lieut. Col. RIGBY. One other question: Do you review proceedings afterwards in cases where the death sentences are carried into effect abroad?

Judge CASSEL. I do; but I have had no occasion to send in any minute where the sentence has actually been carried out.

Lieut. Col. RIGBY. Where the accused is at home you review a death case before it is carried into execution?

Judge CASSEL. Not a single death sentence has been awarded at home.

Lieut. Col. RIGBY. Have not had a death sentence at home?

Judge CASSEL. No. If one had been awarded I would have advised on it before confirmation.

Lieut. Col. RIGBY. Your recommendation is required?

Judge CASSEL. No death sentence at home would be carried into effect unless personally reviewed by me.

Lieut. Col. RIGBY. Have you any thought as to the advisability of having all death sentences awarded abroad being reviewed at home before being carried into effect?

Judge CASSEL. There are very strong reasons against it. Suppose in Mesopotamia a man is sentenced to death, it would take too long a time to send the case back to England. The essence of a death penalty is to carry it out quickly. The quick carrying out of a death penalty has great value, especially with native troops, to prevent mutiny from spreading. If every death sentence had to be sent back to London it would defeat some of the principal objects which necessitate the awarding of a death sentence. I should certainly say it would be a great disadvantage if the case were sent to London. If you are to have death sentences at all, the commander in chief in the field should be able to say whether it should be carried out. He has always the legal advice of the deputy judge advocate general, who in turn can refer to the judge advocate general at home in any case of doubt or difficulty.

Lieut. Col. RIGBY. In practice how quickly was a death sentence carried into effect abroad?

ASSEL. One case in the early part of the war a death sentence was it within three days after arrest; that was while the troops were on the move. A certificate of urgency was given by the convening l it was carried out under three days.

ol. RIGBY. Case of misconduct in the face of the enemy?

ASSEL. It was. It occurred during the retreat from Mons. The death ad to be speedily carried out. The evidence was absolutely clear be- shadow of a doubt. Other cases where it is necessary to carry out the tence very quickly is with native troops to prevent a mutiny from . For troops in the trenches there is not the same necessity for , and longer time is taken. I can not give you an exact figure.

ol. RIGBY. In a general way, your death sentences were very few?

ASSEL. Very few, considering the number in the army and the very circumstances of the fighting.

ol. RIGBY. In a general way are you able to tell me in this form the of the offenses for which most of the sentences were imposed?

ASSEL. The only offenses for which the death sentence was carried mutiny, cowardice, desertion, murder, striking and using violence to officer, willful disobedience of lawful command of superior officer, and ay arms.

ol. RIGBY. In a general form can you tell me the relative proportion these offenses?

ASSEL. The great bulk of them were for desertion in the face of the sertion on active service.

ol. RIGBY. Does that include cowardice?

ASSEL. Desertion on active service, as a rule, involves cowardice also. for a definite period of time is involved it is usual to frame the one of desertion; where there is not absence for any definite period of cowardice is preferred.

ol. RIGBY. In addition to the great bulk which you say was for deser number, what proportion for cowardice?

ASSEL. The great bulk were for desertion; not many for cowardice.

ol. RIGBY. Any further information about these death cases you feel e me at this time?

ASSEL. I do not think I can at the moment.

ol. RIGBY. From your experience in the war, would you advise any the method of handling them or as to modification, any suggestion us?

ASSEL. No; I think not. The only suggestion I have to make is rather r character. It is this: When the accused is informed that he has been sentenced to death by the court, he should also be informed that he may make any [illegible] counsel may wish to the contrary notwithstanding. If a man is accused who is tried on a capital charge, [illegible] represent him, if he wishes [illegible]

ol. RIGBY. Capital charge [illegible] ward the death sentence?

ASSEL. [illegible]

ol. RIGBY. Any [illegible] sentenced to death to apply for commutation?

ASSEL. To whom?

ol. RIGBY. To the [illegible]

ASSEL. I [illegible] ted. The [illegible] mediately [illegible]

ol. RIGBY. [illegible] overturn any judicial [illegible] for commutation. The [illegible] r the purpose of commutation [illegible]

ASSEL. No [illegible] s to be [illegible] keep the power [illegible] for the army [illegible] It would be [illegible] s power.

ol. RIGBY. Would [illegible] make a [illegible]

Judge CASSEL. I make no distinction. If the evidence is sufficient to warrant the death penalty, it must ultimately rest with the commander in chief whether the sentence should be carried out or clemency exercised, and if it is carried out it should be done without undue delay.

Lieut. Col. RIGBY (reading next question):

"(16) Results of suspension of sentence, under suspended-sentence act—statistics and general working of the system."

Judge CASSEL (reading from his answers):

"The working of the suspension of sentences acts has been most beneficial during war time and the acts have fulfilled the purposes for which they were originally passed. They have given many a soldier the opportunity of redeeming his character by bravery in the field. They have prevented men whose services were required in the field from being detailed for long periods in prison. A feature in connection with these acts which has given rise to some dissatisfaction is the fact that, while soldiers who had committeed comparatively slight offenses and who had not had their sentences suspended had to serve those sentences, others who had been guilty of graver crimes and who had their punishments suspended escaped all punishment. The adjutant general's department would be able to supply further information on this question."

This question of suspension really does not come under my department, but under the jurisdiction of the adjutant general. It has been a most beneficial act: it has saved many soldiers from imprisonment. There is one weak point.

Lieut. Col. RIGBY. Have you any suggestions as to any changes?

Judge CASSEL. Any suggestion I would make is this: The court might award forfeiture of pay, and imprisonment in addition. The imprisonment could then be alone suspended. The forfeiture of pay would still stand, so that the soldier would not be altogether without punishment.

Lieut. Col. RIGBY (reading from questionnaire):

"(17) An opportunity (such as was afforded Col. Dunn, of the United States Army in 1911) of visiting detention barracks and other military prisons, and statistics as to the length of sentences and character of offenses for which the prisoners are undergoing confinement.

"(18) An opportunity to visit and make stenographic reports of the proceedings of courts-martial of the different classes—G. C. M., D. C. M., F. G. C. M.—and to procure complete copies of records of actual proceedings (with the names of the defendants omitted, of fictitious names substituted if desirable), such as has been furnished by the French authorities."

Judge CASSEL (reading):

"(17) (18) This is being arranged. Further statistics as to sentences can possibly be supplied by the adjutant general's department of the war office and the authorities at the detention barracks."

Lieut. Col. RIGBY. We had an opportunity to visit Aldershot and got information there. Very interesting. We plan to visit those at Perth and Stirling to-morrow; Gen. Childs has made arrangements for that. [Reading from questionnaire:]

"(19) Information as to the working in practice of the judge advocate general's office; e. g., the number of cases passing through the office per annum, or per month, during the war; the length of time required for the disposition of a case in the office; the routine method of handling cases; the number of cases recommended to be disapproved; number of recommendations to clemency; figures showing how uniformly recommendations of the judge advcate general have been followed by military authorities:

"(*a*) of disapproval, wholly or partially, on legal grounds.

"(*b*) of clemency."

Judge CASSEL (reading):

"(19) The work of the judge advocate general's office consists in giving advice as to courts-martial both under the army act and the air force act and legal advice on other questions. The work so far as it relates to courts-martial falls under four main heads: (i) Advice before trial; (ii) advice before confirmation; (iii) review after confirmation; (iv) review upon appeal.

"As to (i): In the United Kingdom the convening officer before ordering trial submits the charge sheet and summary of evidence in all general courts-martial cases and in all district courts-martial cases where fraud is alleged or where he desires advice. Similar duties are discharged in relation to courts-martial abroad by the deputy of the judge advocate general.

"In such cases advice is given as to whether the evidence is admissible and sufficient to support the charge and what kind of further evidence, if any, is

quired, and also whether the charge is correctly drawn and what amendments d additional charges, if any, are necessary.

"The judge dvocate general himself does not deal with cases 'before trial' cept to lay down general principles, and it is a cardinal rule of the office that e officers who deal with cases at that stage should not deal with them 'after al.'"

I am very particular on that point.

"As to (ii): In the United Kingdom after trial and before confirmation the oceedings are forwarded to the judge advocate general in all general court-artial cases and in any other cases where the confirming authority desires vice.

"These are dealt with by the judge advocate general with the help of legal sistants. Abroad similar duties are discharged by the deputy of the judge vocate general who refers to the judge advocate general in London in cases doubt or difficulty.

"If the proceedings require confirmation by His Majesty, the judge advocate neral forwards them to the secretary of state with his opinion embodied in minute, and the secretary of state submits them to His Majesty. In other ses he returns them to the confirming authority with his advice.

"As to (iii): All proceedings held in any part of the world except India are ter confirmation forwarded to the office of the judge advocate general in ndon for review and custody. For India there is a separate judge advocate neral who reviews proceedings of trials held there.

"In all cases sent to the judge advocate general's office the proceedings are refully reviewed to see whether the charges are properly framed, whether the idence justifies a conviction and whether the proceedings are otherwise legally order. If the proceedings are in order they are filed. If not, they are forarded to the secretary of state for war or the secretary of state for air or the ljutant general, or other proper authority, advising that the proceedings should quashed or that such other action should be taken as the circumstances of the se may require.

"As to (iv): It is open to any person convicted by court-martial to petition is Majesty or the army council, or air council at any time against his convicon or sentence, and persons frequently petition more than once. Such petions if they involve any legal questions are referred to the judge advocate genal and are again considered by him in the light of any further facts or arguents brought forward by the petitioner. Advice is then given to the secretary state for war or air as to whether there is any ground for interference.

"It must be clearly understood that the judge advocate general is concerned ly with the legality of convictions and sentences. He is not concerned with commendations as to clemency though he occasionally calls attention to ntences if they appear unusually severe. His recommendations upon the gal aspect of cases are almost invariably accepted and acted upon. The ly cases in which this has not been done is when the attorney general has en consulted and has taken a different view.

"Cases for advice before trial and before confirmation are, so far as circumances permit, dealt with and dispatched from the judge advocate general's ice within 48 hours of receipt unless they raise some point of exceptional ifficulty.

"Cases for final review after confirmation are dealt with as rapidly as possile; the delay is seldom more than three days.

"As the statistics show, nearly a quarter of a million convictions were relewed in the office during the war."

Lieut. Col. RIGBY. How many are in your staff?

Judge CASSEL. My staff now consists of three civilians, including the registrar nd nine attached officers. I had more before the armistice.

Lieut. Col. RIGBY. How many then?

Judge CASSEL. During the heavy work of the war, I had 14 or 15 attached ficers.

Lieut. Col. RIGBY. With that small staff were you able to write reviews, pinions on a case, or did you simply make a minute?

Judge CASSEL. I am guided by circumstances. I should send in a full inute if I thought it necessary. We have to distribute the work. But we ave been rather shorthanded.

Lieut. Col. RIGBY. Do you have fixed rules to distribute the work among ctions of the staff?

Lieut. Col. RIGBY (interrupting). The next question.

"4. Information and statistics relating to the impartial judge advocate attached to a general court-martial (and to what extent in practice assigned to district court-martial)."

Judge CASSEL (reading):

"4. A judge advocate is always appointed for a general court-martial; he is generally an officer with legal knowledge, but may be a civilian."

Lieut. Col. RIGBY. If a civilian, is he a barrister in practice?

Judge CASSEL. Always. [Continuing reading:]

"The appointment in the United Kingdom is made by the judge advocate general; abroad, by the general officer commanding in chief. A judge advocate is at present only rarely appointed in the case district courts-martial. No statistics are available."

Lieut. Col. RIGBY. What rule is followed in the appointment of court-martial officers?

Judge CASSEL. The adjutant general's office of the war office in the United Kingdom have frequently consulted the judge advocate general as to whether an officer concerned is a fit and proper person to be appointed as a court-martial officer, but the actual appointment is made, in the United Kingdom by the adjutant general's department at the war office; abroad, by the adjutant general's branch of the commander in chief's headquarters, upon the recommendation of the deputy judge advocate general. I think abroad they always consult my deputy before appointing.

Lieut. Col. RIGBY. Does a court-martial officer have direct access to you or to your deputy abroad, or must he go through military channels?

Judge CASSEL. Technically, he ought to go through military channels, but I have on occasions had direct communication with court-martial officers, but technically they should go through military channels.

Lieut. Col. RIGBY. In practice does a judge advocate of a general court-martial in ruling on evidence or in summing up do it as a judge, as though his ruling should govern with the court? What form would the judge advocate use in advising the court that such and such evidence was not admissible? How far does he govern in ruling the court; how far advisory?

Judge CASSEL. In actual practice his advice is almost invariably followed. If the court did not take his advice it would be a serious responsibility, and it would be reported by the judge advocate himself to the convening authority. The judge advocate would be justified in that case to inform me that his ruling had not been followed by the court. I would take that into account in reviewing the case and in considering whether or not to recommend confirmation and in advising whether the conviction should be quashed. The form in which the judge advocate sums up in open court is much the same as that in which a judge would sum up to a jury, but a judge advocate's summing up is much shorter generally, and it is not necessary for the judge advocate to sum up at all if the court and the judge advocate agree that a summing up is not required.

Lieut. Col. RIGBY. And does the court close to consider his advice?

Judge CASSEL. It closes on points of importance.

Lieut. Col. RIGBY. And the court almost invariably accept the ruling of the judge advocate?

Judge CASSEL. If not they would incur a very grave responsibility, and the judge advocate would have the right, as he is my representative on the court, to inform me directly that his advice has not been accepted. It might lead to the proceedings being not confirmed or quashed.

Lieut. Col. RIGBY. Does his advice and summing up become a part of the record?

Judge CASSEL. Yes; it becomes a part of the record unless both the court and the judge advocate think it unnecessary to record it.

Lieut. Col. RIGBY. It is necessary to record his ruling on the admissibility of testimony?

Judge CASSEL. It is necessary to record the decision of the court, but not necessarily the ruling of the judge advocate.

Lieut. Col. RIGBY. In practice is his summing up usually recorded or not?

Judge CASSEL. It is usually recorded where he does sum up. In many cases the court and the judge advocate both agree that a summing up is not necessary.

Lieut. Col. RIGBY. The summing up and ruling by the judge advocate—whether it points out defects in the record—whether it does cause an undue number of disapprovals on account of legal questions in any way?

Judge CASSEL. There have been a certain number of appeals against the suming up of the judge advocate on the ground that there was misdirection and error of law in them, but on the whole the number of cases on which the proceedings have been quashed on that ground have not been numerous. What I consider in dealing with questions of that kind is really the substance of the matter, whether the court has in fact been misled on the matter of law submitted in the summing up by the judge advocate. If I come to that conclusion and consider that a miscarriage of justice has resulted, I would advise quashing the proceedings. The fact that every point in the evidence has not been brought out, or that something has been omitted by the judge advocate would certainly not be a ground for quashing or not confirming proceedings, provided there is no reason for supposing that there has been any substantial injustice.

Lieut. Col. RIGBY. You do not find it necessary to quash a large number of cases because of what you have stated?

Judge CASSEL. Very few have been quashed on that ground.

Lieut. Col. RIGBY. The alternative plan as to summing up is followed in your field general courts, where a specially qualified member of the court gives advice to the court in closed session. Between the two plans, what are the disadvantages?

Judge CASSEL. There is a good deal to be said on both sides of the question. There are advantages and disadvantages in both alternatives. My opinion on the whole inclines toward the judge advocate rather than the special member of the court. A judge advocate is the recognized representative of the judge advocate general with a definite position laid down in the rules of procedure to which all of the other members of the court are required to conform. On the whole, I think it is an advantage that the actual finding and sentence should be those of regimental officers in close touch with regimental life, and acquainted with the actual conditions of fighting. The actual findings and sentence should be theirs, and on points of law they should be guided by a legal expert.

Lieut. Col. RIGBY. One proposal that has been given us is to make the specially qualified member to be president of the court. What would your thought about that be, being that you prefer a judge advocate?

Judge CASSEL. I lean to the judge advocate, though I think it would be better if you have a special officer, that he should be the president rather than an ordinary member.

Lieut. Col. RIGBY. In practice, has the need of a judge advocate on district courts-martial been shown?

Judge CASSEL. I think myself they should be appointed more frequently on district courts, especially on cases of fraud and for civil offenses. I find that the class of courts-martial which most frequently have to be quashed on legal grounds are district courts-martial for the trial of cases of stealing, fraud, and civil offenses where there is no judge advocate. On that ground I am personally in favor of more frequently appointing judge advocates on district courts. I do not think you want them on every district court, not for instance for ordinary cases of absence or drunkenness.

Lieut. Col. RIGBY. What would be your views as to how it should be determined in that case; what cases they should be appointed on?

Judge CASSEL. By the convening authority acting on the advice of his staff officer or court-martial officer. It might be possible to lay down some general rules, such as that judge advocates should usually be appointed where the charge is one of fraud, stealing, or some other civil offense.

Lieut. Col. RIGBY. I noticed in attending some of your district courts, in the taking of the summary of evidence or record of evidence, the president does not require the recording of questions and answers that may have been proposed on cross-examination by the accused, which the president has ruled out as irrelevant or immaterial, so that no note is made of the fact that the question was asked and was ruled out. Is there any reason for the protection of the accused that a legal adviser should be present? Is any harm done the accused should there be carelessness in making up the record?

Judge CASSEL. That is not my ground for thinking it desirable to more frequently have a judge advocate on districts courts. The accused is entitled to have any question recorded to which objection is put.

Lieut. Col. RIGBY. But if not represented by counsel, no note is made of it. That question is ruled out, perhaps properly ruled out, but no record is made of it.

Judge CASSEL. A record ought to be made.

Lieut. Col. RIGBY (reading next question):

"(5) The 'specially qualified member' of the Brtish general field court-martial—

"(*a*) How many officers are required for this service?

"(*b*) From what department are they drawn?

"(*c*) By whom and how are they chosen?

"(*d*) Are they in practice required to have legal training?

"(*e*) What qualifications are required for this 'specially qualified member'?

"(*f*) How many courts can one such officer conveniently serve?

"(*g*) Do they in practice sum up the case as to the facts, as well as the law, like the judge advocate of the British general court-martial?

"(*h*) And, if so, how does such summing up (by an officer who is himself a member of the court and required to vote as one of the merbers) work in practice?

"(*i*) How much deference is in practice paid to the opinions of the 'specially qualified member' of the court?

"(*k*) How does the whole system actually work out?"

Judge CASSEL (reading):

"(5) It must be remembered that the 'specially qualified member' of a field general court-martial, generally called a court-martial officer, was unknown before, and in the early stages of the war. The first court-martial officers were appointed in August, 1915."

Lieut. Col. RIGBY (interrupting). Was there a general order or an army council letter?

Judge CASSEL. No; not abroad. At home there were army council instructions some time about September, 1916, but abroad it was done experimentally at first. I am not aware that there was any actual order issued on the subject abroad, but I will have inquiry made. The little green book which I am going to give you has in it a reference to court-martial officers abroad. [Continuing reading:]

"(*a*) The general rule was to have one attached to each corps of not more than two divisions. If there were more than two divisions in the corps, there were two court-martial officers. In addition, there were one or more court-martial officers attached to each army. There were special appointments for lines of communication."

There would be a court-martial officer at corps headquarters, with a corps consisting of not more than two divisions, but if there were more than two divisions in the corps, say three or four divisions, there would be two court-martial officers at corps headquarters. The court-martial officers attached to the army would be at the army headquarters. [Continuing reading:]

"(*b*)From the army as a whole, in which a great many barristers and solicitors were serving.

"(*c*) By the adjutant general's department, after inquiry as to applicant's ability and professional standing, on the recommendation of the judge advocate general or his deputy.

"(*d*) (*e*) They were all fully qualified barristers or solicitors.

"(*f*) The answer to this question depends on the local conditions and the length and difficulty of the cases; the number of officers referred to under (*a*) were found sufficient to do the work required."

That answers your question?

Lieut. Col. RIGBY. These court-martial officers would be appointed to membership in several courts?

Judge CASSEL. He would go from one court to the other. One would suffice for a corps with not more than two divisions. [Continuing reading:]

"(*g*) They do not formally sum up (either on fact or law) in open court. When the court retires, they give their views both on law and on fact."

Lieut. Col. RIGBY (interrupting). That is not made part of the record.

Judge CASSEL. No; nothing which is not in open court is recorded. [Continuing reading:]

"(*h*) This does not arise.

"(*i*) On questions of law their opinion was generally followed; on a question of fact it had considerable weight, though not so much as on questions of law. But the obligation of secrecy imposed by the oath renders it difficult to speak with certainty.

"(*k*) It is considered that the system has in the emergency worked extremely well. There is, however, a difference of opinion as to whether it would not be better that the court-martial officer should sit either as judge advocate or president, and not merely as a member of the court."

In that I have not expressed a view as to which is best. The balance of my opinion is, as I have already stated, on the whole in favor of judge advocate.

Lieut. Col. RIGBY (reading from questionnaire):

"(6) What have been the results in practice of British Army Orders 110 and 111 of March 17, 1917 (analagous to General Orders Nos. 7 and 94, U. S. War Department, 1918)?

"(*a*) Upon what considerations were these British orders based?

"(*b*) Just how far has their application been extended?

"(*c*) How uniformly have the recommendations of the judge advocate general been followed by confirming authorities?"

Judge CASSEL (reading):

"(6) Before Army Orders 110 and 111 of 1917, in the United Kingdom the judge advocate at the trial forwarded the proceedings of general courts-martial direct to the judge advocate general.

"Under the new system introduced by Army Orders 110 and 111 the proceedings in such cases, instead of going direct to the judge advocate general, pass to him through the convening officer who adds his remarks and recommendations.

"(1) If confirmation by His Majesty was required the judge advocate general transmitted them to the secretary of state for submission to His Majesty.

"(2) If confirmation by His Majesty was not required the judge advocate general returned them with his advice to the convening officer (who was also the confirming officer)."

That was explaining what the position was before. Now [continuing reading]:

"(*a*) The object of the Army Orders 110 and 111 was to insure that the judge advocate general in reviewing the proceedings, and the secretary of state for war or air tendering the advice to His Majesty should have before them the views of the convening officer.

"(*b*) The orders extend to all general courts-martial held in the United Kingdom.

"(*c*) The recommendations of the judge advocate general as to confirmation have almost invariably been followed."

I can not remember a case as to confirmation that has not been followed since I have been judge advocate general.

Lieut. Col. RIGBY. Referring to (*b*), is there any analagous order for field general courts-martial—field courts at home?

Judge CASSEL. No; it only deals with general courts-martial at home.

Lieut. Col. RIGBY. We will come to quashing later on. So, in speaking of uniformity in following your recommendations in confirmation, you mean now recommendations where you have advised confirmation and they have followed you?

Judge CASSEL. Yes; confirmation or nonconfirmation. I have been trying to recall a case where they have not acted on my advice as to confirmation or nonconfirmation. With regard to quashing, I will come to that later.

Lieut. Col. RIGBY (reading questionnaire):

"(7) To what relative extent during the war has the British Army made use of its several disciplinary agencies?

"(*a*) General courts-martial.

"(*b*) District courts-martial.

"(*c*) Field general courts-martial.

"(*d*) Summary disciplinary punishment.

"(8) What about the length and severity of sentences during the war in the British Army for—

"(*a*) Military offenses?

"(*b*) Civil offenses?

"(9) Statistics for the purposes of throwing light on all of the above questions, and others that may arise, as to—

"(*a*) Total number of court-martial trials, segregated among the different courts—

"1. General courts-martial.

"2. District courts-martial.

"3. Field general courts-martial.

"(*b*) Annual percentage of court-martial trial to total strength.

"(*c*) Number (and percentage) of acquittals.

"(*d*) Number and percentage of cases reviewed, disapproved, modified, etc., and by what agencies (that is, confirming authority or recommendation of judge advocate general, or otherwise).

"(10) Number and length of sentences for principal military offenses and principal civil offenses; collated and tabulated separately.

"(11) Number of sentences reduced in severity by the confirming authority or on the recommendation of the judge advocate general—

"1. Classified according to the character of the offense; and

"2. With figures as to the aggregate of such reductions and the percentage of such reductions to the number and length of original sentences.

"3. Classified to show separately those so reduced on recommendation of judge advocate general.

"(12) Death sentences, classified as to—

"1. Offenses for which imposed.

"2. How many carried into execution.

"3. Statistics as to commutation.

"(13) Detention barracks statistics: Number of such sentences, classified as to—

"1. Character of offense and length of sentence.

"2. Figures as to the restoration of men to duty.

"3. Number of men who, having served detention barracks sentences, were again sentenced to the barracks, or to severer punishment.

"(14) Summary disciplinary punishment statistics.

"1. Number and character of sentences and for what kind of offenses.

"2. Number of men so sentenced a second, third, or more times.

"3. Number of men so sentenced who were thereafter sentenced to the detention barracks or to severer punishment."

Judge CASSEL. These paragraphs have been grouped together in my answer:

"(7), (8), (9), (10), (11), (12), (13), and (14). All the statistics available in this office have been supplied. Possibly the adjutant general's department may be able to supply further information as to strength of army, detention barracks, and punishments. There are no statistics of summary punishments by commanding officers, no record of such punishments reaches the office of the judge advocate general."

Our statistics, as I told you before, during the war were improvised. When I was appointed I found no statistics at all, so our statistics previous to my appointment have been made up subsequently and they are not perhaps as full as we should like them to be.

Lieut. Col. RIGBY. These statistics have been given to me in confidence and not to be submitted to Congress.

Judge CASSEL. When submitted to the British House of Commons, I may be able to authorize you to submit them to Congress. I have communicated with the secretary of state. But I would not be justified in authorizing you to disclose to Congress what has not yet been made public in our own house.

Lieut. Col. RIGBY. Any conclusions we may draw from them—percentages—that you may tell me. For instance, I have in mind the percentage of your acquittals before the war, which I gather from examination of the statistics. Can you tell me anything in this form—percentage of disapprovals and acquittals for the purpose of comparison with our own in times of peace. I could make up a little table of conclusions which I have drawn and submit it to you.

Judge CASSEL. I will tell you what I will do. Submit it to me and I will submit it to the secretary of state, but I do not think I would feel justified in authorizing the furnishing of statistics for Congress without having his special permission. If you will submit it to me, I will submit it to him, and if he assents I will let you know.

Lieut. Col. RIGBY. The next question is (15).

"(15) Average length of time elapsed between the offense and final disposition of cases:

"1. By summary disciplinary punishment.

"2. By courts-martial (classified so far as possible by the different kinds of courts-martial).

"3. Final confirmation or other disposition."

Judge CASSEL (reading):

"(15) 1. An offense would ordinarily be disposed of by summary punishment on the day following arrest, but there may be delay owing to a number of causes, such as difficulty in obtaining evidence, reference to superior authority, etc."

I will take an ordinary case—a soldier commits an offense this afternoon, say he strikes a superior officer; he is put in the guardhouse this afternoon; as a rule, he goes before the commanding officer the next morning. First, before the company commander, as I explained. The company commander if he disposes of it summarily would probably do so that morning. If it goes to the commanding officer, he would also ordinarily deal with it this morning; that is to say, the morning after the arrest. There may, however, be a number of reasons which cause delay. [Continuing reading:]

"(2) The times which would elapse between commission of the offense and confirmation of the sentence in the case of each of the four kinds of courts-martial if every step were taken as promptly as possible and no difficulty arose in connection with the obtaining of evidence or otherwise are shown in the table annexed to the evidence of the judge advocate general before the committee on courts-martial. (Appendix III, p. 27, copy attached.)

"(3) No statistics as to the actual times which elapse have been kept."

That table (referring to book) you need not regard as confidential, not treated as confidential. The table appears marked in blue pencil, pages 30 and 31. That table really does give you the information, each step, every hand through which a case passes.

Lieut. Col. RIGBY. What particularly interests us is how long it takes you to run a case through, taking into consideration the delay that you do neet?

Judge CASSEL. During the war, delays have frequently arisen particularly due to the exigencies of the war, the fact that officers had to be constantly on the move or had other more important work to be attended to. District courts-martial do not cause much undue delay in peace time. District courts-martial ought to be tried within a fortnight or thereabouts and from inquiries which I have made I think that before the war that period was not, as a rule, much exceeded. In the case of general courts-martial there is more delay. Three weeks, I think, is the minimum time that is requisite, but especially during the war there have been very long delays.

Lieut. Col. RIGBY. Have you had experience during the war with delays in a case going to 30 or 40 days?

Judge CASSEL. More than that, I am sorry to say—even three, four, or five months in exceptional cases. I have made it a rule to send in to the war office all the cases where I think there has been undue delay. The war office investigate the reasons for the delay, and if it is not satisfactorily accounted for, the officers concerned hear of it. We have constantly had this question of delay under our notice during the war. If an accused is convicted, the general rule is that the court should take the delay into account in awarding sentence, but that only holds redresses to hardships where there is a conviction or if the sentence admits of it. If the accused is acquitted or if the proceedings are not confirmed, or if a light sentence is awarded, it is not possible to remedy the hardship in that way. We are meeting that by a larger use of "open arrest," and more frequently releasing the accused without prejudice to his trial; in fact by more closely approximating to the practice in civil courts in granting bail to the accused.

Lieut. Col. RIGBY. That is a thing we have been interested in and have kept statistics for several years.

Judge CASSEL. I think it is very desirable, and when we get back to normal conditions we shall certainly keep statistics ourselves as to the periods of arrest awaiting trial.

Lieut. Col. RIGBY. How long have you found it necessary to get a case through this office?

Judge CASSEL. In cases before trial we make it a point to try and send the papers back on the same day; if not possible, within 48 hours after their receipt. That is the standard we work up to; to have them passed the same day. Any case involving liberty is given precedence and is dealt with first; I mean if the liberty of the soldier would be affected by the papers being kept here. In advising before trial, we return papers generally on the same day; always within 48 hours. Of course, in reviewing proceedings it takes longer. The accused is already under sentence of a competent court. Where we particularly make a point of expedition is where the liberty of the accused is affected, and he is not yet proven guilty. Of course, asking for additional evidence and additional information may take time.

Lieut. Col. RIGBY. In reviewing cases, how long does it take?

Judge CASSEL. We do it as quickly as we can—with proceedings coming from all parts of the world; all cases are reviewed here except cases tried in India. There is a separate judge advocate general for India. Sometimes we get a

very large number per week; during the war as many as 2,000 in a week, and we have only a very small staff of officers to deal with them. Considerable delay sometimes takes place before proceedings reach us. This was especially the case with proceedings from France while heavy fighting was going on.

Lieut. Col. RIGBY. Cases of death sentences, how are they handled? In what way?

Judge CASSEL. In the United Kingdom not a single death sentence on an officer or soldier in the British Army has been carried out during the war, either for any strictly military or for any civil offense.

Lieut. Col. RIGBY. For strictly military offenses?

Judge CASSEL. By court-martial, none at all in the United Kingdom as regards officers or soldiers of the British Army. Abroad the death sentence has to be confirmed by the commander in chief. Before he confirms the proceedings he has the advice of the deputy judge advocate general, who can always refer to the judge advocate general at home if there is any question of doubt or difficulty. In addition to that the commander in chief has before him the recommendations of the commanding officer of the accused, the brigade commander, the divisional commander, the corps commander, and the army commander as to whether the requirements of discipline are such that the sentence should be carried out or whether clemency should be extended.

Lieut. Col. RIGBY. Are these recommendations required?

Judge CASSEL. There is no law which requires it, but it is a universal practice. Orders have been issued that these recommendations should be forwarded to the commander in chief. He has these before him, and on legal questions he has the advice of the judge advocate general or his deputy. If there is any question as to a man's mind having been affected, through shell shock or in any other way, a special examination by medical board is ordered.

Lieut. Col. RIGBY. Is the advice of the deputy judge advocate general in written form or review?

Judge CASSEL. It takes the form of submitting the proceedings to the adjutant general to place them before the commander in chief, and if the deputy judge advocate general considers that they are in order, his minute would merely be submitted to the adjutant general to place before the commander in chief. If he has grounds for thinking that the proceedings should not be confirmed, he would give his reasons. The position of the deputy judge advocate general is laid down in our field service regulations. What I have been telling you is the practice.

Lieut. Col. RIGBY. One other question: Do you review proceedings afterwards in cases where the death sentences are carried into effect abroad?

Judge CASSEL. I do; but I have had no occasion to send in any minute where the sentence has actually been carried out.

Lieut. Col. RIGBY. Where the accused is at home you review a death case before it is carried into execution?

Judge CASSEL. Not a single death sentence has been awarded at home.

Lieut. Col. RIGBY. Have not had a death sentence at home?

Judge CASSEL. No. If one had been awarded I would have advised on it before confirmation.

Lieut. Col. RIGBY. Your recommendation is required?

Judge CASSEL. No death sentence at home would be carried into effect unless personally reviewed by me.

Lieut. Col. RIGBY. Have you any thought as to the advisability of having all death sentences awarded abroad being reviewed at home before being carried into effect?

Judge CASSEL. There are very strong reasons against it. Suppose in Mesopotamia a man is sentenced to death, it would take too long a time to send the case back to England. The essence of a death penalty is to carry it out quickly. The quick carrying out of a death penalty has great value, especially with native troops, to prevent mutiny from spreading. If every death sentence had to be sent back to London it would defeat some of the principal objects which necessitate the awarding of a death sentence. I should certainly say it would be a great disadvantage if the case were sent to London. If you are to have death sentences at all, the commander in chief in the field should be able to say whether it should be carried out. He has always the legal advice of the deputy judge advocate general, who in turn can refer to the judge advocate general at home in any case of doubt or difficulty.

Lieut. Col. RIGBY. In practice how quickly was a death sentence carried into effect abroad?

Judge CASSEL. I make no distinction. If the evidence is sufficient to warrant the death penalty, it must ultimately rest with the commander in chief whether the sentence should be carried out or clemency exercised, and if it is carried out it should be done without undue delay.

Lieut. Col. RIGBY (reading next question):

"(16) Results of suspension of sentence, under suspended-sentence act—statistics and general working of the system."

Judge CASSEL (reading from his answers):

"The working of the suspension of sentences acts has been most beneficial during war time and the acts have fulfilled the purposes for which they were originally passed. They have given many a soldier the opportunity of redeeming his character by bravery in the field. They have prevented men whose services were required in the field from being detailed for long periods in prison. A feature in connection with these acts which has given rise to some dissatisfaction is the fact that, while soldiers who had committeed comparatively slight offenses and who had not had their sentences suspended had to serve those sentences, others who had been guilty of graver crimes and who had their punishments suspended escaped all punishment. The adjutant general's department would be able to supply further information on this question."

This question of suspension really does not come under my department, but under the jurisdiction of the adjutant general. It has been a most beneficial act; it has saved many soldiers from imprisonment. There is one weak point.

Lieut. Col. RIGBY. Have you any suggestions as to any changes?

Judge CASSEL. Any suggestion I would make is this: The court might award forfeiture of pay, and imprisonment in addition. The imprisonment could then be alone suspended. The forfeiture of pay would still stand, so that the soldier would not be altogether without punishment.

Lieut. Col. RIGBY (reading from questionnaire):

"(17) An opportunity (such as was afforded Col. Dunn, of the United States Army in 1911) of visiting detention barracks and other military prisons, and statistics as to the length of sentences and character of offenses for which the prisoners are undergoing confinement.

"(18) An opportunity to visit and make stenographic reports of the proceedings of courts-martial of the different classes—G. C. M., D. C. M., F. G. C. M.—and to procure complete copies of records of actual proceedings (with the names of the defendants omitted, of fictitious names substituted if desirable), such as has been furnished by the French authorities."

Judge CASSEL (reading):

"(17) (18) This is being arranged. Further statistics as to sentences can possibly be supplied by the adjutant general's department of the war office and the authorities at the detention barracks."

Lieut. Col. RIGBY. We had an opportunity to visit Aldershot and got information there. Very interesting. We plan to visit those at Perth and Stirling to-morrow; Gen. Childs has made arrangements for that. [Reading from questionnaire:]

"(19) Information as to the working in practice of the judge advocate general's office; e. g., the number of cases passing through the office per annum, or per month, during the war; the length of time required for the disposition of a case in the office; the routine method of handling cases; the number of cases recommended to be disapproved; number of recommendations to clemency; figures showing how uniformly recommendations of the judge advcate general have been followed by military authorities:

"(*a*) of disapproval, wholly or partially, on legal grounds.

"(*b*) of clemency."

Judge CASSEL (reading):

"(19) The work of the judge advocate general's office consists in giving advice as to courts-martial both under the army act and the air force act and legal advice on other questions. The work so far as it relates to courts-martial falls under four main heads: (i) Advice before trial; (ii) advice before confirmation; (iii) review after confirmation; (iv) review upon appeal.

"As to (i): In the United Kingdom the convening officer before ordering trial submits the charge sheet and summary of evidence in all general courts-martial cases and in all district courts-martial cases where fraud is alleged or where he desires advice. Similar duties are discharged in relation to courts-martial abroad by the deputy of the judge advocate general.

"In such cases advice is given as to whether the evidence is admissible and sufficient to support the charge and what kind of further evidence, if any, is

required, and also whether the charge is correctly drawn and what amendments and additional charges, if any, are necessary.

"The judge dvocate general himself does not deal with cases 'before trial' except to lay down general principles, and it is a cardinal rule of the office that the officers who deal with cases at that stage should not deal with them 'after trial.'"

I am very particular on that point.

"As to (ii): In the United Kingdom after trial and before confirmation the proceedings are forwarded to the judge advocate general in all general court-martial cases and in any other cases where the confirming authority desires advice.

"These are dealt with by the judge advocate general with the help of legal assistants. Abroad similar duties are discharged by the deputy of the judge advocate general who refers to the judge advocate general in London in cases of doubt or difficulty.

"If the proceedings require confirmation by His Majesty, the judge advocate general forwards them to the secretary of state with his opinion embodied in a minute, and the secretary of state submits them to His Majesty. In other cases he returns them to the confirming authority with his advice.

"As to (iii): All proceedings held in any part of the world except India are after confirmation forwarded to the office of the judge advocate general in London for review and custody. For India there is a separate judge advocate general who reviews proceedings of trials held there.

"In all cases sent to the judge advocate general's office the proceedings are carefully reviewed to see whether the charges are properly framed, whether the evidence justifies a conviction and whether the proceedings are otherwise legally in order. If the proceedings are in order they are filed. If not, they are forwarded to the secretary of state for war or the secretary of state for air or the adjutant general, or other proper authority, advising that the proceedings should be quashed or that such other action should be taken as the circumstances of the case may require.

"As to (iv): It is open to any person convicted by court-martial to petition His Majesty or the army council, or air council at any time against his conviction or sentence, and persons frequently petition more than once. Such petitions if they involve any legal questions are referred to the judge advocate general and are again considered by him in the light of any further facts or arguments brought forward by the petitioner. Advice is then given to the secretary of state for war or air as to whether there is any ground for interference.

"It must be clearly understood that the judge advocate general is concerned only with the legality of convictions and sentences. He is not concerned with recommendations as to clemency though he occasionally calls attention to sentences if they appear unusually severe. His recommendations upon the legal aspect of cases are almost invariably accepted and acted upon. The only cases in which this has not been done is when the attorney general has been consulted and has taken a different view.

"Cases for advice before trial and before confirmation are, so far as circumstances permit, dealt with and dispatched from the judge advocate general's office within 48 hours of receipt unless they raise some point of exceptional difficulty.

"Cases for final review after confirmation are dealt with as rapidly as possible; the delay is seldom more than three days.

"As the statistics show, nearly a quarter of a million convictions were reviewed in the office during the war."

Lieut. Col. RIGBY. How many are in your staff?

Judge CASSEL. My staff now consists of three civilians, including the registrar and nine attached officers. I had more before the armistice.

Lieut. Col. RIGBY. How many then?

Judge CASSEL. During the heavy work of the war, I had 14 or 15 attached officers.

Lieut. Col. RIGBY. With that small staff were you able to write reviews, opinions on a case, or did you simply make a minute?

Judge CASSEL. I am guided by circumstances. I should send in a full minute if I thought it necessary. We have to distribute the work. But we have been rather shorthanded.

Lieut. Col. RIGBY. Do you have fixed rules to distribute the work among sections of the staff?

Judge CASSEL. I have certain officers who deal with cases before trial and nothing else, unless it so happens that they have not work to occupy their whole time, and one of the other groups is pressed. I then let them review cases after trial, but never the same case on which they advised before trial. No hard and fast rules—certain general rules. During the press of work, everybody has to help everybody else.

Lieut. Col. RIGBY. Do you divide the cases as to character?

Judge CASSEL. I have one officer who reviews district courts after confirmation. General courts I always review personally. All appeals I deal with personally. Field general courts-martial when they come here are dealt with by two officers, specially detailed. There have been a very large number of field general courts-martial during the war. All these have been reviewed once abroad by either the deputy judge advocate general or some other under him, so that they do not get so full a review here as a district or general court-martial.

Lieut. Col. RIGBY. Through how many hands would a case go?

Judge CASSEL. Very many hands. Take the case of a district court-martial—first of all the officer who advises the confirming officer, and the confirming officer himself, who must deal with it. After confirmation it is reviewed in my office. Afterwards it is sent by me to the adjutant general's branch, and two or three officers there read it. Some cases go before the attorney general as well as myself. In the case of a general court-martial every possible care is taken before it is finally submitted to His Majesty. Field courts are reviewed first abroad, then come here. If some point of military custom or practice is involved, I sometimes send over to the adjutant general to obtain the views of the military authorities on the military aspect of the case. Any doubt as to whether the accused was mentally responsible, I refer to the war office for a medical report—to have a medical board examine the accused concerned.

Lieut. Col. RIGBY. A case coming into your office then would be reviewed by some officer in the office and he, if he saw any reason for submitting it to you-any irregularity—is his action final? Do you generally follow it?

Judge CASSEL. If he submits it to me I deal with it personally.

Lieut. Col. RIGBY. Does he sign it in your name?

Judge CASSEL. No; I sign personally. If an officer does not submit the proceedings of a court-martial he has reviewed to me personally, he initials them. So I know who is responsible if any question arises. In such cases he simply initials, and the proceedings go to the files. [Continuing reading:]

"In addition to court-martial work of the army and royal air force, the judge advocate general deals with other legal work, e. g., the answering of questions which arise in practice upon the construction of the army act, King's regulations, the pay warrant and other regulations and orders, the drafting of orders and new regulations, military courts upon prisoners of war, etc."

Lieut. Col. RIGBY (reading questionnaire):

"(20) Forms of actions, recommendations or memoranda used by the judge advocate general in the disposition of cases."

Judge CASSEL. Twenty and twenty-one I deal with together.

Lieut. Col. RIGBY (reading next question):

"(21) Information as to the finality of action of the judge advocate general:

"(*a*) From the forms used in practice.

"(*b*) In theory (that is to say, showing how far in practice the power of the judge advocate general is final and judicial, and how far it is, either in theory or practice, recommendatory and subject to the action of higher authority).

"(*c*) Information of the exact nature of the change some years ago in the status, tenure, and power of the judge advocate general."

Judge CASSEL (reading):

"(20) and (21) (*a*) The attached specimen minutes show the forms used by the judge advocate general in advising the secretary of state both before and after trial.

"(*b*) In theory his duties are advisory only. In practice his advice is almost invariably acted upon; the only cases where this is not done is when the attorney general is consulted and he differs from the judge advocate general.

"(*c*) Before the reconstitution of the office in 1905, on the appointment of Sir Thomas Milvain, the judge advocate general had been the direct responsible adviser of the Crown. He submitted direct to the sovereign those court-martial

cases which required the confirmation of the sovereign as head of the army. To insure the responsibility of the judge advocate general to Parliament for the advice which he gave to the Crown, he was generally a member of Parliament and privy councilor, and the office was political, changing with successive governments."

Really a member of the Government.

"Since 1905 the office has not been political, the appointment has been permanent, and the judge advocate general has not been a member of Parliament or of the Government. He does not submit his advice direct to the sovereign, but through the secretary of state, of war, or air. The judge advocate general now devotes his whole time to the work of his office. Formerly the ordinary work of the office was left to the deputy judge advocate general, and it was only in cases of exceptional difficulty or if questions were raised in Parliament or advice had to be given to the sovereign that the judge advocate general acted personally."

Lieut. Col. RIGBY. In what form was that change made in 1905?

Judge CASSEL. There has been no change of law affected by act of Parliament. It was a change of practice. There was a slight change in the wording of the patent.

Lieut. Col. RIGBY. Change in the reconstitution of the cabinet; was not a part of the cabinet?

Judge CASSEL. The change was not affected by any statutory enactment or order in council, but merely by a change of practice and in the wording of the letters patent. Sir Thomas Milvain, my predecessor, ceased to be a member of Parliament after he became judge advocate general. He, in practice, carried out the decision of the cabinet as to how the work of the office was to be carried on in future.

Lieut. Col. RIGBY. The cabinet determined that the work thereof should be carried on in a different way. Before that had not his predecessors been members of the cabinet?

Judge CASSEL. They had generally been members of the privy council, but not of the cabinet.

Lieut. Col. RIGBY. Do I get it correctly then—the change was made largely in the reconstitution of the cabinet at that time?

Judge CASSEL. No. Previously the judge advocate general had generally, though not always, been a member of Parliament and a privy councilor and he had advised the sovereign directly. After the change he ceased to be a member of Parliament or privy councilor and his position became more analogous to that of a civil servant. He ceased to advise the sovereign directly, but did so through the secretary of state for war. After this change more of the work was done by the judge advocate general personally and less through his deputy. His whole time was given to the work after the change.

Lieut. Col. RIGBY. In an informal way—practice since adhered to?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. May I ask your opinion on that—would you advise changing back to the old form? Before that your office really had executive powers that it does not have now?

Judge CASSEL. No.

Lieut. Col. RIGBY. He became responsible under the old system so that in effect his advice was really an order, finally determined in effect all what should be done with a case?

Judge CASSEL. Even before the change the functions of the judge advocate general were not executive. They were advisory, though his advice was almost invariably followed. I have an opinion of Lord Coleridge and Sir George Jessel given in 1873, in which they advised that the judge advocate general had no judicial or executive functions, but that his functions were advisory only.

Lieut. Col. RIGBY. Prior to 1905 was there the same practice that now exists to refer to another officer the opinions and advice of the judge advocate general?

Judge CASSEL. That practice has mainly arisen during the present war.

Lieut. Col. RIGBY. What are your thoughts as to reverting to the old system?

Judge CASSEL. On the whole I do not think it would be an advantage to revert to the old system. I think it is useful that the judge advocate general should give his whole time to the work of the office rather than that it should be left largely to his deputy as formerly. The secretary of state should be responsible to Parliament for the whole work of his department, including courts-martial. The position of the judge advocate general now is really that of legal adviser to the secretary of state for war.

Lieut. Col. RIGBY (reading questionnaire):

"(23) Information as to the routine followed by confirming authorities in acting upon records of trials by courts-martial—

"(a) General courts-martial.

"(b) District courts-martial.

"(c) Field courts-martial.

"(24) Through whose hands do such records pass; and upon the recommendation of what, if any, legal officer does the confirming authority act?"

Judge CASSEL (reading):

"(23) and (24) This is shown by the table (Appendix III) annexed to the judge advocate general's evidence before the court-martial committee and to his memorandum.

"The confirming or reviewing authority acts upon the advice of a staff officer specially skilled in military law or a legal adviser specially attached to the formation which he commands."

Lieut. Col. RIGBY. He is the legal adviser, but the final decision rests with the secretary of state for war?

Judge CASSEL. Yes.

Lieut. Col. RIGBY. In the case analogous, the attorney general and solicitor general are final advisers. Whose advice would be followed if there was a conflict?

Judge CASSEL. That of the attorney and solicitor general; they are advisers to the Government as a whole.

Lieut. Col. RIGBY. Any reason for making it a question in Parliament if the secretary of state for war overrules the opinion of the judge advocate general?

Judge CASSEL. None at all. I should not consider myself aggrieved by the fact that they had overruled me. I accept the position that they are advisers to the Government as a whole. I am happy to say the number of cases where they have differed are few.

Lieut. Col. RIGBY (reading questionnaire):

"(25) Also to have interviews (in the presence of a stenographer, such as have been furnished us in France) with commanding generals in the field, or those who have commanded in the field during the war, for the purpose of procuring their opinions upon the disciplinary or other value of some points wherein the British court-martial and disciplinary practice varies from ours (and from the French), notably—

"(*a*) Summary disciplinary punishment.

"(*b*) Field punishment.

"(*c*) Lack of power to return acquittals for reconsideration.

"(*d*) Lack of power on revision to increase the severity of a sentence.

"(*e*) Power of the commanding general in Great Britain and the United States (as contradistinguished from the French practice) to review the proceedings of courts-martial).

"(*f*) Detailed instructions, as prescribed in the British regulations, as to the method of conducting the preliminary examination.

"(*g*) The value of a legal officer as an impartial judicial officer on the court-martial (judge advocate, as in the British G. C. M., or 'specially qualified member' of the court, as in F. G. C. M.)

"(*h*) Other questions that may be presented.

"(26) The advice and opinion of the British judge advocate general and his assistants and of military lawyers familiar with court-martial practice, as to these questions, and also particularly as to—

"(*a*) The value of counsel for the accused in court-martial trials and the method of choosing counsel for the accused.'

Judge CASSEL (reading):

"(25) Interviews with generals who have commanded in the field will be arranged through the adjutant general's department at the war office.

"(26) The views of the judge advocate general upon the questions asked here and in No. 25 are as follows:

"(*a*) The presence of counsel (including an officer acting as such) to represent the accused is a great safeguard and of great assistance to the accused and the court, provided such counsel is competent. An accused person has the right to be represented by a barrister or solicitor or an officer selected by him. Nevertheless the cases where the accused have not been represented have been frequent. The judge advocate general considers that whenever practicable the assistance of a suitable officer should be offered to the accused for his defense without in any

way derogating from the right of the accused to be represented by the counsel or officer of his own choice."

Qualified officers as counsel are of great value if competent. An incompetent counsel may do a great deal of harm.

Lieut. Col. RIGBY. The matter of counsel is one of the problems with us. What do you think of the suggestion of having public defenders or military defenders appointed?

Judge CASSEL. Not civilian advocates. But it would be desirable to insure so far as practicable that suitable officers should be available for the purpose.

Lieut. Col. RIGBY. I see the French have a plan by which the president of the court has the right, the same as a civil judge, to appoint counsel for the defense, and it is the duty of the "advocate" to appear without charge to defend if directed to do so, just as if he were assigned by a civil judge.

Judge CASSEL. A civil advocate?

Lieut. Col. RIGBY. Yes; that seems to be under their laws, part of the duties—to obey the orders of a military judge.

Judge CASSEL. That would only apply while troops were in the United Kingdom.

Lieut. Col. RIGBY. Under the French system, in armies in the interior.

Judge CASSEL. If you did that while troops were at home, you would be less likely to have suitable officers for the defense abroad and on active service. Even in peace time a large proportion of the British Army is always outside of the United Kingdom—nearly one-half. I am inclined to think that it will be possible to secure a sufficient number of properly qualified officers. I think this is better than assigning civil advocates.

Lieut. Col. RIGBY. Do you think that a counsel is of real assistance to the accused?

Judge CASSEL. On the whole they are, particularly in cases of any complication. Very often a soldier is rather nervous when he goes before a court-martial. He has not the facility of bringing out circumstances in his own favor in the same way as a counsel or qualified officer would.

Lieut. Col. RIGBY. When represented by an officer, in practice what is the rank of the officer representing him?

Judge CASSEL. There is no rule or requirement as to rank. Anything from a second lieutenant upward. On the whole I think that the court gives due weight to arguments irrespective of rank if the counsel is competent.

Lieut. Col. RIGBY. Do you find from your records and general experience in the office, in a general way, which way lieutenants stand out; is there any disadvantage in defending before a court because of the fact that he is a junior officer? Does he fail to bring out the case for the accused because of any timidity on account of his low rank?

Judge CASSEL. No; I do not think so. It has been suggested in Parliament here that the counsel for the accused should always be of high rank, of the same rank as the president of the court.

Lieut. Col. RIGBY. The same suggestion has been made with us. There has been criticism in some quarters of appointing lieutenants to defend the accused.

Judge CASSEL. It all depends on the competency and legal knowledge of the lieutenant. But that has been suggested in Parliament. If a junior officer is well qualified to conduct the defense, I do not think that his rank is sufficient reason for excluding him. [Reading balance of paragraph 25*a*:]

"To increase the number of officers competent to defend the accused, legal instruction among officers should be improved and a list of qualified officers kept.

"(*b*) (25*a*) The British system of summary disciplinary punishment works well in the hands of good commanding officers."

Lieut. Col. RIGBY. Limiting to good commanding officers. Taking the army as a whole, as they are, does it work well?

Judge CASSEL. Yes.

"(*c*) (25*b*) There is very strong opposition to field punishment on the ground that it is degrading and carried out with varying degrees of severity. No effective punishment in substitution has been suggested. Some form of punishment other than a long term of imprisonment is essential on active service."

Lieut. Col. RIGBY. Have you found one?

Judge CASSEL. We have not.

"(*d*) (25*cd*) Lack of the powers referred to does lead to miscarriages of justice and makes it more difficult to secure uniformity of sentences through the action of the confirming authority On the other hand the exercise of such

powers would lead to undermine confidence in the independence of the court and might lead to the belief that convictions or unduly severe sentences had been secured through pressure exercised by the confirming authority."

In the old days the confirming officer could send back an acquittal to the court or could send back a sentence in order to have it increased in severity. We should never go back to that. It would be considered as giving an opportunity to confirming officers to press for convictions or severe sentences unduly.

Lieut. Col. RIGBY. We still have it as you used to have it.

Judge CASSEL. I do not think we shall ever go back to it.

Lieut. Col. RIGBY. You don't know of any disadvantage that arose from practice that made that change?

Judge CASSEL. As I pointed out, our present system makes it more difficult to secure uniformity of sentences, as the confirming officer can only mitigate sentences downward. If a sentence is ridiculously light, he can do nothing. If the next soldier gets a heavier sentence, under less grave circumstances, he is very discontented, but the confirming officer can do nothing. At the same time I don't think that we shall ever go back to the old system, as it is desirable to avoid any pressure whatever being brought to bear on the court to make sentences more severe.

Lieut. Col. RIGBY. Is there any reason why all sentences should not be announced in open court?

Judge CASSEL. I think that they should not all be announced in open court, because it would be in many cases a disadvantage to the accused himself. Take the case of officers. Sentences of cashiering or dismissal announced in open court, to which the press are entitled to attend, and not yet confirmed by His Majesty. Suppose His Majesty does not subsequently confirm, the position of that officer is so affected by the public announcement that it is very difficult for him to regain his old prestige and position. Therefore, I think in all cases where sentence is dismissal from the service or more severe, it would be a great disadvantage to the accused to announce the sentence in open court. It would place him in a very embarrassing position during the interval while the approval of His Majesty was being obtained. I see no objection to communicating the substance in a sealed envelope.

Lieut. Col. RIGBY. Would you advise to change the regulations so as to direct telling him by way of the sealed envelope?

Judge CASSEL. Yes; I should tell the accused himself—the accused should be informed in a sealed envelope, being told at the same time that the sentence is still subject to confirmation. I further think that in those cases where the sentence is less severe than dismissal from the service in the case of officers, and in the case of soldiers where it does not involve loss of liberty, it should be announced in open court. In the case of light sentences I should have the announcement made in open court and the accused at once released from arrest. With us, the sentence can not be increased in severity on confirmation.

"(*e*) (25*e*) The retention of the power to 'review' appears desirable. It is a great safeguard against illegal or improper convictions and excessive sentences and helps to secure uniformity of sentences. It operates automatically without any special application which is necessary in the case of an appeal. The reviewing authority is responsible for the maintenance of discipline in the force he commands which is essential for the safety of his troops and the success of their operations. He can judge better than anyone else what the requirements of discipline are and how far exemplary punishments are necessary. On legal questions he is guided by skilled advisers.

"(*f*) (25*f*) Detailed instructions, though perhaps unnecessary in a small, fully trained army, appear to be very desirable when military law has to be administered by officers who only hold temporary commissions or who have not had a lengthy training.

"(*g*) (25*g*) Their value has been fully proved; but they should sit either as judge advocates or presidents, rather than as members only.

"(*h*) (25*h*) The judge advocate general considers that it is of great importance that legal education among officers in the army should be improved. Officers should be encouraged to qualify in law by additional pay or other advantages. So far as practicable only officers who had, after examination, been certified as fit to do so should sit as presidents or members of courts-martial or act as prosecutors or defenders of the accused. A part of the legal instruction of officers should consist in attending the hearing of cases in the civil courts."

Lieut. Col. RIGBY (reading questionnaire):

"(27) Clemency: (*a*) Before the armistice and (*b*) since the armistice—methods adopted: Routine of procedure; theory upon which it proceeds; statistics showing results."

Judge CASSEL (reading):

"(27) The adjutant general's department of the war office should be applied to for the information."

Lieut. Col. RIGBY (reading questionnaire):

"(28) Any literature on the general subject—motions in Parliament, reports of any parliamentary commissions; and any debates, magazine or newspaper articles, etc., of value."

Judge CASSEL (reading):

"(28) There was a debate in the House of Commons on March 3, 1919, copy of Hansard attached, as a result of which the present court-martial committee was appointed. This committee is at present considering its report. The debate is reported in Hansard, columns 100–183, copy herewith.

"A committee on punishments on active service was appointed after the South African War and reported in 1904. Copy report herewith.

"A royal commission on courts-martial was appointed in 1868 and made two reports, dated July 24, 1868, and May 14, 1869, respectively.

"A select committee appointed to examine into the mutiny act in 1878 and reported in the same year.

"A number of articles have appeared in a weekly publication called John Bull, edited by Mr. Bottomley, M. P., and there are also articles in the Contemporary Review of March, 1919, and Blackwood's Magazine of June, 1919."

(Interview concluded at 8 o'clock p. m.)

(Signed) F. CASSEL,
Judge Advocate General.

AUGUST 8, 1919.

(Reporter: Army Field Clerk F. T. McEneny.)

LONDON, *June 14, 1919.*

Memorandum for the judge advocate general, Great Britain:

On behalf of the United States Government, the following information concerning the administration of military law in the British Armies is respectfully requested, so far as it may be practicable to furnish it:

1. Results of preliminary investigation and trial and how the investigation is actually carried on in practice.

2. How far convening authorities are, in fact, governed by recommendations of law officers as to ordering cases to trial.

3. Summary disciplinary punishment.

4. Information and statistics relating to the impartial judge advocate attached to a general court-martial (and to what extent in practice assigned to district courts-martial).

5. The "specially qualified member" of the British field general court-martial—

(*a*) How many officers are required for this service?

(*b*) From what department are they drawn?

(*c*) By whom and how are they chosen?

(*d*) Are they in practice required to have legal training?

(*e*) What qualifications are required for this "specialy qualified member"?

(*f*) How many courts can one such officer conveniently serve?

(*g*) Do they in practice sum up the case as to the facts, as well as the law, like the judge advocate of the British G. C. M.?

(*h*) And, if so, how does such summing up (by an officer who is himself a member of the court and required to vote as one of the members) work in practice?

(*i*) How much deference is in practice paid to the opinions of the "specially qualified member" of the court?

(*k*) How does the whole system actually work out?

6. What have been the results in practice of British Army orders 110 and 111, of March 17, 1917 (analogous to General Orders, Nos. 7 and 84, United States War Department, 1918)—

(*a*) Upon what considerations were these British orders based?

(*b*) Just how far has their application been extended?

(*c*) How uniformly have the recommendations of the judge advocate general been followed by confirming authorities?

7. To what relative extent during the war has the British Army made use of its several disciplinary agencies?

(*a*) General courts-martial.

(*b*) District courts-martial.

(*c*) Field general courts-martial.

(*d*) Summary disciplinary punishment.

8. What about the length and severity of sentences during the war in the British Army for—

(*a*) Military offenses?

(*b*) Civil offenses?

9. Statistics for the purposes of throwing light on all of the above questions, and others that may arise, as to:

(*a*) Total number of court-martial trials; segregated among the different courts—

(1) General courts-martial.

(2) District courts-martial.

(3) Field general courts-martial.

(*b*) Annual percentage of court-martial trials to total strength.

(*c*) Number (and percentage) of acquittals.

(*d*) Number and percentage of cases reviewed, disapproved, modified, etc., and by what agencies (that is, confirming authority or recommendation of judge advocate general or otherwise).

10. Number and length of sentences for principal military offenses and principal civil offenses, collated and tabulated separately.

11. Number of sentences reduced in severity by the confirming authority or on the recommendation of the judge advocate general—

(1) Classified according to the character of the offense; and,

(2) With figures as to the aggregate of such reductions and the percentage of such reductions to the number and length of original sentences.

(3) Classified to show separately those so reduced on recommendation of judge advocate general.

12. Death sentences, classified as to—

(1) Offenses for which imposed.

(2) How many carried into execution.

(3) Statistics as to commutation.

13. Detention barracks statistics: Number of such sentences, classified as to—

(1) Character of offense and length of sentence.

(2) Figures as to the restoration of men to duty.

(3) Number of men who, having served detention barracks sentences, were again sentenced to the barracks, or to severer punishment.

14. Summary disciplinary punishment statistics:

(1) Number and character of sentences and for what kind of offenses.

(2) Number of men so sentenced a second, third, or more times.

(3) Number of men so sentenced, who were thereafter sentenced to the detention barracks, or to severer punishment.

15. Average length of time elapsed between the offense and final disposition of cases:

(1) By summary disciplinary punishment.

(2) By courts-martial (classified, so far as possible, by the different kinds of courts-martial).

(3) Final confirmation or other disposition.

16. Results of suspension of sentence, under suspended sentence act; statistics and general working of the system.

17. An opportunity (such as was afforded Col. Dunn of the United States Army in 1911) of visiting detention barracks and other military prisons; and statistics as to the length of sentences and character of offenses for which the prisoners are undergoing confinement.

18. An opportunity to visit and take stenographic reports of the proceedings of courts-martial of the different classes—G. C. M., D. C. M., F. G. C. M.—and to procure complete copies of records of actual proceedings (with the names of the defendants omitted, or fictitious names substituted if desirable), such as has been furnished us by the French authorities.

19. Information as to the working in practice of the judge advocate general's office; e. g., the number of cases passing through the office per annum, or per month, during the war; the length of time required for the disposition of a

case in the office; the routine method of handling cases; the number of cases recommended to be disapproved; number of recommendations to clemency; figures showing how uniformly recommendations of the judge advocate general have been followed by military authorities;

(*a*) of disapproval, wholly or partially, on legal grounds,

(*b*) of clemency.

20. Forms of actions, recommendations or memoranda used by the judge advocate general in the disposition of cases.

21. Information as to the finality of action of the judge advocate general.

(*a*) From the forms used in practice.

(*b*) In theory (that is to say, showing how far in practice the power of the judge advocate general is final and judicial; and how far it is, either in theory or practice, recommendatory and subject to the action of higher authority).

(*c*) Information of the exact nature of the change, some years ago, in the status, tenure, and power of the judge advocate general.

22. Information showing the routine disposition or action upon recommendations of the judge advocate general, by the secretary of state for war, army council, chief of staff, or other authorities.

23. Information as to the routine followed by confirming authorities in acting upon records of trials by courts-martial—

(*a*) General courts-martial.

(*b*) District courts-martial.

(*c*) Field general courts-martial.

24. Through whose hands do such records pass; and upon the recommendation of what, if any, legal officer does the confirming authority act?

25. Also to have interviews (in the presence of a stenographer, such as have been furnished us in France), with commanding generals in the field, or those who have commanded in the field during the war, for the purpose of procuring their opinions upon the disciplinary, or other, value of some points wherein the British court-martial and disciplinary practice varies from ours (and from the French), notably—

(*a*) Summary disciplinary punishment.

(*b*) Field punishment.

(*c*) Lack of power to return acquittals for reconsideration.

(*d*) Lack of power on revision to increase the severity of a sentence.

(*e*) Power of the commanding general in Great Britain and the United States (as contradistinguished from the French practice) to review the proceedings of courts-martial.

(*f*) Detailed instructions, as prescribed in the British regulations, as to the method of conducting the preliminary examination.

(*g*) The value of a legal officer as an impartial judicial officer on the court-martial (Judge Advocate, as in British G. C. M., or "Specially qualified member" of the court, as in F. G. C. M.).

(*h*) Other questions that may be presented.

26. The advice and opinion of the British judge advocate general and his assistants, and of military lawyers familiar with court-martial practice, as to these questions, and also particularly as to—

(*a*) The value of counsel for the accused in court-martial trials; and the method of choosing counsel for the accused.

27. Clemency: (*a*) Before the armistice, and (*b*) since the armistice; methods adopted; routine of procedure; theory upon which it proceeds; statistics showing results.

28. Any literature on the general subject; motions in Parliament; reports of any parliamentary commissions; and any debates, magazine, or newspaper articles, etc., of value.

WILLIAM C. RIGBY,
Lieutenant Colonel, Judge Advocate.

ANSWERS TO QUESTIONS RAISED IN THE MEMORANDUM DATED JUNE 14, 1919, OF LIEUT COL. W. C. RIGBY, JUDGE ADVOCATE, CHIEF OF SPECIAL MISSION, U. S. ARMY.

(1) (*a*) No statistics are available as to the number of charges investigated by commanding officers, nor as to the proportion of such charges which are dismissed, remanded for trial by court-martial, or dealt with summarily.

(*b*) In the case of a N. C. O. or man, a charge is first investigated by his company (battery or squadron) commander, whose powers of punishment are very restricted. (See King's Regulations 501.) If the company commander can not, or thinks that he ought not to, deal with the case, he sends it on to be dealt with by the commanding officer. The latter after the charge has been read to the accused hears the witnesses. The accused may cross-examine the witnesses called against him, and may make a statement (or give evidence) in his defense, and may call witnesses. If the accused so required, the evidence must be taken on oath; but it is only very rarely that such a request is preferred. The accused has no right to be represented by counsel or by an officer before the commanding officer.

The commanding officer then takes one of the following courses:

(I) He dismisses the charge;

(II) He disposes of it summarily, if he can do so without reference to superior authority. The charges that may be so disposed of are set out in King's Regulations 487. The punishments which a commanding officer can award to a N. C. O. or man are set out in section 46 (2) of the army act and King's Regulations 493.

(III) If he thinks that the case is one which may be dealt with summarily, but he is not empowered to so deal with it without sanction from superior authority, he refers it to such authority. He will then either be authorized to deal with it summarily, or be directed to send it to a court-martial.

(IV) He adjourns it in order that the evidence may be reduced to writing, with a view to a court-martial.

In every case where the award or finding involves a forfeiture of pay, and in every other case unless one of the minor punishments referred to in army act, section 46 (9) and King's Regulations 493 is awarded, the commanding officer must give the accused the option of being tried by court-martial (army act section 46 (6)).

Where a case is adjourned for the evidence to be reduced to writing, this is (as a rule) done by the adjutant, though any officer may be detailed by the commanding officer for the purpose. The witnesses attend again, give their evidence and are cross-examined as before; the accused makes any statement (or gives any evidence) that he wishes (after being cautioned that he need not say anything), and calls witnesses if he wishes. The whole evidence is taken down in writing by the adjutant or other officer detailed for the purpose. Each witness signs the evidence given by him, and the evidence so taken is called the "Summary of evidence." The evidence is generally not taken on oath, and the accused has no right to be represented. This, however, has sometimes been allowed in cases of exceptional difficulty or importance.

The commanding officer then reconsiders the written record, and finally decides whether to apply for a court-martial or whether to dispose of the case summarily (assuming that he has power to do so and that the accused has not elected trial by court-marital).

If he decides upon a court-martial, he prepares and signs a charge sheet and formal application for trial, which he forwards with the summary of evidence and conduct sheets of the accused to an officer having power to convene a court-martial for the trial of the accused. That officer considers whether the summary of evidence justifies trial, and, if he comes to the conclusion that it does, makes an order accordingly.

In the case of an officer, the case goes at once to the commanding officer without the intervention of the company (battery or squadron) commander. The commanding officer has no power to punish an officer. He can either dismiss the case or apply for a court-martial, or (if the accused officer is below field rank) can refer the case to a superior officer, not under the rank of general. The latter, in the case of an officer below field rank, can award certain minor punishments or can direct trial by court-martial. (See army act, sec. 46A.) Where a court-martial is decided upon, a written summary of evidence must be taken as in the case of a soldier; if the accused so requires otherwise, a summary may be dispensed with, and an "abstract" of the evidence given to the accused.

(2) On legal points, e. g., as to whether the acts alleged constitute an offense against the army act or whether the evidence is sufficient to justify trial, the advice of a qualified officer is taken; but questions of difficulty would generally be referred to the judge advocate general or his deputy, whose advice is almost invariably taken.

(3) A commanding officer can not punish an officer or warrant officer. A general officer holding a general court-martial warrant and a general officer

commanding in chief in the field and any officer (not under the rank of major general) appointed by him or by the Army council can award the following to an officer below field rank:

Forfeiture of seniority of rank (subject to right of accused to elect trial by general court-martial).

Severe reprimand or reprimand (without such option to elect).

This power was only conferred in 1919 by the annual army act of that year.

A N. C. O. may be severely reprimanded, reprimanded, or admonished; also, if holding "acting" or "lance" rank, may be ordered to revert to his permanent rank.

In the case of privates, the "summary" punishments awardable by a commanding officer are:

Detention up to 28 days.

For drunkenness, a fine not exceeding 10/–, in addition to or without detention.

Authorized deductions from pay (e. g. to make good damage done, or loss of arms and kit).

On active service only, field punishment up to 28 days.

On active service only (in addition to or without any other punishment), forfeiture of ordinary pay up to 28 days.

The following minor punishments may also be awarded:

Confinement to barracks up to 14 days.

Extra guards or picquets.

Admonition (see King's Regulations, 493).

If the commanding officer is not of field rank his powers in respect of detention are limited to 7 days (except in cases of absence).

A company (squadron or battery) commander can award normally—

Confinement to barracks up to 7 days.

Extra guards and picquets.

Fines for drunkenness.

He can deal with cases of absence which entail automatic forfeiture of pay.

His awards can be reduced by the commanding officer, and if he has not three years' service his powers may be limited by the commanding officer. (See King's Regulations, 501.)

A commanding officer must give a soldier the option of claiming a trial by court-martial in every case where the award or finding involves a forfeiture of pay, and in every other case unless he awards one of the "minor" punishments. (Army act, sec. 56 (8).)

Subject to this option, a commanding officer can in law deal summarily with any offense if he considers that his powers of punishment are sufficient; but King's Regulations (487) require him to first refer certain of the more serious offenses to superior authority for directions as to whether they shall be dealt with summarily or whether a court-martial shall be held.

(4) A judge advocate is always appointed for a general court-martial; he is generally an officer with legal knowledge, but may be a civilian.

The appointment in the United Kingdom is made by the judge advocate general; abroad, by the general officer commanding in chief. A judge advocate is at present only rarely appointed in the case of district courts-martial. No statistics are available.

(5) It must be remembered that the "specially qualified member" of a field general court-martial, generally called a court-martial officer, was unknown before and in the early stages of the war. The first court-martial officers were appointed in August, 1915.

(*a*) The general rule was to have one attached to each corps of not more than two divisions. If there were more than two divisions there were two court-martial officers. In addition, there were one or more court-martial officers attached to each army. There were special appointments for line of communication.

(*b*) From the army as a whole, in which a great many barristers and solicitors were serving.

(*c*) By the adjutant general's department, after inquiry as to applicant's ability and professional standing, on the recommendation of the judge advocate general or his deputy.

(*d*) (*e*) They were all fully qualified barristers or solicitors.

(*f*) The answer to this question depends on the local conditions and the length and difficulty of the cases; the number of officers referred to under (*a*) were found sufficient to do the work required.

(*g*) They do not formally sum up (either on fact or law) in open court. When the court retires they give their views both on law and on fact.

(*h*) This does not arise.

(*i*) On questions of law their opinion was generally followed; on a question of fact it had considerable weight, though not so much as on questions of law. But the obligation of secrecy imposed by the oath renders it difficult to speak with certainty.

(*k*) It is considered that the system has in the emergency worked extremely well. There is, however, a difference of opinion as to whether it would not be better that the court-martial officer should sit either as judge advocate or president, and not merely as a member of the court.

(6) Before Army Orders 110 and 111 of 1917, in the United Kingdom, the judge advocate at the trial forwarded the proceedings of general courts-martial direct to the judge advocate general.

Under the new system introduced by Army Orders 110 and 111 the proceedings in such cases, instead of going direct to the judge advocate general, pass to him through the convening officer, who adds his remarks and recommendations.

(I) If confirmation by His Majesty was required, the judge advocate general transmitted them to the secretary of state for submission to His Majesty.

(II) If confirmation by His Majesty was not required, the judge advocate general returned them with his advice to the convening officer (who was also the confirming officer).

(*a*) The object of the Army Orders 110 and 111 was to insure that the judge advocate general in reviewing the proceedings and the secretary of state for war or air tendering advice to His Majesty should have before them the views of the convening officer.

(*b*) The orders extend to all general courts-martial held in the United Kingdom.

(*c*) The recommendations of the judge advocate general as to confirmation have almost invariably been followed.

(7), (8), (9), (10), (11), (12), (13), and (14). All the statistics available in this office have been supplied. Possibly the adjutant general's department may be able to supply further information as to strength of army, detention barracks, and punishments. There are no statistics of summary punishments by commanding officers; no record of such punishments reaches the office of the judge advocate general.

(15) (1) An offense would ordinarily be disposed of by summary punishment on the day following arrest, but there may be delay, owing to a number of causes, such as difficulty in obtaining evidence, reference to superior authority, etc.

(2) The times which would elapse between commission of the offense and confirmation of the sentence in the case of each of the four kinds of courts-martial if every step were taken as promptly as possible and no difficulty arose, in connection with the obtaining of evidence or otherwise are shown in the table annexed to the evidence of the judge advocate general before the committee on courts-martial. Appendix III, page 27, copy attached. No statistics as to the actual times which elapse have been kept.

(16) The working of the suspension of sentences acts has been most beneficial during war time and the acts have fulfilled the purposes for which they were originally passed. They have given many a soldier the opportunity of redeeming his character by bravery in the field. They have prevented men whose services were required in the field from being detained for a long period in prison. A feature in connection with these acts which has given rise to some dissatisfaction is the fact that, while soldiers who had committed comparatively slight offences and who had not had their sentences suspended had to serve those sentences, others who had been guilty of graver crimes and who had their punishments suspended escaped all punishment. The adjutant general's department would be able to supply further information on this question.

(17) (18) This is being arranged. Further statistics as to sentences can possibly be supplied by the adjutant general's department of the war office and the authorities at the detention barracks.

(19) The work of the judge advocate general's office consists in giving advice as to courts-martial both under the army act and the air force act and legal advice on other questions. The work so far as it relates to courts-martial falls under four main heads:

(I) Advice before trial.
(II) Advice before confirmation.
(III) Review after confirmation.
(IV) Review upon appeal.

As to (I) in the United Kingdom the convening officer before ordering trial submits the charge sheet and summary of evidence in all general courts-martial cases and in all district court-martial cases where fraud is alleged or where he desires advice. Similar duties are discharged in relation to courts-martial abroad by the deputy of the judge advocate general.

In such cases advice is given as to whether the evidence is admissible and sufficient to support the charge and what kind of further evidence (if any) is required, and also whether the charge is correctly drawn and what amendments and additional charges (if any) are necessary.

The judge advocate general himself does not deal with cases "before trial" except to lay down general principles and it is a cardinal rule of the office that the officers who deal with cases at that stage should not also deal with them "after trial."

As to (II) in the United Kingdom after trial and before confirmation the proceedings are forwarded to the judge advocate general in all general court-martial cases and in any other cases where the confirming authority desires advice.

These are dealt with by the judge advocate general with the help of legal assistants. Abroad similar duties are discharged by the deputy of the judge advocate general who refers to the judge advocate general in London in cases of doubt or difficulty.

If the proceedings require confirmation by His Majesty, the judge advocate general forwards them to the secretary of state with his opinion embodied in a minute, and the secretary of state submits them to His Majesty.

In other cases he returns them to the confirming authority with his advice.

As to (III). All proceedings held in any part of the world except India are, after confirmation, forwarded to the Office of the Judge Advocate General in London for review and custody. For India there is a separate Judge Advocate General who reviews proceedings of trial held there.

In all cases sent to the Judge Advocate General's Office the proceedings are carefully reviewed to see whether the charges are properly framed, whether the evidence justifies a conviction, and whether the proceedings are otherwise legally in order. If the proceedings are in order they are filed. If not, they are forwarded to the Secretary of State for War or the Secretary of State for Air or the Adjutant General, or other proper authority, advising that the proceedings should be quashed or that such other action should be taken as the circumstances of the case may require.

As to (IV). It is open to any person convicted by court-martial to petition His Majesty, or the Army Council, or Air Council at any time against his conviction or sentence, and persons frequently petition more than once. Such petitions, if they involve any legal questions, are referred to the Judge Advocate General and are again considered by him in the light of any further facts or arguments brought forward by the petitioner. Advice is then given to the Secretary of State for War or Air as to whether there is any ground for interference.

It must be clearly understood that the Judge Advocate General is concerned only with the legality of convictions and sentences. He is not concerned with recommendations to clemency, though he occasionally calls attention to sentences if they appear unusually severe. His recommendations upon legal aspect of cases are almost invariably accepted and acted upon. The only cases in which this has not been done is when the attorney general has been consulted and has taken a different view.

Cases for advice before trial and before confirmation are, so far as circumstances permit, dealt with and dispatched from the Judge Advocate General's Office within 48 hours of receipt unless they raise some point of exceptional difficulty.

Cases for final review after confirmation are dealt with as rapidly as possible; the delay is seldom more than three days.

As the statistics show, nearly a quarter of a million convictions were reviewed in the office during the war.

(*b*) In addition to court-martial work of the Army and Royal Air Force the Judge Advocate General deals with other legal work, e. g., the answering of questions which arise in practice upon the construction of the Army Act,

King's Regulations, the Pay Warrant, and other regulations and orders, the drafting of orders and new regulations; military courts upon prisoners of war, etc.

(20) See 21.

(21) (*a*) The attached specimen minutes show the forms used by the Judge Advocate General in advising the Secretary of State, both before and after trial.

(*b*) In theory his duties are advisory only. In practice his advice is almost invariably acted upon. The only cases where this is not done is when the attorney general is consulted and he differs from the Judge Advocate General.

(*c*) Before the reconstitution of the office in 1905, on the appointment of Sir Thomas Milvain, the judge advocate general had been the direct responsible adviser of the Crown. He submitted direct to the sovereign these court-martial cases which required the confirmation of the sovereign as head of the army. To insure the responsibility of the judge advocate general to Parliament for the advice which he gave to the Crown he was generally a member of Parliament and privy councillor, and the office was political, changing with successive Governments. Since 1905 the office has not been political, the appointment has been permanent, and the judge advocate general has not been a member of Parliament or of the Government. He does not submit his advice direct to the sovereign, but through the secretary of state for war or air. The judge advocate general now devotes his whole time to the work of his office. Formerly the ordinary work of the office was left to the deputy judge advocate general, and it was only in cases of exceptional difficulty or if questions were raised in Parliament or advice had to be given to the sovereign that the judge advocate general acted personally.

(23) (24) This is shown by the table (Appendix III) annexed to the judge advocate general's evidence before the court-martial committee and to this memorandum.

The confirming or reviewing authority acts upon the advice of a staff officer specially skilled in military law or a legal adviser specially attached to the formation which he commands.

(25) Interviews with generals who have commanded in the field will be arranged through the Adjutant General's Department at the War Office.

(26) The views of the judge advocate general upon the questions asked here and in No. 25 are as follows:

(*a*) The presence of counsel (including an officer acting as such) to represent the accused is a great safeguard and of great assistance to the accused and the court, provided such counsel is competent. An accused person has the right to be represented by a barrister or solicitor or an officer selected by him. Nevertheless, the cases where the accused have not been represented have been frequent. The judge advocate general considers that whenever practicable the assistance of a suitable officer should be offered to the accused for his defense without in any way derogating from the right of the accused to be represented by the counsel or officer of his own choice. To increase the number of officers competent to defend the accused, legal instruction among officers should be improved and a list of qualified officers kept.

(*b*) (25a) The British system of summary disciplinary punishment works well in the hands of good commanding officers.

(*c*) (25b) There is very strong opposition to field punishment on the ground that it is degrading and carried out with varying degrees of severity. No effective punishment in substitution has been suggested. Some form of punishment other than a long term of imprisonment is essential on active service.

(*d*) (25c d) Lack of the powers referred to does lead to miscarriages of justice and makes it more difficult to secure uniformity of sentences through the action of the confirming authority. On the other hand, the exercise of such powers would lead to undermine confidence in the independence of the court and might lead to the belief that convictions or unduly severe sentences had been secured through pressure exercised by the confirming authority.

(*e*) (25e). The retention of the power to "review" appears desirable. It is a great safeguard against illegal or improper convictions and excessive sentences and helps to secure uniformity of sentences. It operates automatically without any special application, which is necessary in the case of an appeal. The reviewing authority is responsible for the maintenance of discipline in the force he commands, which is essential for the safety of his troops and the success of their operations. He can judge better than anyone else what the requirements of discipline are, and how far exemplary punishments are necessary. On legal questions he is guided by skilled advisers.

(*f*) (25f). Detailed instructions, though perhaps unnecessary in a small, fully trained army, appear to be very desirable when military law has to be administered by officers who only hold temporary commissions or who have not had a lengthy training.

(*g*) (25g). Their value has been fully proved; but they should sit either as judge advocates or presidents, rather than as members only.

(*h*) (25h). The judge advocate general considers that it is of great importance that legal education among officers in the army should be improved. Officers should be encouraged to qualify in law by additional pay or other advantages. So far as practicable, only officers who had after examination been certified as fit to do so should sit as president or members of courts-martial or act as prosecutors or defenders of the accused. A part of the legal instruction of officers should consist in attending the hearing of cases in the civil courts.

(27) The adjutant general's department of the War Office should be applied to for the information.

(28) There was a debate in the House of Commons on March 3, 1919, copy of Hansard attached as a result of which the present court-martial committee was appointed. This committee is at present considering its report. The debate is reported in Hansard, columns 100–183. Copy herewith.

A committee on punishments on active service was appointed after the South African War and reported in 1904. Copy report herewith.

A royal commission on courts-martial was appointed in 1868 and made two reports, dated July 24, 1868, and May 14, 1869, respectively.

A select committee appointed to examine into the mutiny act in 1878 and reported in the same year.

A number of articles have appeared in a weekly publication called John Bull, edited by Mr. Bottomley, M. P., and there are also articles in the Contemporary Review of March, 1919, and Blackwood's Magazine of June, 1919.

(Signed, at the top:) "F. C.,-J. A. G." "24/7/19."

INTERVIEW BETWEEN LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, AND CAPT. EASTWOOD, COURT-MARTIAL OFFICER, DISTRICT OF LONDON, JULY 17, 1919, AT LONDON.

Capt. EASTWOOD. With us, a man is probably put under arrest by some sergeant or noncommissioned officer. Brought before the platoon commander and investigated, and he may give a light punishment, such as extra drills. In any event he listens to the evidence and decides it is not his case. "You will have to go before the company commander." He goes before the company commander. Investigation is made there; this officer usually has a little more experience; he may decide to send the case to the commanding officer. There the investigation is thorough, and a summary of the evidence is made [indicating papers]. Here are two papers which just came in. That case comes up to us here with the application for trial. If a case goes further than the commanding officer it must be accompanied by a summary of the evidence and application for trial.

Lieut. Col. RIGBY. Does the accused and counsel see the summary?

Capt. EASTWOOD. Before the trial. [Indicating a paper.] Here is an application: An officer comes in one night to his mess, and this sergeant goes up to this officer and says, "You are drunk." He is reported. A most insubordinate thing. The officer put him under arrest for saying it. He was remanded for summary, and summary of evidence was taken. The application came in here on this Army form [B–116, Army form]. They have submitted this case here. I look into the case. I come to the conclusion that there was enough evidence to justify trial; three or four men are prepared to swear that he was drunk. They said so in the summary. The accused in the summary also gets other witnesses to come forward to say, "You fellows are drunk." I took the case down to the general. I told him I believed that discipline ran a certain amount of risk by a court-martial, and I thought it better that the commanding officer deal with the case, which he can do. The general did not like that, and he said, "No." The general then had the commanding officer up and wanted to know all about this sergeant. A most insubordinate fellow and troublesome among the soldiers. That being the case, the general said, "I want to try him."

Lieut. Col. RIGBY. What general do you mean?

Capt. EASTWOOD. General officer commanding the London district.

Lieut. Col. RIGBY. In striking out evidence you do it on the face of the summary itself?

Capt. EASTWOOD. I always do. When I submit it back I say, "The evidence as amended in blue pencil is irrelevant."

Lieut. Col. RIGBY. In doing that, in just what official capacity are you acting?

Capt. EASTWOOD. I am court-martial officer to the London command. I am last word in advising on court-martial matters in the command.

Lieut. Col. RIGBY. You are legal adviser to the commanding general?

Capt. EASTWOOD. I am.

Lieut. Col. RIGBY. You are what we call a staff judge advocate?

Capt. EASTWOOD. As far as legal matters are concerned. I can appeal to the judge advocate general, as in this case I did [indicating paper]. As far as discipline is concerned, I can take advantage of the field regulations, or when in doubt go to a superior officer. I can go to the war office.

Lieut. Col. RIGBY. You have access to the judge advocate general and to the war office?

Capt. EASTWOOD. I sign for the commanding general. Everything that we do we do in the name of the general officer commanding. Here are some proceedings [explained and showed Lieut. Col. Rigby how he signed papers as "Captain for Commanding General"]. The papers in all cases are eventually forwarded to the judge advocate general.

Lieut. Col. RIGBY. Court-martial officer to the command—by whom is that appointment made?

Capt. EASTWOOD. By the war office on the application of the general commanding.

Lieut. Col. RIGBY. Not on recommendation of the judge advocate general?

Capt. EASTWOOD. No. As a matter of fact it is a new office. In the old army, done by the staff captain to the brigade. Of course with the growth of the army, and the lowering of discipline most pronounced, court-martials increased until we were getting several a day during the war. The war office then appointed these court-martial officers with extra duty pay—12 shillings per day. It is not a very princely amount. They are mostly all barristers. The court-martial commission, which has just published its report, has recommended the permanent retention of that office, making it worth while. They want to have court-martial officers; they will have to do something for them, as you can not get good men with low pay. It is not worth while to work here all of my life at the regular army pay. So I believe that they are going to make this office a permanent one, and give the officers substantial pay. That is why I am staying on. It is very interesting work.

Lieut. Col. RIGBY. Are court-martial officers required to be barristers?

Capt. EASTWOOD. No. Young Lockwood here—he is a solicitor.

Lieut. Col. RIGBY. In what method was the office established?

Capt. EASTWOOD. Done on a war office letter. Originally this command was given one court-martial officer, some two and one-half years ago. War office ordered some time ago that all offenses committed in London by officers passing through on leave would be tried in London, because the witnesses are here. That is not strictly followed out here. We are very good friends with all the commands and we arranged it very much between ourselves. If we have a case here where the witnesses are in Ireland, we write to the Ireland command and transfer the case.

Lieut. Col. RIGBY. That authority appointing court-martial officers is a war office letter?

Capt. EASTWOOD. Yes. All the correspondence we have with the war office is addressed to the secretary of the war office. Before they appointed court-martial officers he was confidential aid to the staff captain. He attended to all court-martial work and the staff captain signed.

Lieut. Col. RIGBY. Are there any regulations that the summary be referred to the court-martial officer, or is that just practice?

Capt. EASTWOOD. Just practice—no regulation. But the commands shove that work on the court-martial officer.

Lieut. Col. RIGBY. Does the commanding general in practice usually follow the advice of the court-martial officer?

Capt. EASTWOOD. In 99 per cent of the cases.

(Capt. Eastwood referred to one case where there was a difficulty with a brigade commander.)

Lieut. Col. RIGBY. What did you have to do?

Capt. EASTWOOD. Wrote back, "The general officer commanding insists that this evidence will not be used."

Lieut. Col. RIGBY. In order to do that, did you have to consult the general?

Capt. EASTWOOD. In those cases, I usualy do. [Referred here to Army Council Instructions, called A. C. I.—A. C. I., 1852.] These instructions are issued monthly and govern all cases They correspond to general orders.

Lieut. Col. RIGBY. They correspond to our general orders and bulletins. The general orders deal with more important matters and the bulletins with small matters.

Capt. EASTWOOD. We are precisely the same. Any letter that comes from the war office is a war-office letter and some of them lay down advice how to deal with this or that.

Lieut. Col. RIGBY. Has A. C. I. 1852 been supplemented in any way?

Capt. EASTWOOD. No; except to this extent: That is appendix 1 that has been amended to 2. [Furnished a copy of these instructions.] I think that you will find that you will get a lot of information out of the report of the court-martial committee. [Capt. Eastwood here showed Lieut. Col. Rigby another paper which the reporter could not see or understand what it was about.] I did not want to try this fellow [indicating paper]. They wanted to try him for two things, using insubordinate language and with an alternative charge—conduct to the prejudice of good order. I did not like it. The general wanted it for disciplinary reasons, so I said I will safeguard myself and I sent a letter to the judge advocate general, requesting that I be advised as to whether the evidence will substantiate the charges.

(Other papers were referred to and the conversation was lost.)

The army act states that any witness who knows anything about the case should be called at the summary of evidence to tell what he has to say. It goes on to say that any witness called by the prosecution at the summary must be tendered to the accused for cross-examination. If I were conducting the summary I would say, "So-and-so knows something about the case.' Strictly speaking, they would have to call him as a witness for the prosecution. If any of the evidence is in favor of the defense, they would have to offer him for cross-examination to the defense. If they did not do that the defense would call him as their own witnesses. [Referring to another paper.] That is what happened in this case. It came back from the judge advocate general, and on that he says we are bound to act.

As a matter of fact, if I think that I know better than they do, I go around privately and see one of them. Sometimes that gets it through, but not always. It is a little bit difficult at times. This Fratel case that you heard the other day. It has caused a lot of feeling here. The evidence does not state plainly that the individuals died as a result of the accused's treatment. Probably might have died. That is entirely a matter for the court. The most that this fellow can get is two years at hard labor. There is a case that I think the judge advocate general has misinterpreted. He disagreed with me and recommended the trial of the case on the charges I read the other day, and all the fellow can get is two years.

The judge advocate general is simply advisory and his advice is given in an advisory capacity.

Lieut. Col. RIGBY (referring to letter in Capt. Eastwood's hand). This letter is signed by Col. MacGeagh, not signed in his name of the judge advocate general. Any reason for that practice?

Capt. EASTWOOD. These fellows are all lawyers. Custom is always sign your own opinion.

Lieut. Col. RIGBY. The man whose opinion it is is responsible?

Capt. EASTWOOD. Yes and no. But the department will stand by him, but on the other hand it is a custom they have there. A good system.

Lieut. Col. RIGBY. Not signed by Judge Cassel himself?

Capt. EASTWOOD. No. As a matter of fact, I have kept a close watch on what they do. That is the situation here. This case [referring to papers] we sent back. Granted the application for trial. Either sent back for charge sheets to be redrawn, resubmitted, signed by commanding officer, or to be tried by general court-martial. Generally signed by a staff officer to the general for the general.

Lieut. Col. RIGBY. General officer does not personally sign?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. You advise the general here whether it should be tried by general court-martial?

Capt. EASTWOOD. Right.

Lieut. Col. RIGBY. Whether it should not be proceeded with at all?

Capt. EASTWOOD. Right. In cases that affect discipline. I always talk to him. May be some situation that he should know about. This case [referring to papers] which does not affect discipline, I do not bother him at all. Not until confirmed. Send it back for trial and when it is to be confirmed, I do like this [showing a memorandum]; I make a note "confirm." I go through the case to see if it is in legal order. I usually see if it is all right and then mark "confirm."

Lieut. Col. RIGBY. Does the general sign or initial?

Capt. EASTWOOD. Signs.

Lieut. Col. RIGBY. He is required to sign personally?

Capt. EASTWOOD. Oh, yes. [Referring to another case on his desk.] This man had 120 days' service. Guilty, found guilty of absence for 14 days; all right; confirm.

The case I check up. This is a simple one. These are the notes I make [indicating] to advise the general. [Reading:] Two and three-fourths years' service, clean sheet, no convictions by court-martial.

Next thing I look for is the convening order. Check the names of the court to see if it agrees with the order.

Lieut. Col. RIGBY. You do not have a list, a check slip that we use. It is very simple to check by—to compare the authority for the convening order, the detail of the court, whether the court was sworn, etc. We require that the check sheet be attached to the record.

Capt. EASTWOOD. I just look at that. Just look at the charge sheet to see whether it is in order. This one [indicating] is leaving his post. Make a note of it to tell the general. Leaving his post while on duty as a sentry. "Guilty." Pleaded "guilty"; sentenced to 21 days' detention. Has a clean sheet. Accused: "I have nothing to say." Declined to cross-examine. One other thing: Is there enough in the summary of evidence to justify the charge? Done that when the application for trial came in. He pleaded guilty, and there is enough in the summary of evidence to justify the charge. Sentence, 21 days' detention: "confirm." Very simple when a man pleads guilty. When we get one here where the man pleads not guilty I have to go through the evidence.

Lieut. Col. RIGBY. Twenty-one days was within the power of the commanding officer?

Capt. EASTWOOD. Quite right. We got into the way of sending them to court-martial, because the sentences were very heavy during the war. They are away down now.

Lieut. Col. RIGBY. As a matter of habit?

Capt. EASTWOOD. A sentry leaving his post is a serious offense and ought to go to a court-martial.

Lieut. Col. RIGBY. And the court only gives him 21 days?

Capt. EASTWOOD. He has had 2¾ years' service and a clean sheet. [Referring to another case.] Here is a case I will have to show to the general. Absent seven times since enlistment; one drunkenness, using insulting language, making improper remarks, wearing unauthorized wound stripe.

Here is another one [indicating]: Had five courts-martial and got field punishment and hard labor.

Here is a case where the court gave one year. We have got an army council or war-office letter—gotten out last month—in every case where a private soldier is sentenced to hard labor he shall be discharged from the army. I think it is a mistake myself. If he steals from his comrades he usually does hard labor. He may have been an excellent soldier, and the army loses him. Not every one that gets hard labor should be discharged.

Lieut. Col. RIGBY. In practice some of these sentences are being changed, are they not? Changing the order to detention?

Capt. EASTWOOD. That is what I am doing here. Have two cases here now—fellows with a bad sheet. But I will have to let them go; they are worthless.

Lieut. Col. RIGBY. Impossible to make him a good soldier?

Capt. EASTWOOD. Mass of offenses against him. He is no good; let him go. In this case had had four courts-martial. [Capt. Eastwood read off the offenses, including absence, escape from custody, etc.] The court gave him two years—two years at hard labor. Domestic trouble was given as an excuse. To see if there is anything in it, got the commanding officer of the unit to investigate. Two years is too much, and I am going to advise the general to remit one year. In view of the fact that he is always going absent will have to discharge him.

Lieut. Col. RIGBY. In that case he will be discharged under this army letter?

Capt. EASTWOOD. Yes.

Lieut. Col. RIGBY. Tell me something about field punishment.

Capt. EASTWOOD. Field punishment amounts to this. A man is put generally on parade; this corresponds to being confined to the barracks. Also, he has an hour a day tied up. Tied to a wheel; tied to a fixed post; but tying the wheel is very rarely done. A man is not tied so it hurts him—merely tied there in any permanent place where he can be seen. It is a fine punishment. Makes a man think. There has always been a political outcry against it—a demand for the rights of man—that it was an inhuman business. An army on active service in camp behind the lines, what punishment can you give without taking the man away from the front? I saw a man doing 28 days for committing a nuisance in a tent. A lot of others sleeping in there; very insanitary, and you got to put a stop to it before it starts. This man got 28 days field punishment. Was confined to camp, took part in parades, and for one hour a day tied up to a post. A most excellent punishment. I think the men quite approve of it.

Lieut. Col. RIGBY. There is no general feeling among the men against it?

Capt. EASTWOOD. Not a bit. The country would never stand for the lash. As a matter of fact, there are many offenses for which 12 strokes of the lash, properly given, would be the best punishment. But the country would never stand it. Nothing inhuman about this field punishment, merely degrading.

Lieut. Col. RIGBY. Does it leave any stigma on the man?

Capt. EASTWOOD. Not a bit.

Lieut. Col. RIGBY. Among his associates?

Capt. EASTWOOD. Not a bit. You will find a fellow with three sentences to field punishment quite a popular fellow around the barracks.

Lieut. Col. RIGBY. If it is given by the commanding officer, that goes on his service record also?

Capt. EASTWOOD. Yes, sir. They have regimental sheets from which these small offenses are taken.

Lieut. Col. RIGBY. I notice that the French are different from you and from us—do not put a commanding officer's award on service record at all. Does a commanding officer's award go on the regimental sheets?

Capt. EASTWOOD. No; not unless it exceeds seven days. Since I left the battalion, it has been altered. I am not familiar.

Lieut. Col. RIGBY. Anything over seven days?

Capt. EASTWOOD. Yes.

Lieut. Col. RIGBY. Under seven days, it does not?

Capt. EASTWOOD. No; that goes on the conduct sheet.

Lieut. Col. RIGBY. Does the conduct sheet become part of the man's permanent record?

Capt. EASTWOOD. No; it is destroyed after three years.

(Capt. Eastwood showed his record book of executions of civilians in the Tower of London, etc., during the war, for treason, espionage, etc., remarking that many death sentences were commuted.)

(Lieut. Col. Rigby mentioned officers' cases.)

Capt. EASTWOOD. Most of our officers' cases are for drunkenness—severely reprimanded.

Lieut. Col. RIGBY. You do not dismiss?

Capt. EASTWOOD. Yes; we do.

Lieut. Col. RIGBY. Did you take the summary for the Fratel general court?

Capt. EASTWOOD. Yes; we do as much as we can. In any offense which we think requires a punishment of more than two years we usually send to a general court.

Lieut. Col. RIGBY. Practically before the war you used the district court for almost everything?

Capt. EASTWOOD. District courts-martial can not give more than two years. Here is a case of stealing tried by general, and got three.

Lieut. Col. RIGBY. Can a district court award a discharge with ignominy?

Capt. EASTWOOD. Yes; under the army act.

Lieut. Col. RIGBY. That is a matter within the jurisdiction of the court—discharge with ignominy?

Capt. EASTWOOD. Not unless it awards hard labor. You see it from these things here [indicating papers]. Two men tried for desertion under the fourtieth section of the army act—the court only gave two years. A district court might have given that. In the Fratel case—the most he can get is two years. The reason we are trying him by a general is that there is so much feeling we want to show the public that something was done.

Capt. EASTWOOD (making a casual remark). The more dignity you have in a court the more justice you get. [Referring to district courts attended by Lieut. Col. Rigby.] A private soldier has a man with fixed bayonet to guard him. An officer also has an officer to guard him.

Lieut. Col. RIGBY. The first man before the district court was between two guards with fixed bayonets. The guards over the second man had no fixed bayonets.

Capt. EASTWOOD. They were from different regiments—perhaps not the custom for one regiment.

Lieut. Col. RIGBY. Was the judge advocate at the Fratel trial an officer?

Capt. EASTWOOD. From the Judge Advocate General's Office. He is a civilian—not an officer. He is the Deputy Judge Advocate General. An important case, so we asked for him.

Lieut. Col. RIGBY. What about counsel for the defense?

Capt. EASTWOOD. As a matter of fact, the prosecutor always helps. When I am taking a summary, I always help the accused and ask him if he knows anyone in England whom he wants as counsel. I ask, "Can I help you?" and sometimes they ask me if I can recommend anyone, and I do according to what they are able to pay. This man Fratel stated that he could pay 50 or 60 pounds, and I recommended his counsel. He is a very good counsel; lawyer here in London.

Lieut. Col. RIGBY. Let me ask you about the efficiency of the counsel for the accused?

Capt. EASTWOOD. As far as private soldiers are concerned, it is most difficult. It is a national problem. Situation now being brought before Parliament to provide public defenders.

Lieut. Col. RIGBY. Public military defenders?

Capt. EASTWOOD. Yes. Now, we generally get him an officer from his regiment.

Lieut. Col. RIGBY. Do you try to get an officer with any legal training?

Capt. EASTWOOD. It is very difficult, particularly in peace times. In war time you have people in the army from all walks of life, including many lawyers and solicitors. Generally speaking, the president of the court is very fair and the prosecutor will help. In fact, he must help.

Lieut. Col. RIGBY. In district courts, you do not use a judge advocate at all?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. Really is it then in the hands of the president and the prosecutor that he finds his protection, or does the counsel really assist?

Capt. EASTWOOD. Very often, if he is a good solicitor, and if he has handled many cases of soldiers. Near large barracks there is generally a little solicitor, nearly always the same one that appears for the men. I find them generally most tiresome; do not know the defense, and are apt to go into the case with very elaborate statements.

I think that the administering of justice by district courts is very good. My experience is that the president assists the men. "What have you to say?" he asks. "My wife is sick." "Have you a certificate?" "No." "You better get one." The president helps considerably. When a case comes up to us, we confirm the sentence, and let the man start serving his sentence. We then investigate if he has any grievance. One out of ten are true. We write to his unit for a report. Nearly all the grievances are, "I am suffering from shell shock."

Lieut. Col. RIGBY. Where a man does not have civilian counsel to assist him, do you always offer him a counsel?

Capt. EASTWOOD. No; he has to ask.

Lieut. Col. RIGBY. You do not offer?

Capt. EASTWOOD. No. The Canadians always ask. They are a perfect nuisance. Always asking for an officer to assist them. There was an officer in France who knew the procedure very well. Some men were being tried and they asked for this officer to defend them. He got them off. After that everybody wanted him and he got the job, and he got about one-half of them off. The brigadier said, "If you don't stop this I will have to transfer you." He was a most able defender and he got them off.

Lieut. Col. RIGBY. Do you make any effort when you do offer counsel, or a military officer—do you make any effort to get a man of higher rank than a lieutenant?

Capt. EASTWOOD. No. A lieutenant or a captain. It just depends on who is available.

Lieut. Col. RIGBY. Do you sometimes get a soldier?

Capt. EASTWOOD. Now we do. There are lots of barristers in the ranks.

Lieut. Col. RIGBY. Has there been any complaint at all that an officer of low rank, acting as defender, is embarrassed?

(Maj. DuPlat Taylor, court-martial officer of the London command, and "permanent" president of the district court-martial of that command, entered, and this last question was not answered. The major joined in the interview.)

Capt. EASTWOOD (to Maj. Taylor). You help them to bring everything out?

Maj. DUPLAT TAYLOR. I have sat as president of the court at about 1,500 trials and have not acquitted more than 5 or 6. They do not send a case to trial unless the evidence is clear against the man. The man has already been confronted with the witnesses and all the evidence taken down.

Lieut. Col. RIGBY. The man at the trial yesterday asked a question in cross-examining a witness, which you ruled to be immaterial, but you did not take that down for the record?

Maj. DUPLAT TAYLOR. We do not put anything in the record that is irrelevant.

Lieut. Col. RIGBY. It struck me this way—the man asked a question of the witness and you ruled it out. It is not in the record and there is no opportunity for a review on it?

Maj. DUPLAT TAYLOR. No.

Lieut. Col. RIGBY. The fairness of the record depends almost wholly on the president?

Maj. DUPLAT TAYLOR. It says in the Rules of Procedure that the president is responsible for the taking down of a fair summary of what is given. If the man insisted on it, it would go in the record.

Col. RIGBY. But a man not represented by counsel will never insist. Your ruling was right, but a president with less experience—suppose it was a president with less experience; there might be injustice done. Is it not pretty dangerous?

Maj. DUPLAT TAYLOR. If a man has any line of defense at all, anything in his favor, I ask for it. On 1,500 cases since the war I have sat as president—permanent president of the district court.

Col. RIGBY. About how many acquittals?

Maj. DUPLAT TAYLOR. About five or six. I can not be absolutely certain. We have about 7 per cent of the cases quashed.

Col. RIGBY. Any estimate of the number of charges sent back for further investigation or directed not to be tried?

Maj. DUPLAT TAYLOR. Cases which we send back to settle summarily or order the men released go to about 12 per cent. Very low. The commanding officer does not submit the application for trial unless it is a clear case.

Col. RIGBY. One-third of 1 per cent acquittals with you, Major?

Maj. DUPLAT TAYLOR. I can not tell you the exact number.

Col. RIGBY. You must have had a great many alternative charges.

Maj. DUPLAT TAYLOR. Oh, yes; mostly fraud cases. Possibly one-half were found guilty of part of the charge. Most of the desertion cases were found guilty of absence.

Col. RIGBY. Have you a court of inquiry?

Capt. EASTWOOD. Yes.

Col. RIGBY. Is it used for this?

Capt. EASTWOOD. No. Court of inquiry held on absence of the accused.

Col. RIGBY. Really a trial in his absence.

Capt. EASTWOOD. Yes. No further evidence is required.

Col. RIGBY. Evidence only of the fact of his absence being unauthorized?

Capt. EASTWOOD. Yes, sir.

Lieut. Col. RIGBY. You do not permit its finding to be admitted to prove desertion?

Capt. EASTWOOD. No.

Lieut. Col. RIGBY. As evidence of the circumstances under which arrested?

Capt. EASTWOOD. Yes. Evidence is given on oath that the man was picked up by the police for fighting. In an ordinary case of desertion—man absent six months, the charge may be of desertion. A witness comes in and identifies the man in the jug. That is all you want to prove your case.

Lieut. Col. RIGBY. As long as the absence is of six months, you infer desertion?

Capt. EASTWOOD. Yes. If the case is disputed, then you call witnesses, if the man has deserted for six months. But they never dispute absence.

Lieut. Col. RIGBY. If the officer that arrested the man makes a report that the man was fighting, out of uniform, gave a fictitious name and fictitious organization, if he disputes these points?

Capt. EASTWOOD. Then we call witnesses. If he disputed it, it would not be accepted as prima facie evidence of the deed.

Lieut. Col. RIGBY. Another matter—proving intent to desert, desert permanently. A case where a police officer has certified that the man gave a fictitious name, claimed to belong to an outfit to which he did not belong, and the man says, "No; I give him my name, all right. I was on my way back to my outfit." In that case you will have to call witnesses?

Capt. EASTWOOD. Yes; almost sure. As a matter of fact, the rough rule in this command is to nearly always submit a charge for desertion. If a man is absent under a month and surrenders, then we alter the charge to absence without leave. If absent over a month and arrested, let the charge go and let the court hear it. It is a rough rule we have in the office.

Lieut. Col. RIGBY. If he is gone over six months?

Capt. EASTWOOD. Yes; then he is charged with desertion. Must have had no intention to return. During the war they were sentenced to six months' detention for desertion. For absence without leave, two days for every day absent. Now, they get a day. Of course, they also lose pay while away.

Lieut. Col. RIGBY. You ordinarily do not give a man a discharge for desertion?

Capt. EASTWOOD. Not during the war. But now, peace time, we do. During the war the Army council issued an order that no discharges with ignominy be confirmed without reference to them, for the reason that you would have men deliberately committing offenses to escape active service. An excellent reason. They got detention. If fit, they were sent to France in the next draft.

Lieut. Col. RIGBY. I would like to get a copy of the suspension-sentence act. That act worked well?

Capt. EASTWOOD. Oh, very well, indeed; very good.

Maj. DUPLAT TAYLOR (after a reference to not having the record made verbatim). Strictly speaking, every question and answer should go down, so that the confirming officer can tell whether the question is irrelevant or not, but I do not do it.

(Casual remarks by Capt. Eastwood.)

No orders are published announcing sentences. Read to the men on parade. The men stand at ease until you come to the findings; then they come to attention.

In the case of officers, we have them come up here. In the case of dismissal of an officer, he is called up here and I take off his badges of rank.

No reviews are made. Only make a few notes.

(Reporter: Army Field Clerk F. T. McEneny.)

Lieut. Col. RIGBY. I also want to offer, unless it is already in this record, a copy of paragraph 1 of General Order 88 of the War Department, which was issued July 14 last, forbidding return of acquittals for reconsideration.

Senator WARREN. Senator Chamberlain, do you know whether that has been included in this record?

Senator CHAMBERLAIN. It has been mentioned, but not inserted in the record. That was an order of the President, directing that after a man had been acquitted there should be no direction for a retrial and no modification of the verdict of acquittal.

Lieut. Col. RIGBY. Yes; it is a rule of procedure issued under the thirty-eighth article of war, providing for rules of procedure, which are to be submitted annually to Congress.

Senator CHAMBERLAIN. In effect, it is an order not to retry a man who has once been acquitted.

Lieut. Col. RIGBY. No; not that, because that never could be done; but an order not to direct the court to reconsider the case, in case of an acquittal. It covers two or three other things also.

Senator WARREN. I think it had better go into the record.

Senator CHAMBERLAIN. Yes; let it go into the record.

Lieut. Col. RIGBY. It covers acquittal in whole or in part, and it also forbids increasing the sentence on reconsideration.

(Paragraph I of General Order No. 88 is here printed in full, as follows:

GENERAL ORDERS, No. 88. } WAR DEPARTMENT, WASHINGTON, *July 14, 1919.*

I. *Procedure respecting the return of proceedings to courts-martial for revision.*—The following rule of procedure prescribed by the President, modifying the existing procedure respecting the return of proceedings to courts-martial for revision, is published for the information and guidance of all concerned.

1. No authority will return a record of trial to any military tribunal for reconsideration of—

(*a*) An acquittal;

(*b*) A finding of not guilty of any specification;

(*c*) A finding of not guilty of any charge, unless the record shows a finding of guilty on a specification laid under that charge which sufficiently alleges a violation of some article of war; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited.

3. This order will be effective from and after August 10, 1919.

(250.4, A. G. O.)

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

Senator CHAMBERLAIN. What led to the issuance of that regulation?

Lieut. Col. RIGBY. I had a little something to do with the thing; and so far as I know it was a direction of Gen. Crowder, given before he went to Cuba last winter, that a form of changes in the Manual and the Rules of Procedure should be prepared, forbidding the return of acquittals for reconsideration, and making some other changes.

Senator CHAMBERLAIN. That was after the war?

Lieut. Col. RIGBY. That was after the war.

Senator CHAMBERLAIN. What led to it? Was it agitation on the subject of courts-martial?

Lieut. Col. RIGBY. Of course, I do not know, sir; further than that the direction came from Gen. Kreger to me to prepare the draft of that and of these changes, and I prepared and submitted them to him before I went away last April; and during my absence on the other side, they came out.

Senator CHAMBERLAIN. Why was not that done during the war time?

Lieut. Col. RIGBY. Of course, I do not know anything about that.

Senator WARREN. The date of the issuance of the order appears?

Lieut. Col. RIGBY. Yes. This was prepared last March or April, and then, of course, it had to be submitted to the General Staff and the War Department—the Secretary of War—and there were various changes, so that these are not quite in the form in which the Judge Advocate General submitted them. They are not quite as broad,

in fact, as the Judge Advocate General submitted them, in some ways; and they were promulgated on the 14th of July.

Senator WARREN. On the 14th of last July?

Lieut. Col. RIGBY. July 14, 1919. There is also, in addition to this general order, a copy of "Changes No. 5," in the Manual for Courts-Martial, also promulgated July 14, 1919, amending paragraphs 6, 75, 76, 78, 94, 108, 109, 332-A, 367, 370, and 371 of the Manual, and amending Appendix 3 to the Manual, and also adding a new paragraph, 76-A.

I may say that these changes cover the submission of charges and preliminary investigations, making more definite rules in some ways as to how the preliminary investigations shall be carried on and providing also in a cautionary form—

(c) Convening authorities are advised that a majority of the officers appointed on a general court-martial should have not less than a total of two years' service, commissioned or enlisted, either in the Regular Army, the National Guard, National Army—

Or other armed forces, except in case of emergency.

That is to make sure of some experience in the officers composing the court.

Senator CHAMBERLAIN. Those are simply regulations that can be changed at any time?

Lieut. Col. RIGBY. Certainly, sir.

Senator CHAMBERLAIN. I judge from your mentioning them that some of these regulations are really along the lines of S. 64. The one you have just read practically follows S. 64.

Lieut. Col. RIGBY. I would not say that it follows it, but it is along the same line as one clause of that.

Senator CHAMBERLAIN. If it is right to do that by regulation, why is it not proper to do these things by law?

Lieut. Col. RIGBY. My answer to that, Senator, is that as to some of these things it is wiser to do them in a less hard and fast form, so that without the difficulty of having to get the statute changed you can change them if they do not work well, and if you see that changes are needed. I think many of these things should be in a somewhat flexible form. For instance, it was suggested by Gen. Crowder, you will remember, in his letter of March 10 last to the Secretary of War, that for the purpose of trying out the plan of having a legally qualified member of the court an order should be issued, a general order, looking to that. Now, I think there is a good reason for trying that in the first place in that way rather than by statute, because until we have tried it in our Army we do not know whether it would be better ultimately to have the legal adviser in the form of the judge advocate or to have him an additional member of the court, and under just what regulation it will best work out. A general order can be changed easily, whereas if you once embody it in a statute you have it in a very fixed and definite form.

Senator CHAMBERLAIN. I do not know that I have any objection to this system of doing this by regulation, but it seems to me it is simply an excuse for not enacting a law that is pending before the Senate.

Lieut. Col. RIGBY. Of course that is a matter of opinion, Senator. I have not myself, however, thought of it in that way.

Senator WARREN. You are touching upon something that has been running through my mind, not only all through this hearing but before, and that is that there has got to be either a different law or a different application and a different practice at the front in combat positions from the practice at home in times of absolute peace. It seems to me that I can see how more vigorous action should be had at the front and while within reach of the enemy than there should be in times of peace when it is a mere matter of a little delinquency, where a complaint comes in that would be tremendously important if it were at the front.

Senator CHAMBERLAIN. I am disposed to agree with that view, Senator, but here, under the system that has been followed in the United States, the punishments were even severer at home in the camps and cantonments than they were at the battle front.

Senator WARREN. Senator, that is what I think, but as this came up I thought perhaps the colonel would like to express himself upon that point, because I think the situation is as you state it, and on the other hand I think it ought to be just the reverse.

Lieut. Col. RIGBY. That is a matter, Senator, that I do have some opinions on, that I should like to submit to you, with your permission. But I would like first to add just a word about the character of these rules.

Senator CHAMBERLAIN. These papers will be printed in the record?

Senator WARREN. Certainly.

Lieut. Col. RIGBY. The further headings here are to provide for the more careful selection of counsel for the accused, as well as of the judge advocate.

Senator CHAMBERLAIN. That is all proposed to be done by regulation.

Lieut. Col. RIGBY. It is done, sir, by these regulations; which are now in effect.

Senator WARREN. They have been in force since what time?

Lieut. Col. RIGBY. Since August 10. They were promulgated July 14, to go into effect as of August 10, if I remember rightly as to the date of going into effect.

(The documents referred to are here printed in the record, as follows:)

MANUAL FOR COURTS-MARTIAL.

CHANGES No. 5. } WAR DEPARTMENT, WASHINGTON, *July 14, 1919.*

Paragraphs 6, 75, 76, 78, 94. 108, 109, 332a, 367, 370, and 371, and Appendix 3, Manual for Courts-Martial, 1917, are changed, and paragraph 76a is added, as follows:

6. *Who competent to serve.*—Generally all officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, are legally competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. (A. W. 4.)

Exceptions.—(*a*) No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution (A. W. 8, 9); but when there is only one officer present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10). (See chapter 8, sec. 1, par. 129.) (*b*) Chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps are not in practice detailed as members of courts-martial. (*c*) Convening authorities are advised that a majority of the officers appointed

on a general court-martial should have not less than a total of two years service, commissioned or enlisted, in either the Regular Army, National Guard, National Army, or other national armed forces, when such officers can be detailed without manifest injury to the service. In the selection of officers for appointment as members of courts-martial care will be taken to select those officers of the command who are best qualified for such duty by training and experience. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

75. *Submission of charges.*—Charges for trial by courts-martial will be preferred only when, in the opinion of the officer preferring them, there is reasonable ground for believing that an offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. All charges for trial by courts-martial will be prepared in triplicate, using the prescribed charge sheet as first sheet and using such additional sheets of ordinary paper as are required. In the preparation of charges care will be taken to observe the provisions of paragraphs 65, 66, and 67, *ante*. In cases referred for trial to special or general courts-martial, no indorsement will be placed on the charge sheet except the indorsement referring the charges to a court-martial for trial. The charges, when the preferring officer recommends trial by a special or general court-martial, will be accompanied—

(*a*) By a letter of transmittal addressed to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains and signed by the officer preferring the charges, which shall contain a brief summary of the material testimony expected from each material witness for the prosecution, as well as a reference to any known document or other matter of evidence which may become important or necessary in the case. It will also contain a recommendation as to the kind of court-martial, general or special, before which the preferring officer believes the trial should be held.

(*b*) In the case of a soldier, the letter of transmittal will be accompanied by properly authenticated evidence of convictions, if any, of an offense or offenses committed by the accused during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

76. *Investigation of charges—Action.*—The officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains, when a charge is received by him, examine it carefully for the purpose of determining whether it states an offense cognizable by a military tribunal and whether it is laid under the proper Article of War and will, when necessary, cause or permit a charge to be amended or a new or additional charge to be preferred. If, in his opinion, any charge is trivial or inconsequential, he will dispose of it without trial by court-martial. Where the case presented is one which, in his opinion, should be disposed of under the one-hundred and fourth article of war he himself will so dispose of it. He may, without further investigation, refer the charges to a summary court-martial for trial. If he believes that the charges should be tried by a special or a general court-martial, he will, before taking further action thereon, either carefully investigate them himself or cause them to be investigated by an officer other than the one preferring the charges whose rank, experience, and qualifications are such as to fit him for the performance of this important duty. The officer investigating the charges will afford the accused an opportunity to make any statement, call any witness, offer any evidence, or present any matter in explanation or extenuation of his alleged offense that he may desire to have considered. He will, at the outset of his investigation, carefully warn the accused that it is not necessary for him to make any statement with reference to the charges against him, but that if he does make one it may be used against him. (See par. 225 (*b*).) The accused will not be interrogated without the consent of his counsel. All material testimony given by any witness in person will be reduced to a clear, succinct statement, which should be read to the witness and signed by him. When it is not practicable to obtain personal testimony from any material witness, either for the prosecution or the defense, a written statement will be obtained, if possible, by the officer investigating the charges of the testimony to be expected from such witness and submitted with the report of investigation. He will also submit available papers or documents which may serve to throw light on the case. Any written statement made by the accused will be read over to him and he will be offered

an opportunity to sign it if he so desires, but he will not be required to do so and will be advised that it is not necessary for him to do so. Care will be taken to insure that the accused is fully advised of the nature of the offense charged against him and of his legal rights in the premises.

The investigating officer will submit his report to the authority appointing him, inclosing papers, documents, and the signed statements of witnesses referred to above, in the form of an indorsement on the letter of transmittal submitted with the charges by the preferring officer. The report will include a reference to any known document or other matter of evidence not inclosed but which may become important or necessary in the case. It will also include a statement of all explanatory or extenuating circumstances which shall have come to the attention of the investigating officer, a statement as to whether he believes the charges can be sustained, and a specific recommendation as to the disposition thereof. An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout such investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial. When the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains is the officer preferring the charges, he will cause them to be investigated by some officer other than himself before reaching a decision as to their disposition, except where he decides to refer them for trial to a summary court. When the officer preferring the charges is the only officer with the command, and is of the opinion that the case is one for a special or general court-martial, he will himself investigate the charges and make the report thereof as just described.

From this investigation the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains will decide what disposition is to be made of the charges against him. Unless such officer is the accuser or prosecutor of the person to be tried, he should not ordinarily forward charges to superior authority, except in cases where he desires to recommend trial by a court-martial not within his competency to appoint; all other cases he should dispose of without reference to higher authority. Action forwarding charges to superior authority will be in the form of an indorsement on the letter of transmittal submitted by the officer preferring the charges, following the report of investigation. The letter of transmittal, together with all indorsements thereon, will be referred with the charges to the trial judge advocate for his information in preparing the case for trial, but neither this document, nor any part thereof, will be shown to the court or any member thereof. In case of trial by general court-martial the letter of transmittal with all indorsements thereon will be forwarded to the Judge Advocate General with the record of trial.

Each commanding officer superior to the one immediately exercising summary court-martial jurisdiction over the accused into whose hands charges may officially come will either refer them to a court-martial within his jurisdiction for trial, forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise dispose of them as circumstances may appear to require. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

76a. *Further investigation of general court-martial charges.*—Before directing the trial of any charge by general court-martial or military commission, the convening authority will refer it to his staff judge advocate for consideration. Should the investigation of the charges appear not to be complete and satisfactory, the charges may be returned for further investigation, to be conducted, reported, considered, and acted upon in like manner as the original investigation; or, in a proper case, the necessary further investigation may, when practicable, be conducted by the staff judge advocate, an inspector, or other suitable officer through direct correspondence or personal interview. Should any charge or specification appear to be improperly drawn, the staff judge advocate may secure its correction or the substitution of another through direct correspondence or personal interview. The staff judge advocate may, over the signature of the officer preferring the charges, make corrections in the phraseology of any charge or specification by addition, substitution, or elimination whenever such correction does not change the substantive character of the charge or specification as preferred by the officer signing it. He may also

properly cause new or substituted specifications and charges, based upon the indicated competent evidence, to be preferred. When these charges are returned by the staff judge advocate to the convening authority, he should advise the latter that they are correct in form and appropriate to the indicated competent evidence in the case, and whether or not in the opinion of the judge advocate a prima facie case justifying trial exists. The duties herein prescribed for a staff judge advocate will be performed by the officer acting as such if no judge advocate is on duty on the staff of the convening authority. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

78. *Determination of proper trial court.*—When an officer who exercises court-martial jurisdiction receives charges against an enlisted man and has decided that the case requires trial by court-martial, it is his duty to consider whether such trial should be by summary, special, or general court-martial. Subject to jurisdictional limitations, he should not withhold charges from trial by special or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. On the other hand, he should not refer to special or summary court-martial offenses which, by reason of their inherent gravity or the circumstances surrounding their commission, merit greater formality of trial or more condign punishment than is found in the pocedure or jurisdiction of such courts. As a general rule no case should be tried by a special or general court-martial in which, under the apparent circumstances of the case, adequate punishment can be imposed by a summary court-martial; and no case should be tried by a general court-martial in which, under the apparent circumstances of the case, including the previous military record of the accused, adequate punishment can be imposed by a summary or special court-martial. Beyond this no fixed rule can be laid down, and the matter must be decided after careful consideration by commanding officers. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

94. *Selection.*—The prompt, speedy, and thorough trial of a court-martial case is largely dependent upon the judge advocate. He will, accordingly, be carefully selected. Where it can be avoided no officer who has not had experience as a judge advocate will be detailed as judge advocate of a general court-martial unless he has had experience as a member and as an assistant judge advocate of a court-martial and is otherwise qualified by character and attainments for this duty. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

108. *Counsel.*—The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel of his own selection, or by military counsel of his own selection if such counsel be reasonably available. Military counsel will be detailed as soon as practicable after arrest or confinement. Civilian counsel will not be provided at the expense of the Government.

Should the accused request the appointment as his counsel of an officer stationed at the station where the court sits, and such officer be not a member of the court, the commanding officer will appoint such officer as counsel if he is reasonably available. Should the commanding officer decide that the officer desired by the accused is not reasonably available, the accused may appeal to the officer appointing the court, whose decision shall be final. If the counsel desired by the accused is not under the control of the commanding officer where the trial is held, application for counsel will be submitted by the accused in writing to the appointing authority, whose decision as to whether the officer desired is "reasonably available" is final.

Every officer convening a general or special court-martial will, in the convening order, detail a defense counsel for the court whose duty it shall be to act as counsel for all accused persons tried by that court except those who have counsel of their own selection. In this latter case, the defense counsel may, by mutual agreement between himself and counsel selected by the accused, act as associate counsel. Officers so detailed should have the qualifications described in paragraph 94 for judge advocates, and should be selected with the same care. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

109. An officer acting as counsel before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law, but should

not obstruct the proceedings with frivolous and manifestly useless objections or discussions. Ample opportunity will be given to judge advocates and counsel for accused properly to prepare the prosecution and defense of each case respectively, and for that purpose they will be excused from any other duty that may interfere with such work. (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

332a (Added by C. M. C. M. No. 1, and changed by C. M. C. M. No. 4.) When an officer or enlisted man has been tried by a general or special court-martial and acquitted, or has been convicted and the sentence does not include dismissal, dishonorable discharge, or confinement, the judge advocate will at once notify the commanding officer in writing, directly, of the fact that neither dismissal, dishonorable discharge, nor confinement has been imposed on the accused, whereupon the commanding officer will at once release the accused from confinement or arrest, provided he is not awaiting trial or result of trial under other charges. No officer or enlisted man so released shall be ordered to duty outside of the jurisdiction of the reviewing authority until the case shall have been finally disposed of. (Dig. Ops. J. A. G., May, 1918, p. 67.) (C. M. C. M. No. 5, July 14, 1919.)

(250.4, A. G. O.)

367. (Changed by C. M. C. M. No. 4.) *By appointing authority.*—(*a*) *Records of trial by general courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by general court-martial, with the decisions and orders of the appointing authority made thereon, will be transmitted directly to the Judge Advocate General of the Army accompanied by the statement of service, if there be any; five copies of the order, if there be any, promulgating the result of the trial, and the letter of transmittal provided for in paragraph 75, with all indorsements thereon.

(*b*) *Records of trial by special courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial, accompanied by a copy of the order publishing the result of the trial, will be forwarded, ordinarily without indorsement or letter of transmittal, to the officer exercising general court-martial judisdiction over the command, there to be filed in the office of the Judge Advocate until the statistical information in it required for the annual report of the Judge Advocate has been secured, when it may be destroyed.

(*c*) *Records of trial by summary courts-martial.*—The several records, of trial by summary courts-martial within a command shall be filed together in the office of the commanding officer and shall constitute the summary court record of the command.

(*d*) *Reports of trial by summary courts-martial.*—The report of trial by summary court (copy of record of trial) will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted to the officer exercising general court-martial jurisdiction oved the command, there to be filed in the office of the Judge Advocate until the statistical information in it required for the annual report of the Judge Advocate has been secured, when it may be destroyed. (C. M. C. M. No. 5, July 14, 1919.)

(250. 4, A. G. O.)

370. (Changed by C. M. C. M. No. 4.) *Action by reviewing authority and record thereof.*—Every record of trial by general court-martial or military commission received by a reviewing or confirming authority will be referred by him to his staff Judge Advocate for examination. The latter will carefully examine the record and recommend orally or in writing the action which, in his opinion, should be taken thereon. The duties herein defined for a staff Judge Advocate will be performed by the officer acting as such if no Judge Advocate is on duty on the staff of the convening authority.

The reviewing authority will state at the end of the record of trial in each case his decisions and orders. (C. M. C. M. No. 5, July 14, 1919.)

(250. 4, A. G. O.)

371. (Changed by C. M. C. M. No. 4.) *Sentence not effective until approved.*—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the reviewing authority as defined in paragraphs 369 and 374. Upon acquittal, or upon conviction where the sentence does not include dismissal, dishonorable discharge or confinement, the accussed should be released from confinement or arrest as provided in paragraph 332a. The announcement of the result of trial in orders is not necessary to the validity

of the sentence or acquittal. It is not necessary for the reviewing authority to approve the findings and proceedings. (C. M. C. M. No. 5, July 14, 1919.) (250. 4, A. G. O.)

Appendix 3.—Change paragraphs 1 and 2 under "Instructions" to read as follows:

1. *Submission of charges.*—Charges for trial by courts-martial will be preferred only when, in the opinion of the officer preferring them, there is reasonable ground for believing that an offense has been committed, that the accused is guilty of the offense, and that the offense can not be properly or adequately dealt with in any other manner. All charges for trail by courts-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. In the preparation of charges care will be taken to observe the provisions of paragraphs 65, 66, and 67, *ante*. In cases referred for trial to special or general courts-martial, no indorsement will be placed on the charge sheet except the indorsement referring the charges to a court-martial for trial. The charges, when the preferring officer recommends trial by a special or general court-martial, will be accompanied—

(*a*) By a letter of transmittal addressed to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains and signed by the officer preferring the charges, which shall contain a brief summary of the material testimony expected from each material witness for the prosecution, as well as a reference to any known document or other matter of evidence which may become important or necessary in the case. It will also contain a recommendation as to the kind of court-martial, general or special, before which the preferring officer believes the trial should be held.

(*b*) In the case of a soldier, the letter of transmittal will be accompanied by properly authenticated evidence of convictions, if any, of an offense or offenses committed by the accused during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges. (M. C. M., par. 75.)

2. *Investigation of charges—Action.*—The officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains, will, when a charge is received by him, examine it carefully for the purpose of determining whether it states an offense cognizable by a military tribunal and whether it is laid under the proper article of war and will, when necessary, cause or permit a charge to be amended or a new or additional charge to be preferred. If, in his opinion, any charge is trivial or inconsequential, he will dispose of it without trial by court-martial. Where the case presented is one which, in his opinion, should be disposed of under the one hundred and fourth article of war, he himself will so dispose of it. He may, without further investigation, refer the charges to a summary court-martial for trial. If he believes that the charges should be tried by a special or a general court-martial, he will, before taking further action thereon, either carefully investigate them himself, or cause them to be investigated by an officer, other than the one preferring the charges, whose rank, experience, and qualifications are such as to fit him for the performance of this important duty. The officer investigating the charges will afford the accused an opportunity to make any statement, call any witness, offer any evidence, or present any matter in explanation or extenuation of his alleged offense that he may desire to have considered. He will, at the outset of his investigation, carefully warn the accused that it is not necessary for him to make any statement with reference to the charges against him, but that if he does make one, it may be used against him. (See par. 225 (*b*).) The accused will not be interrogated without the consent of his counsel. All material testimony given by any witness in person will be reduced to a clear, succinct statement, which should be read to the witness and signed by him. When it is not practicable to obtain personal testimony from any material witness, either for the prosecution or the defense, a written statement will be obtained, if possible, by the officer investigating the charges, of the estimony to be expected from such witness and submitted with the report of investigation. He will also submit available papers or documents which may serve to throw light on the case. Any written statement made by the accused will be read over to him and he will be offered an opportunity to sign it, if he so desires, but he will not be required to do so and will be advised that it is not necessary for him to do so. Care will be taken to insure that the accused is fully advised of the nature of the offense charged against him and of his legal rights in the premises.

The investigating officer will submit his report to the authority appointing him, inclosing papers, documents, and the signed statements of witnesses referred to above, in the form of an indorsement on the letter of transmittal submitted with the charges by the preferring officer. The report will include a reference to any known document or other matter of evidence not inclosed but which may become important or necessary in the case. It will also include a statement of all explanatory or extenuating circumstances which shall have come to the attention of the investigating officer, a statement as to whether he believes the charges can be sustained, and a specific recommendation as to the disposition thereof. An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout such investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial. When the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains is the officer preferring the charges, he will cause them to be investigated by some officer other than himself before reaching a decision as to their disposition, except where he decides to refer them for trial to a summary court. When the officer preferring the chages is the only officer with the command, and is of the opinion that the case is one for a special or general court-martial, he will himself investigate the charges and make the report thereof as just described.

From this investigation the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains will decide what disposition is to be made of the charges against him. Unless such officer is the accuser or prosecutor of the person to be tried, he should not ordinarily forward charges to superior authority, except in cases where he desires to recommend trial by a court-martial not within his competency to appoint; all other cases he should dispose of without reference to higher authority. Action forwarding charges to superior authority will be in the form of an indorsement on the letter of transmittal submitted by the officer preferring the charges, following the report of investigation. The letter of transmittal, together with all indorsements thereon, will be referred with the charges to the trial judge advocate for his information in preparing the case for trial, but neither this document nor any part thereof will be shown to the court or any member thereof. In case of trial by general court-martial the letter of transmittal with all indorsements thereon will be forwarded to the Judge Advocate General with the record of trial.

Each commanding officer superior to the one immediately exercising summary court-martial jurisdiction over the accused into whose hands charges may officially come will either refer them to a court-martial within his jurisdiction for trial, forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise dispose of them as circumstances may appear to require. (M. C. M., par. 76.) (C. M. C. M. No. 5, July 14, 1919.)

(250.4. A. G. O.)

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

Senator CHAMBERLAIN. Have these orders been published?

Lieut. Col. RIGBY. Yes; Senator.

Senator CHAMBERLAIN. In what official document may they be found?

Lieut. Col. RIGBY. The general order can be found in the general orders that are promulgated and published.

The CHAIRMAN. Will you have a dozen copies sent up here? I suppose they are regularly numbered?

Lieut. Col. RIGBY. Yes.

Senator WARREN. Please send them up here at your convenience.

Lieut. Col. RIGBY. With pleasure. The changes will, of course, appear in the next publication of the Manual. Meantime they are sent out in circular form.

As to the matter we were speaking of a moment ago, Senator——

Senator WARREN. In view of the fact that some of our newspaper friends have come in, let me say this: I understood you in the commencement of your testimony to state that your position had been and is now, in the Judge Advocate General's Office, that of the legislative committee, so that such matters as this which you have just presented would either originate with you or would be submitted to you.

Lieut. Col. RIGBY. Matters of expected congressional legislation, matters to be submitted to Congress, go through our section. These matters of the drafting of proposed amendments to the Manual and things of that sort would not necessarily go to our section. I was simply detailed to do that work last March, I suppose because of the fact that I had prepared a study of the foreign statutes and was somewhat familiar with them.

Senator CHAMBERLAIN. In that connection, Gen. Ansell was sent over to Europe for this purpose at one time, was he not?

Lieut. Col. RIGBY. Yes; Gen. Ansell went over in 1918. My understanding was that Gen. Ansell's investigation was in a way broader and in another way narrower than mine. He was not limited to an investigation of the court-martial system entirely. He was examining other things. On the other hand, he was rather examining those court-martial systems, as I understood it, more from the standpoint of getting the laws and regulations in force, and not attempting to find out, as I was specifically directed to do, so much how the systems worked in practice.

Senator CHAMBERLAIN. Was not that a part of his duty, to do just what you have done?

Lieut. Col. RIGBY. Of course I only know by hearsay and inference. I do not quite gather that from the form of his report.

Senator CHAMBERLAIN. You say he was not limited, but was he not limited by the assistance given him? He had no assistants, had he?

Lieut. Col. RIGBY. Of course I do not know anything about that, Senator. I only know about Gen. Ansell's mission from his report, and not in a definite way.

Senator CHAMBERLAIN. What assistants did they furnish you in the way of interpreters, clerks, and stenographers?

Lieut. Col. RIGBY. I was assigned one major, Maj. Wells, to assist me, who as I testified yesterday, did the work chiefly in Belgium, and also was with me in other interviews; and I was also furnished the assistance of one second lieutenant who was a lawyer——

Senator CHAMBERLAIN. Who was he?

Lieut. Col. RIGBY. Second Lieut. Frank Feuille; and Regimental Sergeant Major Leroy Vander Burgh, who was a New York lawyer, of the Judge Advocate General's Department. He was a very capable young man. Then I had the assistance of Lieut. Ely M. Behar, who was a French interpreter, and of Second Lieut. Henry Bosson, who was translating the Scandinavian languages, and then a major of The Adjutant General's Department was assigned as executive officer, or office manager.

Senator CHAMBERLAIN. Who was that?

Lieut. Col. RIGBY. Maj. John W. Llufrio; and I succeeded in borrowing from the peace commission for a time the services of a French court stenographer whom they were using, and he went with me to some of these interviews with the French officials, and attended French courts martial. He proved himself a very capable man also. Capt. Pierce of the interpreters' bureau of the peace commission was also good enough to go with me several times to help out in interpreting; as was also Capt. McFadden, assistant military attaché in Paris. And I had a stenographer who was a sergeant major in the Judge Advocate General's Department, Sergeant Major Henry J. Çelse. Then I was given the services of other stenographers and field clerks and some civilian translators who were just assigned to me by the officers over there in Paris from time to time as I needed them; or I think I got two field clerks from Chaumont; and three or four from Tours just before I came home, to help in arranging my material. I was really handicapped. I had hoped I might get some money with which to work, but I did not succeed in getting a penny, so I was really put to it to borrow assistants as I could. I was allowed my actual expenses for subsistence, not to exceed $5 a day, and my actual traveling expenses, which I understand is the same that Gen. Ansell was allowed.

Senator CHAMBERLAIN. All of these men whom you have named, practically, received their salaries as officers and men of the Army?

Lieut. Col. RIGBY. Certainly; but there was no special allowance made for any of them at all. They were loaned to me. That was rather easier right then than it might have been otherwise, because different organizations were just waiting for their turns to go home.

Senator CHAMBERLAIN. May I ask you when you come to revise your testimony to give the personnel, the names and official positions, of all those who assisted you?

Lieut. Col. RIGBY. I will be very glad to do so if I have not done it completely. I have the names.

Senator CHAMBERLAIN. You may want to correct them when you look over your testimony.

Lieut. Col. RIGBY. I will be glad to check the names.

Senator CHAMBERLAIN. You had an ample force to accomplish the purposes of your mission?

Lieut. Col. RIGBY. Oh, yes; in a way, Senator; but not to do all that I wanted to do.

Senator CHAMBERLAIN. When did you go over?

Lieut. Col. RIGBY. I sailed on April 7, and arrived in Paris on April 16.

Senator CHAMBERLAIN. And when did you finish your work over there?

Lieut. Col. RIGBY. I really did not finish the work. I should have had two or three weeks more, but I was directed to return so as to be home by the 31st of July, and I dropped the work in time to do that, or to get here within two or three days later. Unfortunately I was held, not being able to get a boat for a few days.

Senator CHAMBERLAIN. That was all in this year?

Lieut. Col. RIGBY. That was all in this year, yes. I was in France from April 16, the date I arrived—I arrived in Brest on April 15—until July 30, the date when I sailed from Brest.

Senator WARREN. I do not want to go too far afield, but I wish to ask you, have you had occasion, either before you went over there or since you returned, to look into court-martial matters in other armies and other countries than France and England; that is, in Italy and perhaps in Germany? We are not supposed to know anything about that.

Lieut. Col. RIGBY. I confess I do not know much of the German system. I did succeed, pretty nearly the last thing I did before I left, in getting quite a lot of the German material, copies of their codes and quite a lot of material which I did not have time to examine before I left, because I was immediately coming home; and I have not had time to examine it yet. I have it, but have not had time to examine it.

Senator WARREN. I do not care to lead you into any detailed statement, but I did not know but you might have some general statement to make as a comparison between the system of our country and that of some other country, or by way of comparison between England and France and the other countries.

Lieut. Col. RIGBY. As to some of those countries I have, and with your permission I will simply refer to that as I go along in connection with what I say on the different points about the countries I have more specially investigated.

Now I find that I am at liberty to offer here and will be glad to offer these statistics of the French courts-martial during the war, which were given to me, and which, as I say, do not show the severity of the sentences or the number of death sentences, but do cover the number of cases tried of different kinds.

Senator WARREN. Is that simply a statement of the cases tried by the French?

Lieut. Col. RIGBY. That presents a statement of all the cases tried, the number of charges brought, the number of charges not sent to trial, the number of acquittals, all that sort of thing, quite in detail; but without a statement of the quantum of the sentences.

Senator CHAMBERLAIN. By whom was that furnished to you?

Lieut. Col. RIGBY. By the under secretary of state for military justice in France, M. Edouard Ignace.

Senator CHAMBERLAIN. Does it give the number of appeals and the disposition of the cases on appeal?

Lieut. Col. RIGBY. No, Senator, it does not; and it was impossible to get definite statistics on that. I will say that this is an English translation of the original French which was handed to me. I tried to get statistics on appeals, and I got estimates. I could not get definite statistics. The estimates that were given to me were that around 25 per cent, between 25 and 30 per cent, of the cases are appealed.

Senator WARREN. Are those figures given in this document?

Lieut. Col. RIGBY. No; I was simply verbally told that.

(The document referred to is as follows:)

	Complaint not entertained.		Quashed ("nonlieu").		Ordered for trial.		Acquittals.	
	Military code.	Ordinary law.	Military code.	Ordinary law.	Military code.	Ordinary law.	Military code.	Ordinary law.
1914.								
Armies	461	138	606	221	4,255	1,861	1,104	444
Interior	962	116	2,128	692	3,109	1,347	588	250
Morocco	25	8	16	3	276	101	50	16
Total	1,448	262	2,750	916	7,640	3,309	1,742	710
1915.								
Armies	1,021	347	1,635	584	15,419	6,733	2,871	1,260
Interior	2,442	378	4,529	2,013	15,711	5,907	2,503	922
Morocco	159	22	139	70	1,161	447	92	55
Total	3,622	747	6,303	2,667	32,291	13,087	5,466	2,237
1916.								
Armies	1,893	584	2,009	560	24,154	4,723	2,122	659
Interior	2,534	367	3,117	1,494	15,656	5,722	1,506	878
Morocco	88	32	98	67	1,053	306	43	23
Total	4,515	983	5,224	2,121	40,863	10,751	3,671	1,560
1917.								
Armies	2,408	459	2,594	754	35,767	3,223	1,830	603
Interior	2,389	539	2,320	1,665	16,409	7,020	1,073	1,037
Morocco	77	27	148	119	1,898	407	105	45
Total	4,874	1,025	5,062	2,538	54,074	10,650	3,008	1,685
1918.								
Armies	1,898	414	2,158	851	23,763	4,444	1,473	695
Interior	1,554	472	1,585	1,441	14,326	7,111	1,048	1,208
Morocco	64	38	63	64	1,030	286	23	26
Total	3,516	924	3,806	2,356	39,119	11,841	2,544	1,929
Grand total	17,975	3,941	23,145	10,598	173,987	49,638	16,431	8,121

	Insubordination.	Desertion (soldiers)	Desertion (officers).	Abandonment of post	Assault on superiors.	Outrages.	Revolt, mutiny	Military theft	Offenses against military administration	Condemned by civil law.	Seditious utterances, discouraging propaganda.	Treason, espionage.	Recapitulation
1914.													
Armies	4	509	1	1,365	63	499	29	262	..	1,406	7	65	4,213
Interior	561	633	18	225	57	473	49	318	2	1,187	66	10	3,599
Morocco	3	17	..	27	12	84	10	42	1	101	2	6	305
	568	1,159	19	1,617	132	1,056	88	622	3	2,694	75	84	8,117
1915.													
Armies	18	2,433	2	4,269	437	3,740	201	783	8	5,620	40	59	17,610
Interior	1,343	6,330	2	1,131	261	2,050	163	1,247	14	4,926	144	31	17,642
Morocco	5	84	..	147	47	457	20	140	3	395	1	4	1,303
	1,366	8,847	4	5,547	745	6,247	384	2,170	25	10,941	185	94	35,555
1916.													
Armies	12	8,924	11	5,337	731	6,054	196	790	10	4,190	30	39	25,374
Interior	1,523	7,403	49	536	333	1,759	153	1,238	33	4,731	45	40	17,846
Morocco	2	94	..	136	36	411	5	132	5	273	10	2	1,104
	1,537	16,421	60	6,009	1,100	7,224	354	2,160	48	9,194	85	131	44,324
1917.													
Armies	5	21,174	13	4,650	935	4,844	535	1,010	24	3,572	94	201	37,057
Interior	692	9,052	1	534	505	1,478	296	1,297	25	6,226	77	37	20,510
Morocco	2	419	.	189	56	008	7	156	.	380	1	.	1,718
	699	30,645	14	5,373	1,496	6,330	828	2,463	49	10,178	172	238	59,285
1918.[1]													
Armies	15	13,092	13	2,617	304	2,348	303	1,231	21	3,609	27	47	24,328
Interior	339	7,684	...	588	320	1,358	242	1,499	42	5,932	36	69	18,399
Morocco	14	392	....	82	41	271	17	127	2	240	....	...	1,186
	368	21,108	13	3,287	1,121	4,707	462	2,857	65	9,781	63	116	43,843
General total	4,539	78,180	110	21,833	4,494	26,364	2,116	10,272	190	42,788	580	663	192,128
								53,250					

[1] Complete statistics of courts-martial for 1918 have not yet come to hand.

Senator CHAMBERLAIN. That covers the French courts-martial during the whole period of the war?

Lieut. Col. RIGBY. Yes. As I say, I was informed that from 25 to 30 per cent of the cases were appealed, but that less than 10 per cent of those appealed were reversed, or sent back for new trial. In the armies on active service, the appeals were practically limited to death cases.

Senator WARREN. Was it only 10 per cent of the number appealed, or was it 10 per cent of the whole number of cases that were reversed or sent back?

Lieut. Col. RIGBY. Only 10 per cent of the cases appealed, which would be about 2½ per cent of the whole number of cases tried.

Senator WARREN. That is what I wanted. I wanted to establish the fact, whatever it might be.

Lieut. Col. RIGBY. That was the situation. That, of course, relates only to the regular courts. In the cases in the "special courts," there was no appeal at all, and until 1917 there was no provision for

stay of execution. In 1917 there was a direction from the President to stay executions in cases where death was adjudged by the "special courts" until they could be submitted to the President for examination.

I just want to add to what I said the last thing yesterday, in answer to a question of Senator Warren, I believe, about those cases of the men who were restored to duty from the disciplinary barracks.

Senator CHAMBERLAIN. At Leavenworth?

Lieut. Col. RIGBY. Referring to the cases cited in Senator Chamberlain's speech, I want to add that our records show really two cases, either one of which might, as it left the court-martial, have been the case mentioned of the 17-year-old boy sentenced to 10 years for sleeping on post. One is the Urben case, 114717, and the other is either the Sabbri case or the Walworth case. I seem to have those two names—Sabbri and Walworth—confused in my mind, somehow. It is one or the other of them. I had assumed, however, and do assume, that the Senator was not referring to the Urben case, because in that case the reviewing authority cut down the sentence to a guardhouse sentence of six months. The other case to which I was referring yesterday, where the man was restored after nine months in the disciplinary barracks, is, as I say, either the Walworth or the Sabbri case.

Senator WARREN. I had no idea of singling out any persons, but I wanted to know the general plan. I had supposed all these years—not since the question has come up before us, but all the years before—that the disciplinary barracks were on a different plan than county jails or State penitentiaries. I assumed that the men were sent to the disciplinary barracks with the intention of getting them out and getting them into the service as fast as possible, provided they were worthy; and if not, to get them out of the Army.

Lieut. Col. RIGBY. That is my understanding also, Senator; and my memory is that in pursuance of that policy 1,182 men were restored in that way to the colors from the Fort Leavenworth barracks alone during the year 1918.

Senator WARREN. I only wanted to know whether that is the plan or not. It ought to be, and I wanted to know whether it really is. How many men do you say were restored to the colors?

Lieut. Col. RIGBY. One thousand one hundred and eighty-two; is my memory; but that is only memory and may be wrong.

Senator WARREN. Within the one year?

Lieut. Col. RIGBY. Within the one year, from the one barracks.

Senator WARREN. How many were committed there?

Lieut. Col. RIGBY. I would have to look up those figures.

Senator WARREN. Can you approximate the proportion?

Lieut. Col. RIGBY. It would not be safe for me to try. I do not know how many were restored from Fort Jay, or how many were restored from Alcatraz. I could easily get and put into the record those figures for you, however, covering the committals to the three institutions and the restorations from the three.

Senator WARREN. We ought to have these figures, because that is the point we ought to get above all others, so as to see what is done; and if there is to be a change made, this Congress ought to be in a position to propose the change.

Lieut. Col. RIGBY. If that may be added to my statement I will have it inserted.

Senator WARREN. Certainly.

Lieut. Col. RIGBY. The figures, as given to me by Lieut. Col. Dinsmore, the Chief of the Statistical Division of the Judge Advocate General's Office, are as follows: For the period April 1, 1917, to July 31, 1919, the committals to all the disciplinary barracks amounted to 11,492; and the total restorations to the colors from the same barracks were 2,528. On April 1, 1917, there were 2,100 persons in confinement in the various disciplinary barracks. On August 30, 1919, the number so in confinement in those barracks was 3,728; which is only 1,628 more than before we entered the war.

Senator CHAMBERLAIN. Taking the Sabbri case to which you have referred—and I really do not remember to what case I referred in my speech—it would seem from the fact that he was committed for a long term, and practically restored to the colors or given an opportunity to be restored to the colors within nine months, that there is much force in the suggestion of Gen. O'Ryan and others that the original sentences were in the nature of sentences *in terrorem*.

Lieut. Col. RIGBY. I might say to you, Senator, that that is quite in line with what was told me soon after I entered the service. I suppose I had the same experience that every other lawyer coming from civil life into the Judge Advocate General's office had, when I was set to examining records and found some of these startlingly long sentences. Of course, while I was first in the "retained in service" section this did not come before me, but immediately when I was transferred to the disciplinary barracks section I noticed them, and I went to the chief of my section and asked about it, and he said to me, "You must remember that these do not really necessarily mean what they say, because these are disciplinary barracks cases and these men have a chance to be restored to the colors; and then beside that, this is during the war, and they have to maintain discipline in the Army, and undoubtedly after the war is over there will be some kind of a review of the cases, something of that kind." Of course I am not quoting the exact language, or trying to do so, but that was the impression on my mind.

Senator CHAMBERLAIN. As a matter of fact, Colonel, when you first went into the service you approved of some system of review or appeal, with power to modify or reverse, did you not?

Lieut. Col. RIGBY. Yes; and I still do.

Senator CHAMBERLAIN. Do you still have that view?

Lieut. Col. RIGBY. Yes; very strongly.

Senator CHAMBERLAIN. I am glad to know that. You find it very generally amongst the lawyers who have come into the service from civil life, do you not?

Lieut. Col. RIGBY. I think so; and not only among them, but among the Regular officers also. I do not think I know of anyone who has seriously considered the question who does not think there should be some such power.

Senator CHAMBERLAIN. As you construed section 1199 of the Revised Statutes, when you first went into the service you thought they had a greater power than was being exercised by the Judge Advocate General, did you not?

Lieut. Col. RIGBY. No, sir; I never did. Of course, it is fair to say, Senator, that I was not in the office in 1917. I came into the service in August, 1918, and my attention was never really called to this until some time along last Christmas.

Senator CHAMBERLAIN. You came in as a captain?

Lieut. Col. RIGBY. I came in as a major.

Senator CHAMBERLAIN. And you were promoted when?

Lieut. Col. RIGBY. Promoted to a lieutenant colonelcy last April. I forget the exact date. The promotion came to me by cablegram while I was over on the other side.

Senator CHAMBERLAIN. I believe there are two bar association committee reports, a majority report and a minority report.

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Both those reports, as well as the Kernan report, recommend some kind of appellate tribunal, do they not?

Lieut. Col. RIGBY. I so understand.

Senator CHAMBERLAIN. The difference between the so-called militaristic view, if I may so designate it, and the civilian view of it is that on the one hand it is insisted that this whole business ought to be done within the military tribunal itself and the others contend for some sort of a civil appellate tribunal.

Lieut. Col. RIGBY. Of course, Senator, I would not like to subscribe to your use of the word "militaristic," because I do not think those who favor the plan recommended, for instance, by Gen. Crowder, are necessarily any more "militaristic" than the others.

Senator CHAMBERLAIN. Of course, that is only a question of opinion.

Lieut. Col. RIGBY. I am frank to say to you, sir, that my own opinion has been, and is, in favor of the ultimate appellate power being vested in the President as Commander in Chief of the Army. It seems to me that is the logical place to put it; and also that that is in accord with the practice in the British system, which is the nearest akin to ours.

Senator CHAMBERLAIN. In theory there is no objection to that, but in practice it is a physical impossibility for the President to review these cases.

Lieut. Col. RIGBY. In practice, Senator, as I understand it, that would mean always the same kind of review that we now have; that is, it would be done on the advice of the Judge Advocate General.

Senator CHAMBERLAIN. Surely.

Lieut. Col. RIGBY. As it is in Great Britain; and that, it seems to me, is the right way to do it. In other words, I think the review should be a careful legal review, and the President advised in that way, leaving the President in the last analysis free to act on his own judgment.

Senator CHAMBERLAIN. Still, the great difference between the British system as you have narrated it and our system is that in Great Britain the judge advocate general is completely dissociated from the military establishment. He is a civilian, while here your tribunal would still be within the military régime.

Lieut. Col. RIGBY. Well———

Senator CHAMBERLAIN. Within the military establishment?

Lieut. Col. RIGBY. That is in a sense true, Senator; but not quite in the way you put it. It is also true, of course, that while the

British judge advocate general is a civilian, he reports through a military officer, namely, the deputy adjutant general, who reviews his work; so that it is much on the same plan as ours.

Senator CHAMBERLAIN. But you have stated that in nearly if not all the cases the opinion of the judge advocate general is followed both by the deputy adjutant general and by the attorney general.

Lieut. Col. RIGBY. In nearly all cases; I think about the same as with us. There is no great difference that I can see, one way or the other, between the British plan and our plan in that regard.

Senator CHAMBERLAIN. Colonel, let us be perfectly frank about it. The cases that stand out in this hearing, so far are those of the four young men who were sentenced to be shot in France. The record that Gen. Crowder has made is one of presenting a solid military front in the disposition of those cases. He has so stated in his letter to the Chief of Staff. A man ought not to be influenced by that consideration. It ought to be a consideration first, of doing justice to the young men, rather than the presenting of a solid military front with reference to the disposition of the cases.

Lieut. Col. RIGBY. Senator, I can only say that I can not read that letter of April 5, 1918, in that way. My reading of that letter is that the letter strongly pointed to clemency; and my reading of the Judge Advocate General's memorandum of April 16, in which he gathered up together the cases cited in Lieut. Col. Clark's memorandum of April 10, and the cases cited, together with the arguments in Gen. Ansell's memorandum of April 15, which were all put together and sent to the Chief of Staff, is that it, to my mind, constitutes a very strong presentation of the reasons for clemency, and points very strongly to clemency. It is very true that he very carefully said that he did not want to formally reopen the case. He was very careful not to invite conflict with the Chief of Staff if he could avoid it; but to my mind that memorandum of April 16 was a very effective argument for clemency; and I can not help thinking it had a great deal to do with the clemency ultimately given in those cases.

Senator CHAMBERLAIN. That is a difference in the construction of what took place.

Lieut. Col. RIGBY. Wholly and entirely so.

Senator CHAMBERLAIN. I take a different view of it; and it seems to me now, in the light of the history of those cases, that a firm recommendation for clemency on the part of Gen. Crowder would have brought about the results you seem to think he wanted.

Lieut. Col. RIGBY. Of course, that is only an opinion on the construction of the papers.

Senator CHAMBERLAIN. Yes; that is all. The language speaks for itself. But however that may be, that is the great difference between the British system and the American system. The appellate tribunal there is civilian, and it does not interfere with the military discipline of the Army, because it goes through military channels in the last analysis.

Lieut. Col. RIGBY. I think it is true that the only substantial difference between their plan and ours is that their judge advocate general is a civilian, whereas ours is a military officer. The functioning of the two systems seems to be almost the same.

Senator CHAMBERLAIN. On the other hand, the judge advocates in Great Britain are appointed, are they not, by the judge advocate general?

Lieut. Col. RIGBY. No, sir; they are appointed by the commanding officer, the convening authority, except within the United Kingdom, where they are appointed always, I think, by or on the recommendation of the judge advocate general.

Senator CHAMBERLAIN. Certainly; and his recommendations usually "go"?

Lieut. Col. RIGBY. I think so; but, in practice, he asks the commanding general, the convening authority, to nominate a fit person for the appointment.

Senator CHAMBERLAIN. Then there is this further difference: The judge advocates over there, while not members of the court, sit by and advise the court with reference to the admissibility of testimony and the proceedings to be had. They do not appear in the rôle of prosecutors, do they?

Lieut. Col. RIGBY. That is, sir, the great difference in the organization of the court, and I am frank to say to you that is a thing wherein I think we might well copy their plan.

Senator CHAMBERLAIN. I am glad to know that.

Lieut. Col. RIGBY. And as I understand it, that was what Gen. Crowder had in mind in his recommendation in his letter of March 10 to the Secretary of War, where he thought a general order should be issued to try out that plan and see how well it will fit here in our Army.

Senator CHAMBERLAIN. I am glad you entertain that view, because it does not stand to reason that under our system a man acting as judge advocate and acting as prosecutor can see to it that justice is done to the prisoner.

Lieut. Col. RIGBY. I very thoroughly agree with you, Senator. It seems to me the only question there is a practical question, the working out of the plan in a way most adaptable to our Army, and without overloading the personnel of our Army with lawyers.

Senator CHAMBERLAIN. It does seem to me, Colonel, that there can be no more effective system for the maintenance of discipline in the Army than to see that justice is done, both to the enlisted personnel and to the commissioned personnel. Any system that leaves in the mind of the military forces a feeling of injustice, or the possibility of injustice, will do more to destroy morale than anything else.

Lieut. Col. RIGBY. I thoroughly agree with you, Senator, in that, of course. What I had in mind was simply this, the practical way of doing it. Now, the British during the war worked out this plan for their "court-martial officers," and found that they could get along with just about two to each division, provided that one acted as staff judge advocate and the other as this additional member of the field courts, without being required to be present at all the trials. Now, they say that worked pretty well. On the other hand, Judge Cassel is inclined to think that for the permanent purposes of their army there ought to be a judge advocate who is the legal adviser of the court, and not a member of the court, but only to be present at the trials of serious, difficult, and complicated cases, outside of their rarely used general court. They are going to experiment with that,

Senator. Now, of course, if in the reorganization of our Army, it is to be gathered into rather large aggregations—to use a word purposely not technical—it may be easier for one legal officer to cover a good deal of work. On the other hand, if the Army were to be scattered as it was before the war, it would be another proposition and another problem, and for that reason it seems to me, personally, that it would be wiser to try it out in the first place with a general order, as Gen. Crowder suggested, which is flexible and can be changed from time to time so as, with experience, to finally whip it into such form as may ultimately seem best; and then, as he suggests, when it has been tried out and we find what is the most practical way to apply it in our Army, then embody it in legislation.

Senator CHAMBERLAIN. The danger about that is that the Judge Advocate General's position is not a permanent one, and neither is that of the Chief of Staff, so that the regulations are likely to be changed according to the whim of the man who happened to fill those two places at the time. That can not be done under a statute, but recommendations for a change or modification of a statute might be made, but it would still be up to Congress to make it.

Lieut. Col. RIGBY. That is true, Senator. Only I can not quite see the danger of the thing being changed simply as a matter of whim.

Senator CHAMBERLAIN. I have been connected with this machine for 10 years, and I find that these whims are quite common on the part of the different heads of the different bureaus.

Proceed. I did not mean to interrupt you so much.

Lieut. Col. RIGBY. I would like to offer in evidence and put in a translation of this French presidential decree of September 6, 1914, to which I referred yesterday, establishing their "special courts," and of the preamble to the letter of Marshal Joffre of September 9, 1914, promulgating that decree.

Senator CHAMBERLAIN. We want to have it in, do we not?

Senator WARREN. Certainly.

(The documents referred to are here printed, as follows:)

TRANSLATION OF PRESIDENTIAL DECREE OF SEPT. 6, 1914, ESTABLISHING "SPECIAL COURTS MARTIAL" FOR THE PERIOD OF THE WAR (PP. 71-72, "GUIDE PRATIQUE ET SOMMAIRE DES CONSEILS DE GUERRE AUX ARMÉES").

Decree concerning the functioning of courts-martial in the armies in active service ("Conseils de Guerre aux Armées").

The President of the French Republic upon the report of the Minister of War in view of the Code of Military Justice for the Territorial Armies and in view of Article 3 of the law of February 25, 1875, concerning the organization of public powers,

DECREES.

ARTICLE 1. Provisionally and during the continuance of the war, courts-martial in the armies on active service are empowered to function in accordance with the conditions hereinafter indicated under the form of "Special Courts Martial" to try military persons and those assimilated to that status taken in the act of committing an offense and also any person following or employed in whatever capacity with the army, or permitted to accompany it, and also prisoners of war. Their accomplices are also equally subject to trial before the special courts-martial.

ARTICLE 2. Special courts-martial will be organized upon the order of the general-in-chief commanding the armies, at headquarters of an army, a corps, a division, a brigade, a regiment, or other unit of not less than a battalion.

ARTICLE 3. They will be composed of three judges appointed by the commandant of the army, corps, division, brigade, regiment, or other unit where

they are established. The president should be, if possible, a general officer or field officer. The two other judges will be, when the accused is an officer, of rank at least that of the accused: in case of a lack of sufficient number of officers of that grade, one of the two judges may be of the next lower rank. If the accused is a noncommissioned officer, corporal, or soldier, one of the judges will be a noncommissioned officer. The commanding officer will appoint an officer to act as commissaire du gouvernement, and a noncommissioned officer as clerk.

ARTICLE 4. The special courts-martial will take cognizance of "crimes" (i. e. not including misdemeanors) punishable under the Code of Military Justice, and also "crimes" punishable under articles 295 to 304, 309 and 310, 331 to 333, 434 and 435 of the Penal Code.

ARTICLE 5. The procedure before the special courts-martial will be that indicated in articles 152 to 158 of the Code of Military Justice; except that no delay will be imposed between the citation of the accused and the meeting of the court. The judgment will be pronounced by a majority of two votes against one.

ARTICLE 6. The judgments of the special courts-martial will not be subject to recourse to revision nor to cassation (i. e. no appeal is to be allowed to the "Conseil de Revision" nor to the Court of Cassation).

ARTICLE 7. The Minister of War is charged with the execution of this decree.

Done in Bordeaux, September 6, 1914.

R. POINCARÉ.

For the President of the Republic.
The Minister of War,

A. MILLERAND.

TRANSLATION OF PREAMBLE OF CIRCULAR LETTER OF MARSHAL JOFFRE, NO. 4487, SEPTEMBER 9, 1914, PROMULGATING THE PRESIDENTIAL DECREE OF SEPTEMBER 6, 1914, ESTABLISHING "SPECIAL COURTS-MARTIAL."

Subject: Instructions for the application of the decree of September 6, 1914, relative to special courts-martial.

The generals commanding the armies have several times called to my attention, in most pressing terms, the extreme difficulty of reconciling the forms and delays prescribed by the Code of Military Justice with the imperious necessities of discipline and of the maintenance of public order.

Acting upon their advice, I asked the Government to introduce into the procedure of courts-martial ("conseils de guerre") in the armies on active service the necessary simplification by giving those tribunals a simpler composition and a more rapid procedure and providing for the possibility of their establishment in every organization or unit where it may appear to be necessary.

A decree of September 6, 1914, adopting this point of view, now authorizes the organization, provisionally and during the war, of special courts-martial in the armies on active service; the jurisdiction, organization, composition, and procedure of which will accord with the views above set forth.

I have the honor to send you with the text of the decree the following instructions for its application.

(Here follow instructions, divided into four paragraphs, under the following headings, viz: Organization of special courts-martial; Composition of special courts-martial; Jurisdiction of special courts-martial; Procedure.)

J. JOFFRE.

Senator CHAMBERLAIN. That decree was subsequently repealed by the French Parliament?

Lieut. Col. RIGBY. Those courts were abolished in 1918.

Senator WARREN. Those were war measures?

Lieut Col. RIGBY. Emergency measures, so denominated. It simply shows that an emergency court was created during the war, or the early part of the war. The reasons for its creation are stated in the letter of Marshal Joffre.

Just a word more on the question of appeal in our Army. I think Senator Chamberlain asked me yesterday whether we have any ap-

peal. In that sense we have none. But I think it is fair to say that I think the review that we do have in the office of the Judge Advocate General is really at least as careful an examination as is made by most appellate courts; and that is true, not only of the death cases and dismissal of officers' cases, but of all other cases. The same review precisely, I think, is had, at least was had while I was in the penitentiary section, of all penitentiary cases. A penitentiary case has to go through the hands of, and the review has to be approved by, at least six men besides the Judge Advocate General.

Senator CHAMBERLAIN. When was that reviewing board established?

Lieut. Col. RIGBY. The second board referred to was established in November, 1918, I think; but before that those cases went to the first board of review, so there was no difference in practice. It simply was dividing the board of review, because they were getting behind with their work. The practice was not changed at that time at all.

Senator CHAMBERLAIN. In theory that was a review without power to afford remedy, without power to reverse, without power to modify; without any other power, where the court had jurisdiction and the proceedings were regular, than the power to advise the commanding officer.

Lieut. Col. RIGBY. Of course, that is like the British system. Under General Order No. 7, which became effective February 1, 1918, before the approval becomes final—and, therefore, while it is possible to set aside the whole proceedings and disapprove them, if there is error in the record—in around 98 per cent of the cases at least, where the judge advocate general advises disapproval or modification, his advice is followed; so that, while not formally executive in its form, the judge advocate general's recommendation practically is so.

Senator CHAMBERLAIN. Can you give the number of cases which were actually reviewed by the board, and the number of cases where the judge advocate general advised a modification of the sentence to the commanding general, and the number of cases where that advice was acted upon favorably?

Lieut. Col. RIGBY. I could get and insert the number of those, I think. I can not tell you from memory the number reviewed. I can state substantially the number where reversals were recommended, as I remember it, up to the 1st of October of last year. During the year prior to that, there were about 276 sent back to the commanding officers, and roughly 250 sent up to the Secretary of War, or possibly I have them just turned around, vice versa.

Senator WARREN. You will get those figures?

Lieut. Col. RIGBY. Yes, and put them in. Out of all of them there were only 13 where we were not followed, 6, I think, by the Secretary of War, and 7 by the commanding officers, or maybe that is vice versa.

Senator CHAMBERLAIN. I would like to have in the record the total number of sentences and the total number of reviews, the total number of cases where you had made recommendations to the commanding officer——

Lieut. Col. RIGBY. That is other than he approved, you mean, Senator?

Senator CHAMBERLAIN. Yes. That would include the total number of approvals, the total number of those sent back to the commanding officer and the total number of cases where the commanding officer followed your advice. Can not that be put in the record?

Lieut. Col. RIGBY. I think we can put that in the record, yes, sir.

I can put in a table giving the figures from October 1, 1917, to August 31, 1919, prepared by Col. Dinsmore.

I may say that during the first six months of the war no accurate records were kept covering these matters, so that it is impossible to give statistics for that early period of the war without having an examination made of all the original records for that six months in our office and the corresponding records in The Adjutant General's office. The table is as follows:

	Number of cases examined in Judge Advocate General's Office during period covered (Oct. 1, 1917, to Aug. 31, 1919).	Number of cases in which recommendations for modification or disapproval of sentence on legal grounds were made.	Recommendations given effect.	Per cent of total number of cases in which recommendations were made.	Recommendations not given effect.	Per cent of total number of cases in which recommendations were made.	Per cent of total number of cases examined.
To reviewing authority...	28,463	275	271	98.54	4	1.46	0.00014
To War Department.....		182	176	96.70	6	3.30	.00021

Then, continuing a little further with my comparison of the composition of the court, which was what I started out to make, I think I have told how the judges of the French court are constituted. There is attached to the court an officer corresponding somewhat roughly to our trial judge advocate. They call him the "commissiare du gouvernement."

Senator WARREN. You are going back to about where you were yesterday?

Lieut. Col. RIGBY. Yes. In the territorial courts, that is, the courts in use in the armies not in active service, the commissaire receives from the reporter or rapporteur the report of the preliminary investigation. He advises the commanding general whether the case should be referred for trial. If it is referred for trial he acts as the prosecutor before the court and also as the legal adviser to the court. He is supposed to be the minister of justice—or to represent the minister of justice—before the court. The commissaire du gouvernement is an officer in the army, and the only requirement is that he be an officer of field rank and be at least 25 years of age.

Senator WARREN. Their field rank is relatively about the same as ours?

Lieut. Col. RIGBY. The same as ours—colonel, lieutenant colonel, commandant, who is the same as major. There is no requirement that he be a lawyer. In practice he sometimes is, and he sometimes is not, a lawyer. As it happened last May when I had occasion to look it up in Paris—six courts were running in Paris, with six commissaires du gouvernement, and exactly half those men were law-

yers and the other half were not men of legal training—three lawyers and three who were not lawyers. I was told an effort had been made during the war to get lawyers so far as possible for those positions. But it had not always been possible to do it. Before the war it was almost always a regular army officer who did the work. The position carries with it the same double responsibility as that of our judge advocate does; that is, he is both prosecutor and adviser to the court.

It might be well to say there, in connection with the method of trial, of course the French procedure is a great deal more rapid than ours. It can be so, because they have the preliminary investigation conducted, where there is one—and there always must be one in the territorial armies, although not always when in active service—by this officer, the rapporteur, who investigates the charges, questions the accused, and makes a report of the testimony of each witness; and the court at the trial sits rather in the position of an American equity judge or chancellor hearing a case on objections to a master's report, than like our court. In other words, their court does not sit primarily to listen to witnesses and get at the facts—that is supposed to have been done by the rapporteur—but sits primarily for the purpose of applying the law to the facts which the rapporteur has gathered up. Some witnesses may be called, but usually not nearly all of them; and they may go ahead without even a single witness in court. If the commissaire has called a witness or two witnesses and they are not there for any reason, the court may direct adjournment until they can come; or the president of the court may direct that their evidence as contained in the rapporteur's report be read; and they may even go so far, as I was told by two of the commissaires du gouvernement, whom I really cross-examined on that question, that they can try a man and even condemn him to death without even a single witness appearing in open court against him, by simply reading to the court the testimony that was taken by the rapporteur.

Senator CHAMBERLAIN. You would not advocate such a system?

Lieut. Col. RIGBY. I certainly would not, sir. I am simply giving you a comparative view, as I got it, of the French method of trial. Of course, their belief is that the men are wholly protected by their method of investigation by the rapporteur. They have the plan of what they call "confrontation of witnesses" in the course of that preliminary investigation. The accused is permitted to have counsel at the preliminary investigation.

Senator CHAMBERLAIN. Before the charge is preferred?

Lieut. Col. RIGBY. Before the charge is referred to the court for trial. When it is first preferred, the commanding general, if he thinks it is worth investigating, refers it to this rapporteur to investigate, and the rapporteur must give the accused an opportunity to have counsel present at the last hearing, and the first hearing. He may see him in between times, without the counsel. If he finds a witness who contradicts the statements of the accused, he must confront the accused with the witness, and they thresh it all out in that way; so that, as I said, the nearest analogy that we have, that I know of, is the hearing before a master in chancery, and then the trial in court on objections to the master's report—assuming that the chan

cellor had power to call witnesses if he chose to in his discretion—and you have pretty nearly a picture of the French trial.

In the Belgian Army they have a court composed of five judges. They call it the "conseil de guerre," the same term the French use. They have but the one court. That court is composed of one civilian, and four military officers.

Senator CHAMBERLAIN. What is the function of the civilian?

Lieut. Col. RIGBY. He is president of the court. He is appointed by the king for three years. He must be a doctor of laws. He must have had at least 10 years' experience as a judge of a civilian court, in order to be eligible.

Senator CHAMBERLAIN. He sits in the trial and participates in the sentence?

Lieut. Col. RIGBY. Yes, sir; he is president of the court, and he occupies a very important position. He is the permanent member of the court. The military members, four officers, are appointed by roster for periods of one month. At the end of every month there is a change, the theory being apparently that the military officers should be kept in close touch with the army itself. The permanent civilian judge sits there to get the legal element into the court. They do not have any noncommissioned officers nor any enlisted men on the court. They have four officers temporarily appointed, and the one president, a permanent civilian judge, who sits in his robe of office, in the way they do over there, formally; and there is a great deal of formality about the Belgian court. The one in Brussels sits in the Palace of Justice, in as fine a courtroom as perhaps there is anywhere, and there is a great deal of formality about it all.

Then, corresponding to our trial judge advocate, they have what they call the "auditeur militaire." He again has the double function of adviser to the court and of prosecutor.

Senator CHAMBERLAIN. Is he a civilian?

Lieut. Col. RIGBY. He is a civilian, and is appointed by the king for three years, and must be a lawyer. He occupies a really more powerful position than that of the French commissaire du gouvernement, because he is also the chairman of what they call the "judiciary commission" which makes the preliminary investigation. This preliminary investigation is always made by this judiciary commission composed of three men.

Senator CHAMBERLAIN. Does that court have to do only with commissioned officers?

Lieut. Col. RIGBY. The trial court, the conseil de guerre?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. It tries everything.

Senator CHAMBERLAIN. Of course their army is smaller and their territory is much smaller than ours.

Lieut. Col. RIGBY. Yes.

Now, I was just going to add that their preliminary examination is by the judiciary commission of three members, composed of this same civilian "auditeur militaire," with two officers of the army to assist him; and of course he is in an advantageous position if the case is referred to trial and he appears as prosecutor at the trial.

Summing those up and comparing them with what to my mind are the outstanding features of Senate bill 64:

In the first place as to the position of the judge advocate: Senate bill 64 provides that the judge advocate shall organize the court. He really is to appoint the court from the panel. I do not find any such power given to any corresponding officer, or to any legal officer, in either of the other systems that I mentioned; nor, I may say, in any other system of which I have knowledge. I have some knowledge of the Italian, the Swiss, the Netherlands, the Norwegian, and the Swedish systems, and there is no such power in any of those systems given to any legal officer or to any subordinate officer, by which I mean staff officer subordinate to the appointing authority.

Then, second, as to the provision of Senate bill 64, that the rulings of the judge advocate as to matters of law shall govern the court. There is no such power as that in the corresponding legal officer either in Great Britain, France, or Belgium, or in any that I know of.

Senator CHAMBERLAIN. In effect it is the same, though, according to your testimony of yesterday. The judge advocate of the court of Great Britain advises the court as to the law and eventually sums up the evidence, and if the court departs from his view of the law it does it at its peril, and only departs from it in cases of emergency.

Lieut. Col. RIGBY. At their peril is putting it a little more strongly than the wording of section 103 (F) of their rules of procedure warrants; but that is, in effect, not far from true. To my mind this is the vital difference; that, after all, the power of decision in all of those systems is left with the court.

Senator CHAMBERLAIN. Yes; that is true, Colonel, but here in the Federal court, where the judge has the power to comment both on the law and the evidence, if the jury does not follow his view the court can set aside the verdict.

Lieut. Col. RIGBY. To my mind the difference is largely that, to come to the civilian courts, between the Federal courts of which you speak, and the courts of some States, for instance, of Illinois, where by statute the jury in criminal cases are made the judges of the law as well as of the facts, and where the court in instructing them has to say to them, "Gentlemen, I have told you my view of the law, but you have the right, if you see fit, to disregard my view," and once in a while the jury will do that.

Senator CHAMBERLAIN. That is practically the way it is in the British court, and if the court disregards the instructions or the views of the judge advocate over there they are held in frequent cases in damages.

Lieut. Col. RIGBY. No; but, to put it accurately, as I remember, if a damage suit is brought, and they are able to show in defense that they acted in reliance on the advice of the judge advocate, that is a substantial defense. If they are not able to show that, then it is neither one thing nor the other; it is open for the plaintiff to prove his case if he can.

But that is, as I view it, the vital difference on that between Senate bill 64 and all of those other systems, for those systems all provide that the legal officer attached to the court is merely an adviser, however much the court may in practice be expected to follow his advice. The court have the power to judge for themselves—to accept or reject his advice—whereas Senate bill 64 makes them bound by his directions.

Then, third, Senate bill 64 provides that the judge advocate of the court, the trial judge advocate, shall have the power to approve in whole or in part the findings of the court; and that carries with it, I think necessarily, the correlative power to disapprove the findings of the court. In other words, the judge advocate is to become really the reviewing authority for the court; and is not to be limited to reviewing matters of law, but may review questions of fact, and may really substitute his opinion for that of the court, so that in effect the court become simply advisers to the judge advocate. Now, I do not find any such power given to any legal officer in any of the other systems which I have examined or of which I have any knowledge whatever.

Then, fourth, Senate bill 64 further provides that the court shall not impose sentence in any case where there is a judge advocate—that is, the special court or the general court—but that the sentence shall be imposed by the judge advocate. That, again, is not provided in any of the systems of those other armies, nor in any system of which I have any knowledge; and I may say that, so far as I gather views and opinions, that would seem to be opposed to the general current of opinion, even among those who believe that the question of the guilt or innocence of the accused is to be judged as a question of law, or even pure law, or by lawyers. Most men with whom I have talked—even those who hold those views—seem to think that even then the quantum of the sentence is the thing to be determined, if any part of it is to be determined at all, by the military men, because the quantum of the punishment is a matter directly affecting discipline and of which the military men—if they are to be allowed to judge of anything at all—are in the best position to judge. At any rate, there is nothing corresponding to that provision in any of the other systems. It seems to be an entirely new plan proposed in this bill.

Then, fifth, the power given by Senate bill 64 to the judge advocate, the trial judge advocate of the court, to suspend the sentence which he has imposed and to suspend it either in whole or in part, except, I think, in death sentences or in sentences of dismissal of an officer, is different from anything in any of the other systems or in any system of which I have kowledge. No such power is given to a legal officer or adviser of the court or to any staff officer or legal officer in any system with which I am familiar to thus suspend the sentence of the court.

As I look at it, Senate bill 64 would make the proposed judge advocate really an autocrat. The court become simply the advisers to him; and there is no authority above him that can in any way affect his decisions. There is no power of review in the commanding officer, or the commanding general, or in any other military authority, even in the President; and the power of review given, in the case of special courts, to the judge advocate—the staff judge advocate—and in the case of general courts to the military court of appeals is stated in articles 39 and 52 to be a review on questions of law only. If that be the case, and if article 52 is to be construed in that way, then the trial judge advocate becomes really the sole arbiter of questions of fact. He really tries the case, and becomes the officer responsible, so far as discipline is enforced through the courts, for the discipline of the command, and subject to no higher authority whatever. There

is some language used in article 52, in the latter part of it, providing for the court of military appeals' power [reading]:

To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

To disapprove the whole or any part of a sentence.

Some provisions here that, in practically carrying them out, would almost require the consideration of questions of errors of fact. But I am assuming that the intent of the proposed bill is to provide for a review of errors of law only; and that, if there is any question about that, the bill could be amended to make that clear.

To sum it all up, I do not find any officer in any foreign system given any such broad powers as are proposed for this trial judge advocate.

Senator WARREN. You give your opinion that this proposed system is better than or not as good as those of the countries with which you have compared it, do you?

Lieut. Col. RIGBY. Why, for whatever my opinion may be worth, as a result of my examination of this bill and of my investigations of the other systems, it seems to me that the proposed system is not nearly as good as those of the other armies or as our own.

It seems to me, to begin with, that it is wholly experimental, and is going very far in the way of experiment, and with a very important subject, in taking away the control of the courts-martial from the commanding officer and placing them absolutely in the power—and the autocratic power, really—of a civilian; because, in effect, that is what is done. The trial judge advocate is to be a member of the Judge Advocate General's Department, if available, or otherwise to be a man recommended by the Judge Advocate General because of legal qualifications, not required necessarily to have had any military training or any special military qualifications, and is to be, really, a civilian, although wearing a uniform; and he is a subordinate officer.

Take, for instance, if the American Army should find itself some time in the position of the British during the retreat from Mons, and if it became necessary to try a man for desertion in the face of the enemy, like that man was tried by the British in the case in which the transcript of the trial was introduced here yesterday. The responsibility for determining whether it was necessary to shoot that man instantly for the purposes of discipline, or whether he should be allowed to go, would be in the hands of this civilian, instead of in the hands of the commander of the division or of the Commander in Chief of the Army; and no matter how important it appeared to the general commanding that a guilty man should be punished, and punished promptly, if the judge advocate did not coincide with that view, the judge advocate's view would be the determining factor; he would have to take the responsibility of determining what punishment should be used in enforcing discipline in the Army, even under the most strenuous circumstances. It seems to me that it is certainly dangerous, without the experience of any other army anywhere in the world to guide us, to go so far as that in taking that power away from the responsible commanding officers and putting it into the hands of a junior, who is purely a legal officer, practically a civilian.

Now, sixth, as to the provision in the same section of Senate bill 64 that noncommissioned officers and privates shall sit on the court. I may say that I do not suppose from reading this bill that it was really contemplated that more than three enlisted men, privates or noncommissioned officers, should sit on the general court, or more than one on the special court; and yet, really, as I read the language of the bill, there is nothing to prevent the trial judge advocate, if he saw fit to do so, in organizing the court, from putting eight privates on the general court, and three privates on the special court, or any number of privates or noncommissioned officers, at all. In other words, it is wholly in his discretion; except that he can not put more than five officers on the general court, or more than two officers on the special court except where the accused is an officer. Article 4 makes soldiers equally competent with officers to sit on the court. And while article 5 provides that three members of the court shall be privates in the case of the trial of a private, and three of them noncommissioned officers in the case of the trial of a noncommissioned officer, there is nothing there to say that there shall not be more than three privates or noncommissioned officers on the court in any case.

Senator WARREN. You take the ground that while it restricts the number of commissioned officers, it does not restrict the number of privates and noncommissioned officers?

Lieut. Col. RIGBY. That is the way I read it. I do not suppose that was the intention in drafting the bill, Senator. The context does not seem to imply that.

Senator WARREN. It had not occurred to me in reading it.

Lieut. Col. RIGBY. I think it would bear that construction. I do not think there is anything to prevent the trial judge advocate, if he wanted to so constitute the court, from doing it. For instance, he might choose eight privates to try their captain.

Senator CHAMBERLAIN. That is article 52?

Lieut. Col. RIGBY. No, sir; articles 4, 5, and 6, Senator. But in any event it provides for three privates for the trial of a private in a general court; and I do not find any such provision, either in the French or the Belgian or the British systems.

Senator CHAMBERLAIN. You mean such an exact provision? They do have enlisted men on some of these courts?

Lieut. Col. RIGBY. I was speaking of a private soldier. There is no provision for a private soldier on the British, Belgian, or French courts; and there is no provision for a noncommissioned officer on the Belgian or the British courts. There is a provision for one noncommissioned officer in the French court, but only one, and as I said yesterday, the trend of opinion seems to be against increasing the number, while they do think favorably of their present plan of having one noncommissioned officer on the court in France. But he is usually, in practice, of the highest noncommissioned grade.

And just in passing for a moment, I might say that you will find in Gen. Childs's statement, which I have put in, of England, his opinion as to having private soldiers or noncommissioned officers on the courts; he is against it for the English Army. I may add that I meant to say yesterday in my testimony—I have never read the statutes myself, but I have a compilation made by one of our officers

in France—that during the French Revolution they did experiment with having private soldiers on the courts. They instituted a court which was practically a jury; but Napoleon I, as soon as he came into power, abolished it. Now, further than that, I do not know about that experiment, nor just why Napoleon abolished it: but he apparently did, as soon as he gained control of the army.

Senator WARREN. Is there a record showing that it was ever attempted in this country, or in any of the others that you know of, except as you have related?

Lieut. Col. RIGBY. Yes, Senator, I have a list of some of the other countries. In Holland they do not do it. They have one civilian and four officers on their court, very much like Belgium. In Switzerland they do have a court of seven members, all of them appointed for three years by the Federal Council. One of those men is a lawyer, a member of the Judicial Section of the General Staff, which corresponds pretty closely to our Judge Advocate General's department. He is the president and must be an officer of field rank. Three other members of the court are officers; and the other three are either noncommissioned officers or privates. That was introduced by the law of 1889 into the Swiss system. I think it would be very interesting to know how that worked out, through their long mobilization during the war. I was unable to get to Switzerland; and I do not know anything about it; and only know from reading their laws that Switzerland has experimented, during the last century, a great deal with her courts. They tried at one time in 1851 a jury of eight jurors with three judges; and they have made, during the last century, quite a number of changes. They never seem to get anything to satisfy them; and how it worked, I do not know.

Senator WARREN. In the meantime, they have not been in actual war.

Lieut. Col. RIGBY. They have never been in actual war during the century, that I know of, Senator; and the great difference between their plan, you see, and the plan proposed in Senate bill 64, is that their judges of that court are all appointed for three years, and are appointed by the Federal Council of the Republic.

Now, I can understand, as it seems to me, that you can pick out three men from the enlisted ranks, experienced noncommissioned officers, or perhaps an experienced private, and make him a permanent judge, appoint him for three years, and give him a feeling of responsibility, practically such as an officer has. You separate him in that way from the ordinary body of the enlisted personnel. It is not, as it seems to me, quite the same as temporarily taking a soldier who may to-morrow go back among his tent mates, and be ostracized perhaps if he has voted in an unpopular way on the court to which he was temporarily assigned. I think the Swiss court really has, in that, a very different factor introduced; but, as I say, I do not know how it works.

Senator WARREN. From all that, I understand that you do not recommend the use of privates and noncommissioned officers in courts-martial?

Lieut. Col. RIGBY. No, sir; I see no reason for doing so, from what I know. And from what I have heard during my service, I have not got the impression that there is any great demand for it in our

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Lieut. Col. RIGBY. No, sir; I see no reason for doing so, from what I know. And from what I have heard during my service, I have not got the impression that there is any great demand for it in our

Army; and I am very strongly of the opinion that you would not get as good service from the courts if you had enlisted personnel as you get now, particularly if you were to put private soldiers, who would be inexperienced, on the courts; who would probably either be led wholly by the officers and look up to them, or else would be always inclined to fight against any severe punishment for their fellow soldiers. In any case, might be afraid of ostracism when he returned to his tent mates and his company mates, if he had not done the popular thing. I fear that it would be impossible to prevent it being known how the different judges voted on the court, because you would probably not have the same feeling of responsibility in that on the part of the private soldiers who are less educated than the officers, as a rule, even in our temporary Army, and in the Army to which we may look forward in the future. The selection of efficient men for officers takes the best men out of the ranks; so that the men whom you would get would probably not be experienced, and not be as suitable.

And then it does seem to me that we must look ahead to the possibility of a crisis sometime, and there might be danger, in a crisis, in having a court so constituted. If, for instance—I will refer again to a situation which might meet us if we were forced to have our Army go through an experience like the Russian retreat in 1915 or the British retreat from Mons, and it was necessary to impose severe punishment to hold the men up to the mark under very hard circumstances—it would be more difficult, it seems to me, to enforce necessary discipline by the use of private soldiers on the court.

Senator CHAMBERLAIN. You are assuming all the time that with enlisted men on the courts there would not be the proper legal instruction given. But what I would suggest is an independent judge advocate general acting as adviser, when there would be no more danger than there is under the jury system.

Lieut. Col. RIGBY. I fear there would be. There is a difference, it seems to me. To begin with, it is not a national calamity for a jury to refuse to convict a saloon keeper guilty of selling liquor on Sunday, though he is clearly guilty; but under some circumstances it might really amount to a national calamity for a military court to refuse to convict men absent without leave. Then, again, you take your jurors from the general body of the country, and they represent the general intelligence and education of the country. You are likely to get good men on your juries frequently, as well as others. In the Army you do not have the same fair cross section from which to take them. When you take them from the Army, the cream of the intelligence is already drained off to make into officers, and in the old Regular Army the best men have been chosen for officers, and even in the temporary Army the best men are promptly made noncommissioned officers and get a chance for a commission.

Senator CHAMBERLAIN. I thought this Army presented a pretty fair cross section of the American people.

Lieut. Col. RIGBY. I think so, Senator; but is it not true also that as soon as the men get into the Army this straining process commences, and before very long you will find the best men getting out of the ranks, simply because they are needed in the commissioned personnel, and the whole theory is to make the best use of the men

you have; so that you would be taking your jury from what, I would fear, would rather be the inferior material?

Senator WARREN. Of course, you are only alluding to them as inferior in the line of legal capability?

Lieut. Col. RIGBY. Oh, surely; or general experience. I can not believe that one who has enlisted under the draft, say, and just come into the Army within the last two or three weeks or months, can have the same breadth of view, the same capability for making a competent judge, that an officer can. We have difficulty enough, we all of us, I think, can see, in getting, even among the officers, sufficient competent men to do that work. I fear you would simply multiply the difficulty if you went out into the field of enlisted personnel generally.

My thought would really be to rather follow the British again in that lead where they provide, for instance—and we have followed it to some extent in this amendment to the Manual of July 14 last—the British will not let an officer sit on a general court-martial until he has held a commission for at least three years, and in order to make sure that they may have experience they put members on the court "for instruction" only; that is, members who simply sit with the court and go with the court into closed session, but have no vote and take no part in the proceedings.

Senator WARREN. Would not that be pretty restrictive in times of war, as in the case of the late war, when our Army was constituted so largely of new men? Would you be able in such case to establish the courts with men that had served three years?

Lieut. Col. RIGBY. No; you can not do that in a hard and fast way—they could not do it on their field courts—and for that reason all that you can do, it seems to me, is to make a hard and fast restriction for armies not on active service, or in times of peace, and to provide that on active service those regulations shall, so far as possible or practicable, be obeyed, but pointing out and insisting, so far as possible, on putting men on the court who have had experience for a certain length of time.

Senator WARREN. Now, as I understand from your testimony and from the testimony of others, there seems to be a necessity of one law for actual war and one law for times of peace, or else a law with alternative provisions, or else we must trust largely to regulations under the law, with the law so constructed that from time to time the effect would be largely changed by regulations under it, and it seems to me that our difficulty is very largely by reason of having a part of the Army in war and a part in peace largely made up of new and inexperienced men.

Lieut. Col. RIGBY. I thoroughly agree with that, Senator. It seems to me that really our country has arrived, perhaps, at the time when it might be wise to consider following again the experience of countries that have had colonial armies, like Great Britain and France, providing the difference between the two kinds of status, the status of what we call war, and the status of what we call peace, making the distinction not between technical peace and war, but between the "Army on active service" and the "Army not on active service." For instance, I had occasion to review last winter a record of trial of some prisoners who had murdered a fellow prisoner

out in Fort Leavenworth in the disciplinary barracks, and the counsel for the accused insisted very strongly and ingeniously that the disciplinary barracks were 4,000 miles away from where any active fighting was going on, and therefore, in effect, it was a time of peace in Kansas, and the civil courts were open and functioning in Kansas, and therefore under the ninety-second article of war a military court could not take jurisdiction to try men for murder.

Now, of course, as a legal argument, there was nothing in it. They were wrong; but it does seem to me that looking at it in a broad way, as a matter of policy, there is some justice in that; for Kansas was locally at peace, and the courts were functioning. We might have a war perhaps in the Philippines, just as Great Britain sometimes has a war in Afghanistan; but it should not be necessary for that reason to treat the whole Army everywhere as on a war footing. The British do not do so during most of their wars. In fact, this war was the first time, I think, in three centuries, so I was told, when their army within the United Kingdom had been treated as "in active service," in spite of all the wars which Great Britain has had.

So that, for instance, to limit the maximum punishments under article of war 45, which provides that the President may by Executive order "in time of peace" limit the punishment—it seems to me that if those words "in time of peace" were out of that article, or if instead of saying "in time of peace" it should read "not on active service," the President could then by Executive order prevent all of these unduly severe sentences, such as were given in some cases here at home. It does seem to me that it would be much wiser to provide that the President by Executive order, which might be changed and varied from time to time—it need not necessarily be the same order for the Army at the front as for the Army here in the United States at the same time—might limit the maximum punishments. I think, in fact I know, that that is one of the things that Gen. Crowder recommended in his letter to the Secretary of War of March 10 last. I believe that to be of great value. I notice the Kernan Board did not adopt it in their report; but nevertheless I do think it a matter of great value; and I do think that it would be wiser to put the whole distinction, which is now made between war and peace, on a basis like the British, and make the distinction between the Army "on active service" and the Army "not on active service."

Senator WARREN. Of course, they would have to define that "active service" a lot more specifically, because now active service and retired service seem to be the two opposites.

Lieut. Col. RIGBY. There would have to be a new definition. The British do have a careful definition of it in their army code—in section 189 of their army act, which I have already read to you here.

Then passing to another matter in Senate bill 64, that is the provision of what, if I understand it correctly, is the veto power given to the staff judge advocate, before bringing an accused to trial.

Senator CHAMBERLAIN. What article is that? That is article 19, is it not?

Lieut. Col. RIGBY. Yes, sir; article 19, which provides as follows [reading]:

No officer with authority to appoint a special court shall refer any charge to such court for trial, nor shall any commanding officer charged with such

duty forward any charge to an officer having authority to appoint general courts until he shall have made or caused to be made a thorough investigation—

and so on. Article 19 is the preliminary investigation. Then Article 20 provides [reading]:

ART. 20. No charge shall be referred to or be tried by a general court unless an officer of the Judge Advocate General's Department charged with such duty shall have indorsed in writing upon the charge that in his opinion an offense made punishable by these articles is charged with legal sufficiency against the accused and that it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged, nor unless the officer referring the charge believes that in the interests of the service and of justice the charge can not be disposed of except by trial by general court-martial.

Now, the first part of that article 20 places, as I see it, really a veto power in the hands of the staff judge advocate against the commanding general to whose staff he is attached, because it provides that the commanding general shall not have any power under any circumstances to refer the case for trial, unless he first has the written indorsement of the staff judge advocate and the staff judge advocate's favorable opinion. Now, I might say that I do not find any such power given to any legal officer or to any staff officer or other subordinate official anywhere in any of the other systems which I have investigated, or of which I have any knowledge. Of course, in our own system the commanding general does have the benefit of the advice of his staff judge advocate. That has been, through this war, anyway, I think, the almost universal practice; and that practice is now crystallized into a definite regulation, which is a definite law for the Army, by paragraph 76 (a) of the changes in the Court-Martial Manual of July 14 last, which has been put in evidence here. So that it is the rule of the United States Army to-day that the commanding general must have before him, so that he can consider it and have the benefit of it, the advice of his legal officer; but he is, of course, not bound to take it, although I think it is fair to say that, as far as I have been able to gather, the commanding general almost invariably follows on legal matters, such as the reference of a case for trial, the advice of his staff judge advocate.

That is also the rule in Great Britain. There is no regulation in Great Britain providing that the commanding general must ask the advice of the staff judge advocate or of any other legal officer.

In that way their regulations, on their face, are just as ours were prior to July 14, 1919; except that in Great Britain, in the general courts within the United Kingdom, the charges have to be referred to the Judge Advocate General before the case is referred for trial. With that exception, there is no provision in the way of regulation about it, in the British system. The advice of the Judge Advocate General is advisory; it is not mandatory. But it is, in fact, in practice almost universally, if not universally, followed. Outside of that their system is practically the same as ours. In practice the commanding general or convening authority does refer the charges to his legal officer, who has been, since the institution of the corps of court-martial officers, in September, 1916, one of those court-martial officers. He gets his opinion, and, in practice, is almost invariably guided by that opinion.

In France a very analogous system is in vogue. The power to refer cases to trial, whether before the "special" or emergency courts in use during the war, or before the regular courts, is wholly in the hands of the commanding general, the territorial division commander, the commander of the division on active service, or of a higher command; or, in some cases of a brigade, as the case may be. The convening authority of the court has the full and untrammeled power to order a case to trial, or not, as he sees fit. He is in practice advised by an officer who is called the "Chief of the Bureau of Military Justice," attached to his staff, who is appointed on the recommendation of the Undersecretary of State for Military Justice. This "Chief of the Bureau of Military Justice" is required to be an officer. He is not required to be a lawyer, although in practice he often is an officer with legal training. In practice, also, he usually is the commissaire du gouvernement of the court. All these functions are usually united in the same official; although not invariably.

The legal adviser, be he commissaire du gouvernement or separate Chief of the Bureau of Military Justice, does not make any formal written report or recommendation as to whether the case shall be referred for trial, other than that which the commissaire du gouvernement makes in connection with the investigation (where one has been had), but prepares a formal order such as he thinks the general ought to sign, either refusing trial or directing trial; and the practice as to the general's following this advice seems to be rather variable. I have talked with quite a number of commissaires du gouvernement and divisional chiefs of staff, and others, in France. I have a number of written interviews here; and while, on the whole, the commanding general usually follows the advice, it depends pretty much on the personality of the general and the personality of the legal adviser. For instance, I have an interview with one commissaire du gouvernement who was a very capable lawyer, a man who would impress you, who said that never in all his experience had the general failed to follow his recommendations; except, I think, once. On the other hand, I have an interview with a commissaire du gouvernement who was a young man, I think just 25 years of age, who had just graduated from a law school before he went into the army, and then gone into the line of the army, and was appointed a commissaire du gouvernement later on. He said very frankly, "The general follows my advice, because I know in advance what the general wants, and advise accordingly." In other words, he was just a secretary to the general; and between those extremes it runs the whole gamut.

Perhaps the best interview I had on that was with Col. Gaussot, the chief of staff of the Thirty-sixth Division, who had been, during the war, chief of staff to 10 different divisional generals. He said that every man had his own method; that sometimes, as chief of staff, the reports of the commissaire du gouvernement were referred to him for advice, but other generals did not do so; that some generals almost invariably followed the advice of their legal advisers; but that other generals frequently acted contrary to the advice of the commissaire du gouvernement; and that all that could be said was that, taking it by and large, on the whole, the recom-

mendation was usually followed; but that where it was not followed, the instances where it was not followed were usually those where the commissaire du gouvernement had recommended against trial. In other words, where the legal officer recommends trial, the French general almost invariably falls in with the recommendation, and sends the case to trial. But where the commissaire du gouvernement's recommendation is against trial, there the general is very likely to take the responsibility of personally going all through the papers in the case, and not infrequently does order a case to trial, over the adverse recommendation of his legal adviser.

Then another thing that they do, which of course we do not do, because we do not have such broad summary disciplinary powers, the French general will very often, instead of sending the case to trial, give a man 60 days' confinement by simple executive order. If, for instance, he finds that it is rather doubtful whether a case can be fully proved, and he feels that the man is surely guilty, but there is some question as to the proof, instead of ordering the case to trial and taking chances of an acquittal, he will give him 60 days in prison by executive order. Or, if it is doubtful, for instance, whether the intent of desertion can be proved, where desertion is charged, instead of ordering the case to trial and taking the chances of acquittal, the commanding general would simply give the man this summary disciplinary punishment, and dispose of it in that way. They use that very freely, and they believe in it a great deal.

They insist that it is better to give a lighter punishment, and to give it by disciplinary measures immediately and certainly, than to send the case to trial before the court. It may be that one reason for that has to do with the fact that once the case goes to court it is out of the general's hands. The French court is a final judicial body; that is, its judgments are final in this, that they are executive in form, they do not require the approval of the commanding general; so that once the case has gone to the court it is wholly out of the commanding general's hands. How far that may have to do with their tendency to use this summary disciplinary power which the general has in his hands, instead of sending the case to court, I do not know.

I tried to get information, as far as I could by interviews, as to the relative value of our power of the reviewing authority to approve or disapprove the findings and sentence, instead of having the judgment of the court final as the French do, and I got very varying opinions. For instance, I had a talk with Gen. Gouroud, who, you may remember, was the commander of the French Army at Rheims on the 15th of July, 1918, who beat back the German attack and really stopped the German rush toward Rheims during their last offensive. Gen. Gouroud was also in command of the French Army in Gallipoli earlier in the war; and was, when I saw him, in command of the Fourth Army, in Alsace. I asked him the question whether in his opinion the American and British plan of having the judgment of the court-martial subject to review by the commanding general, or the French plan of having the judgment of the court-martial final, was the better system, and what

he thought were the advantages or disadvantages of each, and Gen. Gouroud answered very emphatically—I have his exact words in an interview here—but he said in substance, "I do not hesitate for a moment to say that the American system is infinitely superior," and then he went on to tell a number of instances where he had felt the lack during the war, in emergencies, of the power to in any way control the judgments of the courts.

On the other hand, Gen. Valdant, chief of staff at Paris, and Gen. Halluin, commander at Bordeaux, believe in the French plan and the finality of the judgments; but when I asked them, if they were faced with an emergency, with a lowering of morale, in an event of that sort, what would they do, they said they would discharge the court and appoint another court, or they would call up the commissaire du gouvernement, and they would find ways to bring pressure to bear on the court, and they would resort to the free use of the summary disciplinary power.

Senator WARREN. Now, Colonel, we have a pretty good photograph of the different systems. Are there some other points to which you wish to allude?

Lieut. Col. RIGBY. The other one that I had especially in mind was the matter of appeal, the court of military appeals contemplated in article 52 of Senate bill 64, and the corresponding provisions in the other armies; and I had some suggestions that I wanted to put before you as to punishments and the use of the suspended sentence, and the things that were accomplished by Great Britain, particularly concerning the suspended sentence, and the results of that during the war.

Senator WARREN. Proceed.

Lieut. Col. RIGBY. I do not want to take too much time. To continue the same topic for a moment, in Belgium the plan is substantially the same as in France. There also the commanding general has the complete and absolute power, with the only exception that if the complaint has originated with a civilian, and the judiciary commission has found and recommended that the complaint ought not to be proceeded with, it must be dismissed. With that exception, the commanding general has full power to follow or not follow the recommendation of the judiciary commission which makes the preliminary investigation; though, in practice, we found that it was followed in almost all cases.

In Holland, I may say I know what the regulations are, though I know nothing further. The regulations provide, apparently, the same full power in the commanding general.

Summing it all up, I do not know of any system which gives Senate bill 64's proposed veto power over the reference of cases to trial, to any officer corresponding to the staff judge advocate, or to any other legal officer, or staff officer.

Now, as to the proposed system of a court of military appeals, and review after trial, Senate bill 64 provides two plans of review or appeal.

Senator CHAMBERLAIN. Under what article?

Lieut. Col. RIGBY. First, article 39 provides, as to special courts and summary courts, that the staff judge advocate at the headquarters to which the report of the summary court or the record of the

special court is directed to be transmitted by the President—that the staff judge advocate at those headquarters shall have powers of review similar to those given by article 52, in the case of general courts, to the proposed court of military appeals, to "review and revise"—

Senator CHAMBERLAIN. What article are you reading?

Lieut. Col. RIGBY. Article 39 [reading]:

Review and revise all such records and reports for errors of law prejudicial to the accused.

Then, second: Article 52 provides, in the case of general courts, for an appeal and a review on appeal by the "court of military appeals." The court of military appeals is not to review as of course all records of trials by general courts, but only those in which the accused does not indicate that he does not want the appeal. In other words, it is a kind of semiautomatic appeal; except that sentences which do not carry confinement for more than six months, or death, dismissal, or dishonorable discharge, are not to be reviewed at all. So that, as I view it, the result is that there is to be, first, an automatic review in all cases by the staff judge advocate, for errors of law only, of the reports of summary courts and the records of special courts; and, second, that as to the general courts, there is (*a*) to be no review by anybody, and no possibility of any reexamination of any kind, except for purposes of clemency or pardon, or of any judgment not carrying confinement for more than six months, or death, dismissal, or dishonorable discharge; and that (*b*) as to the four latter classes of cases, the sentences of the general court—that is, those carrying confinement for more than six months, death, dismissal, or dishonorable discharge—there is to be a review by the court of military appeals in all cases, unless the accused shall indicate that he does not care to have a review.

Now, first, as to the review by the staff judge advocate. That comes back very closely to the same thing as the present review for the purpose of approval or confirmation (except that it is to be "for errors of law" only). But the vital difference is that this bill provides that the staff judge advocate is to make the decision himself, instead of advising his chief, the commanding general. Now, I do not find any system of law, anywhere, vesting such a final executive power in a staff officer, or in any legal officer.

At present we do have a review in all cases by the staff judge advocate of records of general court trials, for the purpose of advising the commanding general. But the power to decide is in the commanding general. Great Britain has the same thing. I do not know of any other army that does, unless it be in Holland, in their supreme military tribunal or court, to which I am coming presently. But the British review, like ours, is for the purpose of advising the commanding general. I know of no system that makes the staff officer, the legal officer on the staff of the commanding general—or any staff officer—the final arbiter in those cases.

As to appeal, or review otherwise, by some higher tribunal of the judgment, such as is proposed for certain classes of judgments of the general courts by the proposed court of military appeals, there is, of course, in Great Britain no court of military appeals or anything of that kind; but there is—as with us—a review, as I have explained from my study of it, by the deputy judge advocate general or the

Judge Advocate General, in an advisory capacity only; and they have the right, even after the proceedings have been reviewed and confirmed, for the accused or anyone for him at any time to petition the Sovereign for a reexamination, which petition will be referred to the Judge Advocate General for his advice; and the Sovereign does have the power, if so advised, to quash. We have no such "appellate" power, after final approval or confirmation. The only thing in our present system of review which is not wholly automatic is that an accused—if he wants to have a brief or anything presented—I think it would be entertained undoubtedly by the staff judge advocate anywhere. I know it would be, and has been, in the office of the Judge Advocate General. Printed briefs are sometimes submitted, and wherever briefs are offered within a reasonable time they are always welcome.

Senator CHAMBERLAIN. Do all the records and information of the division go up to the staff judge advocate?

Lieut. Col. RIGBY. Do you mean of the general courts?

Senator CHAMBERLAIN. Any court?

Lieut. Co. RIGBY. All records of the general courts go up. All records of special courts go to the headquarters of the convening authority. That is usually the brigade commander, and if there is a reason why there is anything not quite in order about it or requiring legal advice, the staff judge advocate is the one who reviews it.

Senator CHAMBERLAIN. No record is made of the summary court?

Lieut. Col. RIGBY. Only a report of the summary court, no formal record of testimony, any more than there is in the case of a French court. I should have perhaps said, on the French system, that they make no record in any case of the evidence heard in court.

Senator CHAMBERLAIN. All the records of special courts and all the records of general courts finally reach the judge advocate general?

Lieut. Col. RIGBY. All the records of general courts do, Senator; not of special courts.

Senator CHAMBERLAIN. They do not get there at all?

Lieut. Col. RIGBY. They simply make reports on them to us, statistical reports. The general court records all come up.

Now, as to the French system of appeal, they have a "court of revision." The court of revision consists of five members. There are courts of revision for the territorial armies not on active service; and for divisions, and for every army on active service.

Senator CHAMBERLAIN. That is composed of civilians or military men?

Lieut. Col. RIGBY. In the armies on active service it is composed wholly of military men. It is composed of a brigadier general, two colonels or lieutenant colonels, and two majors. In the territorial armies it is composed of three military men and two civilians. Formerly it was all military. That was changed by law during the war—by a statute enacted in 1916—by which it is now provided that the president of the court of revision in the territorial armies not on active service shall be a civilian judge of the district in which the court of revision sits.

Senator CHAMBERLAIN. That was possibly induced by these criticisms leveled against the system just as they have been leveled against the system here.

Lieut. Col. RIGBY. I am only telling you what I find there. The other civilian member is also a civilian judge. Those two civilian members are appointed on the recommendation of the under secretary of state for military justice. The civilian members really do the routine work of the court where they are appointed, but the majority of the judges are still military.

Senator CHAMBERLAIN. What cases go up to them—what convictions?

Lieut. Col. RIGBY. Unless all appeals are prohibited by presidential decree, as may be done during war, all cases may be appealed. There is no automatic review; no cases go up except those which are appealed, either by the Government or by the accused, and the appeal must be taken within 24 hours after the judgment is rendered. If it is not taken within that time, the right of appeal is absolutely gone. The court of revision sits for the correction of errors of law only, and really in a very narrow way. The record that goes up does not contain in it any of the evidence taken on the trial in the conseil de guerre. It does contain the statements of witnesses taken in the preliminary examination, the dossier; but there is no report of evidence heard in the conseil de guerre.

Senator CHAMBERLAIN. According to your statement, all the confrontation by witnesses is in the preliminary hearing.

Lieut. Col. RIGBY. That is true, so far as the record will show. There may be a confrontation on the trial, but the record will not show anything about that. So that the case does not go up on the admissibility of evidence in the conseil de guerre; and the Court of Revision is forbidden to discuss or to consider the case on the merits; and counsel in preparing their briefs are forbidden to discuss the merits of the case in any way. The only questions for consideration, as stated in the statutes, section 74 of the military code, are, first, whether the court below was constituted in accordance with the provisions of the code; second, whether it has exceeded its jurisdiction; third, whether the sentence pronounced by it is within the penalties fixed by law, upon the facts as found by the court; fourth, whether there has been any violation or omission of any form (or formality) prescribed by law "on pain of nullity"; fifth, whether the court below has omitted to accord either to the accused or to the commissaire du gouvernement, upon proper demand, any right or "faculty" secured to him by law.

As to the "pain of nullity," I might say that there are certain provisions of the code, certain things to be done, which are expressly stated to be required "on pain of nullity." They are the ones referred to in that section. For instance, "on pain of nullity," the accused must be advised at the same time the charges are served upon him, of his right to counsel, and that unless he has his own counsel, counsel will be assigned him by the court.

Senator CHAMBERLAIN. These articles do not permit the court of appeals to change the judgment except when the law has not been properly applied to the facts, etc. That is a pretty general power. That would seem to indicate that they have power to consider the facts.

Lieut. Col. RIGBY. They do not so construe that, Senator. I talked on that subject with Col. Augier, the commissaire du gouvernement

of the Court of Revision at Paris, who is a very eminent authority and author of several books—they are standard on military law in France—and he explained that they simply consider there whether the sentence accords with the facts found and set out in the findings. You see the form of their judgment below is a finding of facts and then a sentence, and the Court of Revision simply considers, under that subdivision, whether the sentence there, as found in the judgment roll, is proper in view of the facts recited as found in the judgment roll.

Senator CHAMBERLAIN. As I read that provision, it is pretty broad. Whatever the practice may be, it would seem that they could consider the facts.

Lieut. Col. RIGBY. However that may be, even if that language will bear that construction, it is not so construed by the French themselves. They construe it as I have stated, and, in fact, the rules of the court specifically forbid counsel for the accused in his "Memoir," as they call it—his brief—to discuss the case on its merits,

I will be glad to put into the record that portion of my interview with Col. Augier, if it is desired.

There is also a power, in time of peace, given by sections 80, 81, and 82 of their code, for civilians who may be tried before the conseil de guerre to appeal to the Court of Cassation; and, under the law of April 17, 1906, in time of peace, the Court of Cassation is substituted for the Court of Revision, in appeals from the conseils de guerre.

Senator CHAMBERLAIN. The trial of civilians is so limited in our jurisdiction that it does not make much difference.

Lieut. Col. RIGBY. I only call attention to it.

Then in the Belgian system they have what they call the cour militaire, which is a supreme military appellate tribunal.

Senator CHAMBERLAIN. How is that constituted? Are there any civilians on it?

Lieut. Col. RIGBY. There is one civilian on that; there are five judges—1 civilian and four line officers of the army. The civilian judge is appointed for life, and he is entitled to the honors due to a general. In practice he wears the uniform of a general, but he is a civilian appointed by the King for life. The four military judges are: One lieutenant general or major general, one colonel or lieutenant colonel, and two majors. The civilian member is the president of the court; and he must have been a civilian judge for at least 10 years before his appointment. He must, by the way, know both French and Flemish. The military members are appointed for terms of one month only. Their names are drawn by lot from a list of those available. This Belgian court of appeals differs from the French court of revision in that it reviews the facts as well as the law. It considers the case on its merits.

Senator CHAMBERLAIN. There is a record there?

Lieut. Col. RIGBY. The record there is that made up by the judiciary commission, so far as the evidence is concerned. They (the cour militaire) consider the whole case, and they have some original jurisdiction also. In Holland, there is a supreme military court. I only know of Holland from an examination of the statutes and regulations, but it is a rather anomalous situation. They have both the

review without appeal and an appeal, and both by the same court, which they call the Hoog Militair Geregtshof.

Senator CHAMBERLAIN. That is automatic?

Lieut. Col. RIGBY. It is an automatic review of the record, Senator; and there is also a provision that the accused may within a certain fixed time, I think within 10 or 15 days, appeal. Then, in addition to the regular review of the facts on the record, the court will entertain any briefs or arguments that the accused wants to put in, and hear him.

Senator CHAMBERLAIN. Are there any civilians on that court?

Lieut. Col. RIGBY. Yes; there are civilians on that court also. This court in Holland is composed of nine judges. Of those three are civilians, three are army officers, and three are navy officers. It has jurisdiction over both the army and the navy—over all military law. The civilian judges are appointed by the sovereign upon the recommendation of the ministers of justice, war, and navy; and they are appointed for life, with the right to retire at 70 years of age. One of them is made the president of the court. In his absence the other senior civilian presides. The military judges are three army officers, as I said, and three naval officers. They are required to be at least 30 years of age. There is no further requirement. They are not required to have any special legal knowledge. They, also, however, are appointed for life, and are appointed by the sovereign upon the recommendation of the ministers of justice, navy, and war.

This court in Holland has power, as in Belgium, to review the case on its merits, both on the law and the facts; and, by the way, the court in Holland has also original jurisdiction over all prosecutions of officers of the army above the grade of captain, and of officers of the navy above the grade of first lieutenant; and also has the power to examine into the actions of any commander who surrenders a fortress or naval commander who surrenders a ship—anything of that kind. They have pretty broad original jurisdiction.

In Switzerland there is a "military tribunal of cassation," composed of five judges and three alternates. They are all chosen for a term of three years by the federal council. They are all military men, but three of the judges must be—the majority of them—chosen from the "judicial section of the general staff"; that is, the judge advocate general's department. The others must also be officers who have had some legal training. I do not really know very much about the jurisdiction of the Swiss court.

There is also a court in Prussia. I do not know anything about its composition. The interesting thing about it that I do know—I have just gotten hold of the books recently—is that it publishes formal reports every year of cases decided, so that you can get reports of the supreme Prussian military courts, as you can get the reports of the cases decided in our Supreme Court or in the supreme court of any State.

In Italy there is also a revision without appeal of all cases involving confinement for more than seven years. They call this court the "Council of Revision."

Senator CHAMBERLAIN. Is there any appeal for lesser sentences than that?

Lieut. Col. RIGBY. There is also an appeal to the supreme court of war and navy for lesser sentences, under somewhat severe restric-

tions. I have not all the details, Senator, but all cases where more than seven years' confinement is involved go up automatically. That court is composed of three judges—a "general, commanding a section of military justice," as he is called; a colonel attached to the section of military justice, and one civilian judge.

Then there is detailed to act as prosecutor before that "council of revision" the military advocate general of Italy, and an officer is detailed as reporter to the court.

Senator CHAMBERLAIN. Practically all of those courts have one civilian member on the court?

Lieut. Col. RIGBY. The situation, summing it all up, Senator, is, I think, that in all of them, either the court is wholly military, or else the majority of the court is military. Here is this table which I prepared, for which you were asking, Senator; I can put it into the record now.

(The table, relating to military courts of appeal in several different armies, is here printed in the record as follows:)

Analysis of military courts of appeal in various armies.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
I. Title of court	Conseil de Revision (court of revision).	Conseil de Revision (court of revision).	Council of revision.	Hoog Militair Geregshof (supreme military court).	Cour Militaire	Krigsöverdomstol (superior military court).	Tribunal Militaire de Cassation.
II. Number of judges	5	5	3	9	5	5	5 (also 3 alternates)
III. Civilian judges, number	2		1	3	1	2	
a. Qualifications—							
1. Age	30 years			30 years	No requirements	25 years	
2. Legal experience	Magistrate of civilian court of appeal (Cour d'Appel).		Councillor of the Court of Appeals.	Doctor of laws	10 years civilian judge.	Qualified for appointment as a civilian judge,	
3. Military experience	None required		None required	None required	None required	None required	
b. By whom appointed	Minister of War (recommendation of under secretary state for military justice.		Minister of Grace and Justice.	Sovereign upon recommendation of ministers of justice, war, and navy.	Sovereign	King	
c. Tenure of office	Determined by cabinet (Conseil des Ministres).			Life, retired at 70	Life	For the term of court.	
d. Special powers and duties	Act as rapporteurs to the court.			Civilian is President. In his absence, senior civilian presides.	Rapporteur to the court; entitled to honors of a general.	Rapporteur to the court.	
IV. Military Judges, number	3	5	2	6	4	3	5.
a. Qualifications—							
1. Rank	1 colonel or lieutenant colonel, 2 majors;	1 brigadier general, 2 colonels or lieutenant colonels, 2 majors.	1 general officer, 1 colonel.	3 army, 3 navy officers.	1 lieutenant general or major general, 1 colonel or lieutenant colonel; 2 majors.	1 general officer, 2 field officers.	Officers.
2. Age	30 years	30 years		30 years	No requirement	25 years	
3. Other military qualifications.	None required	None required	1 general commanding a section of military justice; 1 colonel attached to the section of military justice.	None required	None		

4. Legal experience	do	do		None required	None required	None required	3 from "Judicial section of the general staff"; 2 others must be "officers with legal training."
b. By whom appointed	Commanding general.	Commanding general.		Sovereign (recommendation of ministers of justice, navy, and war).	By president of the court, by drawing from roster furnished by minister of war.	King	By federal council
c. Tenure of office	6 months	Commanding general's pleasure.		Life (retired at 70).	1 month	For term of court	3 years.
d. Special powers and duties							
V. President of court:							
a. Civilian or military	Civilian	Military	Military	Civilian	Civilian	Military	Military.
b. Qualifications—							
1. Age	30 years	30 years		30 years	No requirements	25 years	
2. Legal experience	President of chamber of (civilian) court of appeal ("President de chambre de la cour d'appel".)	No requirement	"The general commanding a section of military justice."	Lawyer, doctor of law.	10 years as civilian judge.	No requirement	Member of judicial section of general staff.
3. Military experience	None required			None required	None required		
4. Rank	None required	Brigadier general	General officer		Entitled to honors of a general.	General officer	
c. By whom appointed	Minister of war under regulations fixed by the cabinet.	Commanding general.		Sovereign (recommendation ministers of justice, war, and navy).	Sovereign	King	Federal council.
d. Tenure of office	Determined by cabinet.	Pleasure of commanding general.		Life	Life	Term of the court	3 years.
e. Powers and duties	Presides, general supervision, appoints rapporteurs.	Presides, general supervision, appoints rapporteurs.		"Directs all meetings of the court." May appoint a rapporteur "to expedite proceedings."	Acts as rapporteur to court.		
VI. Officials of court. Titles of	Commissaire du Gouvernement, greffier.	Commissaire du Gouvernement, greffier.	Military advocate general (or military vice advocate general), reviewer.	Advokaat-fiscaal, procureur, provost general, commissaris, rapporteur, griffier.	Auditeur general, greffier.	Överkrigsfiskal	Auditeur in chief.

Analysis of military courts of appeal in various armies—Continued.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
VII. Advokaat-fiscaal, auditeur-general, commissaire du gouvernement, judge advocate general, etc.:							
a. Title	Commissaire du gouvernement.	Commissaire du gouvernement.	Military advocate general.	Advokaat-fiscaal	Auditeur general	Överkrigsfiskal	Auditeur in chief.
b. Civilian or military	Military	Military		Civilian	Civilian		Military.
c. Qualifications—							
1. Age	30 years	30 years		30 years	35 years	25 years	
2. Legal experience	None required.	None required		Doctor of law	Lawyer; doctor of law.	Qualified for appointment as a civilian judge.	
3. Rank	Field officer or "sous intendant militaire."	Field officer or "sous intendant militaire."			Entitled to honors of general.		
4. Military experience	Requisite rank	Requisite rank		None required	None required	No requirement	Chief of the judicial section of the general staff.
d. By whom appointed	Minister of war	Commanding general.		Sovereign (recommendation ministers of justice, marine, and war).	King	King	
e. Tenure of office	Pleasure of minister of war.	Pleasure of commanding general.		Life	Life		
f. Qualifications as to impartiality, etc.	Same as judges of Conseil de Guerre.	Same as judges of Conseil de Guerre.		Not related to members of court or grifier, if related to accused, temporary Advokaat-Fiscaal appointed			
g. Powers and duties	Prosecutor and adviser of the court.	Prosecutor and adviser of the court.	Prosecutor	1. Prosecute original cases; adviser to court in confirmation and appeal cases. 2. Advisor of surrender of forts, ships, etc. 3. General supervision of Auditeur-	Prosecutor and adviser to the court; "discharges the functions of a public minister."	Prosecutor; general supervisor of inferior military courts.	

				tears - Militair and of Krygsraads.		
VIII. Assistants to commissaire du gouvernement, advokaat-fiscaal, etc.: Titles.	Substitute	Substitute	Military vice advocate general.	Procureur; provost general.	Substitute	Substitute
IX. Deputy — substitute, procureur, etc.	do	do	do	Procureur	do	do
a. By whom appointed	Commanding general.	Commanding general.		Court, on petition of Advokaat-Fiscaal.	King	Commanding general.
b. Duties	Same as commissaire du gouvernement (assistant).	Same as commissaire du gouvernement (assistant).		To assist Advokaat-Fiscaal.	To assist, and act for, the auditeur general.	To act, in case of absence of Overkrigsfiskal.
X. Provost General:						
a. By whom appointed				Sovereign provost general.		
b. Duties				Charge of prisons, etc.		
XI. "Commissaris" "Juge D'Instruction:"						
a. Title				Commissaris, one or more.		
b. Powers and duties				Investigation of accused in cases of original jurisdiction.		
c. Civilian or military				No requirement		
d. Qualifications—						
1. Age				No limitation		
2. Rank				No requirement		
3. Legal experience				None required		
4. Military experience				do		
5. Impartiality				No requirements		
6. Special matters				None		
XII. "Rapporteur"						
a. Powers and duties	Report on record to the court.	Report on record to the court.	Reviewer. Examine the record and report to the court.	To investigate case thoroughly.		
b. Member of court or not	Yes	Yes	No	No	Yes	Yes
c. If a member—						
1. By whom appointed	President	President			President acts as rapporteur to the court, ex officio.	
2. Civilian or military	Civilian	Military			Civilian	Civilian
d. If not a member—						
1. By whom appointed			Commander in chief.	President of court		
2. Civilian or military			Military	Not fixed		

Analysis of military courts of appeal in various armies—Continued.

Salient points.	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies.	Army, active service.					
XII. "Rapporteur"—Continued.							
d. If not a member—Continued.							
3. Qualifications	.....	.....	Officer who has received a degree in law, and "preferably a magistrate."	Not fixed, but must not be related to any attorney in the case.	.....	.....	
4. Any special matters	.....	.....	Has as many assistants as may be needed.	Appointment kept strictly secret.	.....	.....	
XIII. "Greffier," "Griffier," clerk of court:							
a. Title	Greffier	Greffier	Referee	Griffier	Greffier	.....	
b. Civilian or military	Military	Military	No requirement	Civilian	Either (a) an officer of the army, or else (b) doctor of law, or (c) had judicial experience.	Civilian member of court keeps the record	
c. Qualifications—							
1. Impartiality	Same as judges of Conseil de Guerre.	Same as judges of Conseil de Guerre.	.....	Not related to judges nor to Advocaat Fiscaal. May not act where related to any party.	.....	.....	
2. Age	30 years	30 years	.....	25 years	25 years	.....	
3. Rank	Officer	Officer	.....	.....	.....	.....	
4. Legal experience	No requirement	No requirement	.....	Doctor of law	As above stated; either an Army officer, or else a doctor of law, or judicial experience.	.....	
5. Military experience	Requisite rank	Requisite rank	.....	None required	.....	.....	
d. By whom appointed	Commanding general by roster.	Commanding general.	President of the court.	Sovereign (recommendation ministers of justice, marine, war).	King	.....	

e. Tenure of office	6 months	Commanding general's pleasure.		Life	Royal pleasure	
XIV. Jurisdiction of the court:						
a. Original				Naval officers above first lieutenant, Army officers above captain, provost marshals, auditors militair, pilots, commander surrendering fortress, some special cases.	Over Army officers above captain in rank; over members of courts-martial in their official capacity as such.	
b. Appellate— 1. Automatic	No	No	All sentences involving a penalty greater than 7 years' confinement.	All sentences of Krygsraad's except sentences adjudged 1. In the field. 2 In a beleaguered fortress 3 In a city "in a state of siege"	No	
(a) Questions to be considered.				1. Was the case properly tried? 2. Was a complete criminal case made out? 3. Is the guilt proven beyond any doubt? 4. Is the sentence authorized by law?		
(b) May case be returned for new trial?				Yes; same court		
2. Upon appeal, or other action— (a) By accused	Yes	Yes		By accused; with same exceptions as on review without appeal.	Yes	Yes
(b) By Government	Yes	Yes		No	Yes	No
(c) Other parties	No	No		No	Yes	No

Analysis of military courts of appeal in various armies—Continued.

Salient points	France.		Italy.	Holland.	Belgium.	Sweden.	Switzerland.
	Territorial armies	Army, active service.					
XIV. Jurisdiction of the court—Continued. b. Appellate—Continued. 2. Upon appeal, or other action—Continued. (d) Questions to be considered.	1. Composition of conseil de guerre. 2. Did the court below exceed its jurisdiction. 3. Is the judgment authorized by law upon the facts found by the court below? 4. Was there any violation or omission of any statutory steps prescribed upon "pain of nullity?" 5. Did court below fail upon proper motion to award either to the accused or to the Government any rights secured by law?		Facts, as well as law.	Same as on review without appeal.	Facts, as well as law.	.....	
(e) May case be returned for new trial?	Yes; to different court.	Yes, to different court.	Yes.....	Yes; to same court.	Yes; to same court.	.....	
c. Other jurisdiction	.....	.....	.....	Supervision of guardhouses and military prisons.	.....	.....	
XV. Vote required:							
a. For findings	Majority	Majority	.....	Majority of members of the court.	Majority	.....	
b. For sentence	do	do	.....	do	do	.....	
c. Special requirements	Judges vote viva voce, beginning with junior in rank.	Judges vote viva voce, beginning with junior in rank.	.....	Members must vote in person viva voce in open court. (See arts. 36-45.)	.....	.....	
XVI. Is case reviewed on the merits?	No	No	Yes	Yes	Yes	.....	

Senator CHAMBERLAIN. The cases in some of the countries are reviewed automatically, and in some only in case of appeal?

Lieut. Col. RIGBY. Yes. Italy has the automatic review for long-term sentences. Holland has the automatic review for all sentences. The others go up on appeal—all those I am familiar with—except Great Britain and the United States. I do not know the jurisdiction of the Swiss court. In all of them, where there is a formal military court of appeals established, there are one or more civilians, except in the French court of revision, in the armies on active service, where they are all officers; and the Swiss, where a majority of them are officers of the judge advocate general's department. But in none of them is the majority civilian. There is none where they are all civilian; and there is none where a majority of them is civilian. In other words, in all of them, to turn it around, either the judges are all military men, or else the majority is composed of military officers. The theory seems to be to put the trial into the hands of the military officers, with the benefit of the advice of one or more—in the minority, however—of legally trained officers; and, of course, in the French armies on active service they are all military officers.

Now, I think that is all I have to say on that question, and, perhaps, if you are not through with me you would prefer that I come back.

(Thereupon, at 1.05 o'clock p. m., the committee took a recess until 2.30 o'clock p. m.)

AFTERNOON SESSION.

The subcommittee reconvened, pursuant to the taking of the recess, at 2.30 o'clock p. m., Senator Francis E. Warren (chairman) presiding.

STATEMENT OF BRIG. GEN. WALTER A. BETHEL, UNITED STATES ARMY.

Senator WARREN. General, the duty of this subcommittee is to report to the full Committee on Military Affairs on Senate bill 64, the Chamberlain bill, so-called, as a whole, or amended, or with substitutes, and we are taking evidence to establish, if we can, what is the better mode; just how we are going to change the Articles of War and to change the method of administration of military justice.

We have been hearing testimony of officers who have become acquainted in a certain way with the laws and practices of other nations. Will you tell us what your service has been? I notice that you have four stripes, showing that you have been overseas two years. Will you tell us what has been your experience abroad, or in the Army in this country, with respect to military justice?

Gen. BETHEL. I was graduated from West Point 30 years ago, and after serving for five years with troops as a subaltern, was instructor in law at West Point for four years.

Soon after my relief from West Point, I was detailed in the Judge Advocate General's department, and have been on duty in that department ever since, having been permanently appointed judge advocate in 1903, I served as a department judge advocate in Alaska, on the Pacific coast and in the Philippines, for nine years;

after which I went to the United States Military Academy as a professor of law, where I remained as such for five years, and in 1914 came to Washington for duty in the Judge Advocate General's office, where I was when the United States declared war.

Senator WARREN. Was that the commencement of your duties here in the general office?

Gen. BETHEL. Yes, sir.

Senator WARREN. What is your real rank now, in the Regular Army?

Gen. BETHEL. I am a colonel in the Judge Advocate General's department of the Army.

Senator WARREN. That is as high as you can get?

Gen. BETHEL. As high as I can get by seniority.

On the declaration of war by the United States against Germany I went with Gen. Pershing to France as judge advocate of the A. E. F., and remained such until his return to the United States.

Senator WARREN. Then you had the highest command over there, of that kind?

Gen. BETHEL. I was the chief law officer of the A. E. F. at all times.

Senator WARREN. You were stationed at the general headquarters, were you?

Gen. BETHEL. I was stationed at general headquarters all the time; yes, sir. I might say, further, that while at West Point I undertook to write a revision of Winthrop's Military Law, based upon the Articles of War, then in the form of a bill before Congress, and devoted two or three years to that work; but inasmuch as the articles were not enacted until after I had entered on duty in the Judge Advocate General's office in Washington, I never completed the work.

Senator WARREN. Now, will you, in your own way, tell us some thing of the dispensation of military justice on the other side, and also whatever you may know of it here at home.

Gen. BETHEL. I may say that I know practically nothing as to what has occurred in the United States during the two years of my absence. I have read a few newspaper articles, and in the last few days, since being summoned to appear before this committee, I have read as much of the testimony that has been adduced before this committee as possible; but further than that I know nothing as to what has occurred in the United States. I was as familiar as it was possible for me to be with what took place in the A. E. F.

Just before leaving Europe I rendered a brief report to Gen. Pershing of the workings of the court-martial system in Europe, a copy of which I have here.

Senator WARREN. You might insert that in the hearings. You might like to have him read it over hastily, Senator Chamberlain, so that you may ask him any questions that occur to you.

Gen. BETHEL. I really think, before I go ahead with my statement, that is if you are going to question me much on the conditions in the A. E. F., it would be well for me to read that.

Senator CHAMBERLAIN. Just read it.

Senator WARREN. I think it would be well for him to read it, and then it will bring out what you want to ask him about.

Gen. BETHEL. (reading):

GENERAL HEADQUARTERS,
AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, August 7, 1919.

Memorandum: For the commander in chief.
Subject: General court-martial trials in the American Expeditionary Forces.

1. On May 7 I received the following memorandum from the secretary of the General Staff:

"The commander in chief desires that you furnish the undersigned with a monograph of the general court-martial system as it has worked in the American Expeditionary Forces. with data as to number of convictions of different crimes, length of sentence, etc."

He advised me that it was desirable to have a list by name of all persons who had been tried by general court-martial in the American Expeditionary Forces, together with the result of trial and a statement of the offenses of which the accused were convicted, their sentences and such further disposition as may have been made in their cases in the way of mitigation, remission, etc. I have had a table (see blank form herewith) prepared as above indicated and am keeping the same up to date, and shall submit the same to you upon the breaking up of the American Expeditionary Forces. As there will be but few more court-martial trials, the report which is substantially an extract from the section report will be submitted now.

Under the law each army, corps, division, and separate brigade constituted a general court-martial jurisdiction. Authority to appoint general courts-martial was granted to the commanding general of the Services of Supply September 1, 1917, and as the number of troops increased the authority was likewise granted from time to time to the commanding officers of sections of the Service of Supplies and other commands. There were in all 75 general court-martial jurisdictions in the American Expeditionary Forces.

The following table shows the number of trials by general court-martial in the American Expeditionary Forces, to include June 30, 1919, it being impracticable to fix a later date, such as will be inclusive of all trials in the various divisions and sections of the Service of Supplies:

	Convictions.		Acquittals.		Total.
	Approved.	Disapproved.	Approved.	Disapproved.	
1917.					
Officers	11	3	2	1	17
Enlisted men	97	8	13	2	120
Other persons	2	.....	.....	.....	2
Total	110	11	15	3	139
1918.					
Officers	416	66	104	34	620
Enlisted men	1,628	90	309	29	2,056
Other persons	32	2	5	2	41
Total	2,076	158	418	65	2,717
1919 (TO JUNE 30).					
Officers	550	80	142	33	805
Enlisted men	2,442	202	503	48	3,195
Other persons	13	.....	4	.....	17
Total	3,005	282	649	81	4,017
Total trials for 1917-18 and to June 30, 1919, inclusive	5,191	451	1,082	149	6,873

The following table shows cases tried in the United States before divisions arrived in France, the court-martial orders having been promulgated after arrival:

	Convictions.		Acquittals.		Total.
	Approved.	Disapproved.	Approved.	Disapproved.	
Officers	4		1		
Enlisted men	227	14	15	4	
Total	231	14	16	4	25

It should be borne in mind that the number of troops in the American Expeditionary Forces was continualy undergoing great variation. It rose from a little more than two hundred thousand in January, 1918, to about two million in November, 1918, and then diminished steadily. The number of troops in the American Expeditionary Forces on June 30, 1919, was three hundred and seventy thousand. The average number of troops in the American Expeditionary Forces during the year 1918 was considerably more than one million; and this average was maintained for the first half of the year 1919.

In 1917 and 1918 the number of trials by general court-martial in the American Expeditionary Forces was approximately one-quarter of 1 per cent of the average number of troops during those years. The number of general court-martial trials during the first six months of 1919 was about three-fourths of 1 per cent per year of the number of troops. The number of trials by general court-martial in the United States Army during the five years preceding the present war was approximately 5 per cent per year of the number of troops in the Army. The small percentage of trials by general court martial in the American Expeditionary Forces as compared with the Regular Army before the war is so remarkable as to require comment. A few cases had to be dismissed, of course, for the reason that the witnesses, on account of sickness, wounds, return to the United States, or other causes, were not available. More important, however, was the liberal employment of the special court-martial. Conditions in the American Expeditionary Forces were very favorable to the use of the special court for the reason that the other urgent duties of officers made it inadvisable to convene general courts-martial except in cases where the jurisdiction of the general court-martial is exclusive, or in those cases where severe punishment appeared to be necessary. The use of the special court, as will hereinafter appear, was encouraged in General Orders, No. 56, 1918, and it was there advised that cases of petit larceny could be properly punished under the existing conditions by the special court-martial.

By far the most important cause, however, of the small number of general court-martial trials was the character of the troops. They realized the seriousness of their cause, and their patriotism and sense of duty, together with the hard service to which they were necessarily subjected, brought about such a state of behavior and discipline as to make the commission of crime extremely rare and but few trials necessary. Since the American Expeditionary Forces was a truly National Army, the excellent behavior of the troops must be accepted as proof of the high standard of American citizenship.

The increase in trials after the signing of the armistice over what it had been prior thereto was very marked, but by no means so great as was expected. It was but natural that the relaxation that followed the severe strain of 1918 should manifest itself in a lower state of discipline and that this should be aggravated by the soldiers' desire to return to the United States when hostilities ceased. The impossibility of sending the Army home at once, or even for quite a while, produced considerable dissatisfaction. Notwithstanding these conditions, however, the number of trials by general court-martial, considering the size of the Army, was very small and was only three-twentieths as great as in times of peace preceding the war.

It became evident in the spring of 1918 that the methods of punishment usually employed in an army were not best adapted to war-time conditions. Whether well founded or not, there was a somewhat prevalent belief that some soldiers would commit offenses with a view to obtaining dishonorable discharge from the service and confinement in a disciplinary barracks, and thereby obtain their release from military service and its incident dangers. It was, therefore, deemed inexpedient to send soldiers convicted of offenses in combat organizations to a place of confinement either

in the United States or France, except in those cases where a long penitentiary sentence only would fit the crime. It was deemed better that they should remain with their organizations, sharing the hardships and dangers of their more worthy comrades. General Orders, No. 56, of April 13, 1918, was accordingly issued in terms as follows—

I might say, before reading that order, which was published in the spring of 1918, that it was practically the only order published for the guidance of the command in disciplinary matters.

Senator WARREN. That was considered a very important order.

Gen. BETHEL. Yes, sir; I think so. I shall proceed to read it [reading]:

1. Conditions of service in the American Expeditionary Forces necessitate policies as to punishment different from those which have heretofore obtained in our armies. The law has authorized the President to prescribe maximum limits of punishment for times of peace only. (See Excutive Order, par. 349, Manual for Courts-Martial).

2. Heretofore the punishment of dishonorable discharge with confinement for a term in the United States Disciplinary Barracks has been employed for serious cases where penitentiary confinement was not authorized. This punishment is not adapted to the conditions in the American Expeditionary Forces. Hereafter prisoners not sentenced to imprisonment in a penitentiary will be retained in Europe in order that their services may be here utilized and that early opportunity may be given them in proper cases to redeem themselves as soldiers. To this end reviewing authorities should freely exercise their power under the fifty-second article of war.

3. In awarding punishments, it should be borne in mind that a soldier should not escape dangerous service by the commission of crime. Petit larceny and even other offenses involving some moral turpitude, which have heretofore been punished with dishonorable discharge and confinement, may, under existing conditions, be properly punished in a disciplinary way, leaving the soldier to perform military service either with his company or at such other place as the reviewing or higher authority may direct.

In the combat units few cases will arise requiring dishonorable discharge. A sentence of confinement for six months at hard labor, or at hard labor without confinement in a combat unit, which is served by the soldier at the front is severe enough except in extraordinary cases. Where dishonorable discharge is not advisable, and the offense is not capital, the case should, as a rule, be disposed of by an inferior court-martial. Officers should not be withdrawn from their duties to constitute a general court-martial except when the offense can not be otherwise adequately punished.

4. Offenses against the persons or property of the inhabitants of France are much more serious than such offenses would be in our own country. They should be punished with the utmost vigor. When such an offense calls for a penitentiary sentence, it should be for a much longer time than would be awarded under normal conditions.

Absence without leave is an offense incomparably more serious now then in time of piece. Such absences not only give occasion for serious offenses, but whenever an offense is so committed it is brought to the attention of our allies and tends to destroy the good repute of our Army. Therefore, every measure should be taken to prevent the soldier from absenting himself without leave, and when absent to apprehend him immediately, and the offense of absence without leave should be punished with severity.

Deadly weapons are carried by soldiers for the purpose of use against the enemy. Their employment to settle private disputes is equivalent to doing the work of the enemy, and such conduct should be followed by punishment much more severe than would be awarded under usual circumstances.

5. Since trial by court-martial tends to destroy the self-respect of the soldier, it should not be resorted to when other measures are adequate. For minor offenses not frequently repeated the power of the commanding officer under the one hundred and fourth article of war should be employed.

6. It is expected that the disciplinary powers of commanding officers under the one hundred and fourth article of war will be fully utilized, thereby reducing the number of trials by summary courts-martial; that the special court will be employed whenever the case is such that six months' confinement at hard labor under the special conditions now existing will meet the ends of justice; that members of combat organizations will not be sentenced to dishonorable discharge unless the sentence includes a term of confinement extending well beyond the probable duration of the war, and that commanding officers of all grades having prisoners under their control will cooperate to see that such prisoners share the hardships and dangers of their more worthy comrades. Normally a penitentiary sentence should not be given unless the term of imprisonment is 10 years or more.

7. The reviewing authority will, in a case arising in a combat unit, direct that a general prisoner whose is not to be confined in a penitentiary be confined at the station where his unit service or at such other place within the reviewing authority's command as he may deem best.

Now continuing my report to the commander in chief, I said:

While the foregoing order was in most part suggestive and advisory rather than mandatory, all officers exercising disciplinary powers were in accord with its provisions and immediately proceeded to carry it into effect. It resulted that nearly all men convicted of military offenses in combat divisions remained with their organizations and continued to perform their duty as soldiers. A great proportion of them were thus able to redeem themselves by honorable service in the course of a few weeks or months and to bring about the remission of their punishment. Many, indeed, rendered valiant service in action and were immediately released from the further operation of their sentences.

The difficulties of bringing soldiers to trial by general court-martial were very much greater than would be expected among mobilized troops. The rapid movements and frequent changes of stations of the various commands, changes in personnel effected by heavy replacements, together with evacuations of the sick and wounded to hospitals in central and western France, made it difficult in many cases to secure the witnesses. It was more necessary than ever that the trial should immediately follow the offense; but this was frequently impossible on account of the rapidity with which the operations were conducted. During the early part of 1918 our troops were employed mainly in trench warfare, and while a division was in the trenches there were cases that could not be tried by reason of the difficulty of assembling the officers necessary to constitute a general court-martial and obtaining the presence of the witnesses. Such cases were tried when the division returned to a rest area.

In the spring of 1918 the policy of sending to each division or corps a sufficient number of officers to constitute a general court-martial and to be employed on that duty alone was seriously considered. It was realized that officers employed upon this duty exclusively would so familiarize themselves with military law and the requirements of court-martial practice as to bring about regularity in the proceedings, but that such officers would not appreciate conditions of service so well as officers belonging to the division in which the offense should be committed. Had conditions continued as they were then, the employment of officers disabled by wounds as members of court-martial was intended, for the reason that such officers, after service at the front, could best understand the conditions of service there and would be most inclined to do justice in cases coming before them. The moral effect of trial by wounded officers rather than by officers of no combat experience was regarded as important. Competent officers who had convalesced from wounds were so much in need for other administrative duties, however, that but one such court was organized, which was sent where most needed in the summer and fall of 1918.

From the beginning of the Argonne offensive, on September 26, to the close of hostilities, on November 11, there were very few trials in the combat divisions. Indeed, conditions were such as to make it generally impracticable to bring offenders to trial before division courts; and most of the offenses that were committed during the Argonne offensive were tried in November and December. Had hostilities continued many months longer, it is certain that other means for the trial of offenses in the combat divisions would have had to be devised than the usual one of appointing division officers on division courts. Such conditions could have been met by the assignment to each division of sufficient number of officers convalescent from wounds constituting permanent courts. I think it desirable that our law make provision for an additional court to those now authorized to meet the condition of open warfare where troops are constantly on the march or in battle. The act of Congress of the Confederate States of America, of October 9, 1862, providing for a military court of three officers, and later acts amendatory thereto, are very worthy of consideration. In this connection it may also be observed that the field general court-martial of the British Army, usually composed of three officers, was employed in France during the war for the trial of serious offenses instead of the general court-martial analagous to ours for which the British law also provides.

Under such conditions of warfare as obtained during the Argonne offensive, only the most serious offenses should be tried by superior court-martial, and it is almost imperative that those be tried immediately. The accused, together with all witnesses for the prosecution and the defense, should be sent at once to a court sitting as near the lines as practicable. Unless this is done, cases must frequently be dismissed by reason of the witnesses not being available. It is also most important that immediate example be made of the guilty; otherwise disciplinary measures fail in their purpose.

From a comparison of the number of trials of officers and soldiers with the number of officers and soldiers in the American Expeditionary Forces, it appears that the percentage of trials by general courts-martial was more than six times greater among the officers than among the enlisted men. It should not be inferred from this, however, that the standard of conduct was lower among the officers than among the soldiers. Under the Articles of War officers can be tried by general court-martial only. The great majority of offenses committed by soldiers are not only triable, but in fact are tried, by summary or special court-martial. The figures in the above table, therefore, prove nothing as to the comparative conduct of the two classes of military persons.

In one respect the Articles of War have proved defective, I think—under war conditions—in not making sufficient provisions for the punishment of officers for minor offenses. It has been noted that officers can be tried by general court-martial only, and since it is contrary to good policy, and impracticable as well, to employ the general court for minor offenses, it follows that such offenses when committed by officers can only be dealt with under the one hundred and fourth article of war, which authorizes commanding officers to impose certain disciplinary punishments, not including, however, forfeiture of pay. The most effective of the disciplinary punishments authorized by the one hundred and fourth article of war is "restriction to limits," which, in time of peace, consists in restricting the officer to his military post. It is impracticable to impose this punishment under such conditions as we have had in France. Officers' duties have been such that they must come and go, and seldom have officers been stationed where it was practicable to prescribe limits or compel their observance. I feel that there has been a real need of a power to impose a moderate forfeiture of pay upon officers for minor offenses. In the event of a future war, I think there should be a statute authorizing officers of general rank to impose a forfeiture of one-half the monthly pay per month on officers under their command, not above the grade of captain, for minor offenses. This power would conform very closely to that now exercised by summary courts with respect to soldiers' pay, and in view of the right of appeal and other safeguards provided by the one hundred and fourth article of war, the power could not be greatly abused.

Now, I come to the commander in chief's jurisdiction, which is really a change in subject. As you know, Gen. Pershing, as the commander in chief of an army in the field, was the confirming authority for sentences of dismissal and of death adjudged and approved in the various jurisdictions. The next paragraph, however, deals with remission. [Continuing reading:]

Under the fiftieth article of war the unexecuted portion of a sentence could be remitted by the commander in chief so long as the person serving the same was in the American Expeditionary Forces whoever might have been the reviewing authority other than the President. So long as hostilities continued, the exercise of the power thus to mitigate or remit punishment was sparingly exercised. Early in 1919 the matter of general remission was taken up systematically, and Lieut. Col. William Taylor, judge advocate, spent many weeks at the camps where the prisoners were confined, conferring with the prison officers and examining the prisoners themselves, as well as the nature of their cases. Upon his recommendation the remaining portions of about 600 sentences were remitted in whole or in part. The sentences imposed by general court-martial prior to the signing of the armistice were generally more severe than those inflicted in time of peace for like offenses. Military courts appeared to regard theft or embezzlement of military property, absence without leave and acts of violence against the civilian population as more serious than such offenses would be under normal circumstances, and to require, for purposes of example, severer punishment than usual. In the mitigation of these sentences the policy was adopted of reducing them as nearly as practicable to peace-time standings, and to remit the whole where good discipline would not suffer by so doing.

Now I come to the special jurisdiction.

By far the greater number of sentences that came before the commander in chief for his action were those of dismissals of officers adjudged by courts appointed by division or other commanders and approved by them. But 64 officers and 87 soldiers were tried by court-martial appointed by the commander in chief. Four hundred and seventy-nine cases of dismissals of officers came before the commander in chief for the exercise of his approving or confirming authority, and in 318 cases the sentence was confirmed and dismissal directed. In 45 cases the sentence was confirmed, but the execution thereof was suspended, though in two

of such cases the suspension was later vacated and dismissal ordered. In 17 cases the sentence was mitigated under the provisions of an act of February 28, 1919, amending the fiftieth article of war, pursuant to which the commander in chief was, by cable of May 8, 1919, authorized to mitigate death and dismissal sentences. In 99 cases the sentence of dismissal was disapproved or confirmation was withheld. Such disapproval was given in some cases for serious mistakes in law made at the trial; in others where the evidence was not deemed conclusive of guilt; and in a few cases before the above-cited enactment, the sentence of dismissal was disapproved for the reason that it was deemed too severe in view of the offenses and their circumstances. Forty-four sentences of death came before the commander in chief for confirmation and in 11 cases the sentence was confirmed and executed. In 10 cases the sentence was disapproved and in 11 cases the sentence of death was mitigated to imprisonment for life or a term of years. Prior to the above-cited enactment 12 death sentences which the commander in chief had the power to confirm were forwarded to the President with the recommendation that the sentence be commuted. The figures in this and the preceding paragraph cover the period from the beginning of the American Expeditionary Forces to the date of this report,—August 7, 1919.

Murder and rape were the only offenses for which the offender suffered the death penalty in the American Expeditionary Forces.

Senator WARREN. Desertion was not punished in that way in any case?

Gen. BETHEL. No, sir; it was not. We had a few desertion cases that came before us.

Senator WARREN. I do not want to interrupt you if there is anything you want to ask, Senator Chamberlain.

Senator CHAMBERLAIN. Go right along, Senator.

(At this point Senator Lenroot entered the committee room.)

Senator WARREN. General, just make that last statement again, about the number of death sentences in the American Expeditionary Forces.

Gen. BETHEL. I will begin with the death sentences again. I have another copy of this report which Senator Lenroot can follow as I read. [Reading:]

Forty-four sentences of death came before the Commander in Chief for confirmation——

Senator WARREN. Those cases came up from different divisions, perhaps?

Gen. BETHEL. From different divisions and sections of the S. O. S.

Senator WARREN. With the recommendation of the death penalty—with a death sentence?

Gen. BETHEL. Yes, sir.

Senator WARREN. What was done with those?

Gen. BETHEL. In other words, these death sentences came up with the approval of the authority that ordered the court, generally the division commander. [Continuing reading:]

and in 11 cases the sentence was confirmed and executed.

Senator CHAMBERLAIN. That is, those men were shot?

Gen. BETHEL. They were hung, those 11 men. [Continuing reading:]

In 10 cases the sentence was disapproved, and in 11 cases the sentence of death was mitigated to imprisonment for life or a term of years. Prior to the above-cited enactment 12 death sentences which the Commander in Chief had the power to confirm were forwarded to the President with the recommendation that the sentence be commuted.

That was at the time when Gen. Pershing did not have the power to commute these sentences. He had the power to confirm and carry a sentence into effect, but not the power to commute.

Senator WARREN. He had the power to send a case to the President?

Gen. BETHEL. Yes; and believing that the death sentence should not be carried into effect, he sent these cases up to the President in order that they might be commuted. [Continuing reading:]

The figures in this and the preceding paragraph cover the period from the beginning of the American Expeditionary Forces to the date of this report—August 7, 1919.

Murder and rape were the only offenses for which the offender suffered the death penalty in the American Expeditionary Forces.

Senator WARREN. Then those men who were hanged were not guilty of desertion; they were not executed for desertion but for the other kinds of offenses?

Gen. BETHEL. For murder or rape, or for the combined offense of murder and rape, as in some of the cases.

Senator WARREN. I do not want to seem personal about it, but it has been asserted that the commander in chief of the American Expeditionary Forces was intent upon having carried into effect those sentences prescribing capital punishment, when he might have acted otherwise, and that is the reason that I wanted to be particular about that.

Senator CHAMBERLAIN. There has been a suggestion of that with reference to four boys, of whom two were found guilty of sleeping on post and the other two of disobedience of orders. I think those were the only four cases in which that appeared.

Senator WARREN. Yes, I understand. If this statement of Gen. Bethel is correct, no man has suffered capital punishment on account of desertion.

Senator CHAMBERLAIN. That is entirely true, no doubt; but what about those four young men?

Gen. BETHEL. The four cases to which you refer no doubt were four cases that occurred in the early history of the American Expeditionary Forces, I think about November, 1917, and they occurred in the First Division when it had, I think, just entered the line or was about to enter the line; I am not sure.

Senator CHAMBERLAIN. Did Gen. Pershing commute their sentences?

Gen. BETHEL. He had then no power as to their sentences. Gen. Pershing had power to confirm death sentences given him by the Articles of War only with respect to the following offenses: Murder, rape, desertion, and mutiny. He had no power to carry a death sentence into effect for sleeping on post, for disobedience of orders, for lifting a weapon against a superior officer, or for various other things for which the Articles of War permit the death penalty to be imposed. All cases except those of murder, desertion, mutiny, and rape required confirmation by the President for the execution of the death penalty; so that those cases might have come direct from the division commander to the President under the law.

An order was issued, however, in the early days of the American Expeditionary Forces, requiring records involving sentences which required the confirmation of higher authority to pass through intermediate authority in order that the intermediate authority might express its views and make its recommendation. In other words, cases coming up from divisions came to Gen. Pershing through corps headquarters in order that the corps commander might make recommendations, and in that way these four cases which you mention passed through Gen. Pershing's headquarters on their way to the President.

Senator WARREN. He had no power to act on them?

Gen. BETHEL. No, sir.

Senator CHAMBERLAIN. That is what the testimony shows.

Senator WARREN. He had not power to commute or do away with it?

Gen. BETHEL. No power to act on that in any way whatsoever. Just the same as these four were sent on up to the President, a number of others came up which would have had to go to the President. On my examination of them, under his supervision it was believed that a less punishment than death should be inflicted, and they were sent back to the reviewing authorities to resubmit to the court.

Senator CHAMBERLAIN. Those were cases over which the general commanding had jurisdiction?

Gen. BETHEL. He had no jurisdiction over them. They were cases where the death sentence had been adjudged, which had been approved by the reviewing authority, the division commander, and where it would require the confirmation of the President to give them effect, but inasmuch as we believed the death sentence should not be inflicted in those cases, the records were sent back to the reviewing authority with the suggestion that he send them back to the court for the imposition of a lesser penalty.

Senator CHAMBERLAIN. That was by the commander of the American Expeditionary Forces?

Gen BETHEL. Yes, sir.

Senator CHAMBERLAIN. He had no authority to act?

Gen. BETHEL. Not at all.

Senator WARREN. He had the authority to act in that way, to send them back?

Gen. BETHEL. In that way. In other words, there was nothing preventing his acting in that way.

Senator WARREN. He assumed as there was no law against it he could exercise it in that way?

Gen. BETHEL. Yes, sir. In other words, he sent it back to the major general who had approved it for such further action as he thought proper.

Senator CHAMBERLAIN. Did any other cases come up where the commander of the expeditionary forces recommended the change of a sentence, even where he had no authority to act himself?

Gen. BETHEL. Yes; there were a few others in which he had no power given by law but in which recommendations were made to the President.

Senator CHAMBERLAIN. He had no jurisdiction even to do that?

Gen. BETHEL. No jurisdiction conferred by law; no, sir.

Senator CHAMBERLAIN. Why was the recommendation made in these four cases that they should be executed?

Gen. BETHEL. Because it was believed to be necessary for disciplinary purposes at that time, as a deterrent to the commission of such crimes thereafter.

Senator CHAMBERLAIN. I think that is what the evidence here generally shows, Senator Warren.

Gen. BETHEL. There is not any question about that.

Senator WARREN. I wanted to get at the facts as he has given them because there has been a good deal of loose talk outside, and I wanted to get at the facts.

Senator CHAMBERLAIN. So far as that recommendation was concerned, there was absolutely no provision of law which required Gen. Pershing to certify those up and recommend execution?

Gen. BETHEL. None whatsoever.

Senator CHAMBERLAIN. And there was not any authority for him to take the case where sentence of death had been passed, no authority of law which authorized him or required him to send them back to the division commander?

Gen. BETHEL. No express authority, but such action was legally appropriate and conducive to justice.

Senator WARREN. And of course he could not remit them?

Gen. BETHEL. No, sir.

Senator LENROOT. May I ask you, General, how many death sentences were imposed, I do not mean executed. I see you speak of 44, but I see that only includes those which the commander in chief had power to confirm?

Gen. BETHEL. Yes, sir.

Senator LENROOT. How many others were there?

Gen. BETHEL. It seems to me that includes all that were adjudged in the American Expeditionary Forces.

Senator LENROOT. That did not include these four boys, for instance?

Gen. BETHEL. No; these 44 include those who came before the commander in chief for confirmation, for his action.

Senator LENROOT. How many more were there, if you know, that did not come before him for confirmation?

Gen. BETHEL. I could find out from my records, but I think not more than, I should say, not to exceed a dozen, Senator.

Senator CHAMBERLAIN. Death sentences?

Gen. BETHEL. Yes, sir; death sentences.

Senator WARREN. Could you in looking over your notes finally insert the number?

Gen. BETHEL. Yes, sir; I could. I can recall three or four now. I remember one particularly where he recommended that it be carried into effect, and I remember a number of others—I had better not state any further. My memory is not reliable.

(NOTE BY GEN. BETHEL.—In addition to the four cases heretofore referred to there were four other death sentences which required the action of the President; one of such was recommended to be executed, two were recommended to be commuted and one to be disapproved.)

Senator LENROOT. You can show those in the record where the recommendation was made for the reduction of the sentence, or where recommendations were made to carry out the sentence.

Gen. BETHEL. Yes, Senator, I shall just continue this tabulation so as to show those numbers.

I may say here also with reference to the death sentences that were carried into effect, 11 for murder and rape, that I take the absolute responsibility for what was done in those cases, and that I gave each one of those cases the most careful personal study, reading all the evidence in every case and generally rereading it, and that I feel personally responsible for the infliction of that sentence in each of those 11 cases.

Senator WARREN. Did any of them acknowledge their guilt?

Gen. BETHEL. Well, some of them did, but how many I do not remember.

Senator WARREN. That is not a controlling factor.

Senator LENROOT. In those cases, General, were they of such a nature that where the death penalty was inflicted, the same punishment would have been inflicted under the civil law?

Gen. BETHEL. I am glad you asked that question, Senator. I suppose in many of our States the death sentence is not enforced for rape. I think in practically all of them it is for murder. Most of these were rape cases. Now, we had quite a few murder cases among the 2,000,000 men of the American Expeditionary Forces, and we determined not to confirm and carry into effect the sentence of death in such cases unless we were very certain that such punishment would generally be carried into effect in the United States. In fact we leaned backward on that principle and commuted to life imprisonment or sent up for commutation by the President some pretty flagrant cases of murder. In fact, I can state the circumstances of the murder cases, where the death sentence was actually carried into effect. One was a very cold-blooded murder of a military policeman by a person who had been in desertion for quite a while and endeavored to effect his escape in that way. Another was committed by a negro upon a French professor who was endeavoring to prevent the negro from committing rape, which he was attempting at the time. The other two murder cases were in connection with rape which was being committed, and was committed at the same time.

We had a number of murder cases where the man was apparently somewhat under the influence of liquor, or where there was some degree of provocation, where he felt aggrieved and was in more or less hot blood, and in none of those cases did we carry out the sentence of death.

Senator CHAMBERLAIN. All of those are in your list here, in your detailed statement?

Gen. BETHEL. Yes, they are in this list, and I am speaking of cases where Gen. Pershing had the power to carry the sentence into effect.

Senator WARREN. What is the penalty in your State for rape?

Senator LENROOT. We have no death penalty. But, of course, I see that in this situation the death penalty for rape would be very much more proper as a deterrent than it would in civil life.

Gen. BETHEL. Yes, sir. In the first place, the article of war says that for rape the sentence shall be either death or life imprisonment, and under the special conditions existing there, where the women were defenseless, their men were all at the front, we felt it necessary to make an example on a clear case, and I am free to say that in nearly all the cases of rape that were tried, and in all in which there was a conviction, there was the clearest and most convincing evidence.

There was one case where a negro was convicted of rape and the sentence was approved and sent to our headquarters, and there was just a slight doubt as to the identity, and of course the sentence was disapproved by the commander in chief. That is one thing we had to be very careful about, that there was no question about identity, because, as you know, negroes look very much alike to us and still more alike to the French people. These rape sentences were not confined to negroes by any means. They were about equally divided between the two races.

Senator CHAMBERLAIN. You did not quite finish reading that.

Gen. BETHEL. No, sir, not quite [reading]:

On the whole, the court-martial system has worked well in the American Expeditionary Forces, and has proved its adaptability to war conditions. Difficulties were encountered, as indicated above, but they were not as great as in other fields of military administration and did not to an appreciable extent defeat the purpose of military trials—to enforce discipline. This was the first war test of the law establishing the special court and the law authorizing the President to empower other commanding officers to appoint general courts-martial than those designated in the Articles of War. Both provisions of law have proved invaluable. In fact, great embarrassment would have resulted had not the President the authority to delegate the power to appoint general courts-martial.

Cases were generally well tried. There were, of course, some poorly tried cases, but the percentage of such was not, in my opinion, greater than in peace times. In the majority of the cases it was apparent from the way the trial was conducted, as shown by the record, that not only the Judge Advocate and counsel, but some members of the court also, were professional lawyers.

With reference to that last remark, some other judge advocates have expressed a different opinion from what I have stated here with respect to the thoroughness of the trials. Of course I only read the record generally in the more important trials, the dismissal of officers and death cases, though in some other cases of soldiers. I think that these trials for thoroughness average as well as the cases I read for 10 years as a department judge advocate in time of peace, but that is an opinion that is expressed only on somewhat limited experience. I only read a certain class. A great many of them were very well tried.

Senator WARREN. That is your judgment from the experience you had?

Gen. BETHEL. That I had; yes, sir.

Senator CHAMBERLAIN. General, take your statistical record here, you say that there were in the aggregate 6,875 general court-martial cases during the years 1917, 1918, and 1919.

Gen. BETHEL. In the A. E. F.?

Senator CHAMBERLAIN. Yes.

Gen. BETHEL. Six thousand eight hundred and seventy-three it indicates; yes, sir.

Senator CHAMBERLAIN. That is right, is it not?

Gen. BETHEL. Total trials for 1917, 1918 up to June 30, 1919, yes, sir.

Senator CHAMBERLAIN. Now, have you any record to show what the aggregate of the sentences was upon those whose sentences were permitted to stand?

Gen. BETHEL. No, sir; I had submitted to Gen. Pershing, and I have a record myself, a large, tabulated record, showing the sentences in every case, together with such remissions as were thereafter made, but I never added up the aggregate, no, sir. I have not any idea as to what the aggregate was.

Senator CHAMBERLAIN. Could you furnish that?

Gen. BETHEL. I think so.

Senator CHAMBERLAIN. I would like to have it in the record.

Gen. BETHEL. The aggregate of years of confinement, you want, do you not?

Senator CHAMBERLAIN. Yes.

Senator WARREN. You want the original sentence?

Senator CHAMBERLAIN. The whole amount.

Gen. BETHEL. No, indeed; Gen. Pershing had no legal authority whatsoever over a sentence finally approved by one of his lower commanders. His authority in such cases was confined to remitting the punishment of a man that might be serving in the A. E. F., he being the supreme commander.

Senator WARREN. Something in the nature of a pardon, do you mean?

Gen. BETHEL. Yes, sir; the remission of punishment.

Senator CHAMBERLAIN. You are referring to Gen. Pershing. I am not trying to make this personal, as I have a very high regard for him.

Senator WARREN. You mean the commander in chief?

Senator CHAMBERLAIN. I am trying to get at the construction of this statute. I am not trying to fix any responsibility upon Gen. Pershing. But I want to find out to what extent there is for that reviewing power under your construction of the law.

Gen. BETHEL. The law was perfectly clear so far as the powers of the commander in chief were concerned. He was the reviewing authority in the cases of courts appointed by him, and he was the confirming authority in cases of dismissal and death adjudged by lower commanders.

Senator CHAMBERLAIN. I think there is no question about that. There is no difference between us there.

Gen. BETHEL. And he also had the authority under the Articles of War to remit a punishment which had been approved and had gone into effect, and which was being served in his command.

Senator CHAMBERLAIN. Where does he get that?

Gen. BETHEL. From the Articles of War expressly, and that was the end of his authority under the Articles of War.

Senator CHAMBERLAIN. Now, what was this General Order No. 7?

Gen. BETHEL. General Order No. 7 was issued by the War Department in the spring of 1918, and provided that before the sentence of dismissal of an officer or a death sentence or a sentence inflicting dishonorable discharge of a soldier should be carried into effect, the record of trial should be submitted to the Judge Advocate General's Office for determination of the legality of the trial. Whereupon, the examination having been made, the record would be returned to the reviewing authority for his final action.

Senator CHAMBERLAIN. What was the genesis of that order? Do you know in what it had its origin? What was the occasion of its adoption?

Gen. BETHEL. No; I do not. I was in France, and it came out of a clear sky so far as we were concerned in France.

Senator CHAMBERLAIN. Let me ask you if, in August, 1918, Gen. Crowder did not write you a letter on the subject, in substance the purpose of which was that some rule must be adopted or something must be done to head off a congressional investigation as to court-martial systems?

Gen. BETHEL. He wrote me a letter. I think the letter—I have read Gen. Ansell's testimony before this committee, and came across this letter in the printed record, and I have no doubt that it is a correct copy of the letter that was sent me. I remember getting such a letter, and I have no doubt that it is a correct copy of the letter.

Senator CHAMBERLAIN. You remember the letter?

Gen. BETHEL. I remember rather vaguely the letter; yes, sir.

Senator CHAMBERLAIN. You would have it in your papers?

Gen. BETHEL. Undoubtedly; at least I presume it is in my files.

Senator CHAMBERLAIN. If the letter which is printed in the record is incorrect, and you find it incorrect with a comparison of your files, will you put in the correct one?

Gen. BETHEL. I shall have a verification made.

(NOTE BY GEN. BETHEL.—The letter is correctly set forth in the printed record.)

Senator CHAMBERLAIN. In that letter to you, did he not also state that this General Order No. 7 was to prevent our effort toward the establishment of a military court of appeals?

Gen. BETHEL. I do not recall the substance of that letter, Senator, because in fact it made practically no impression on my mind. The important part of that letter to me was this: When the office of acting judge advocate general was established in France, the branch office of the War Department, of which I was ordered to take charge temporarily, the cable, through a mistake in code numbers, as we received it, directed a certain captain of Infantry to take charge, and we assumed that that captain of Infantry was on his way to France, and therefore the office was not established at once, but about a month later the error was discovered, and then I established the office; and that was the most important thing that Gen. Crowder wrote to me about, as I remember.

Senator CHAMBERLAIN. The order was adopted without consultation with you in the first place?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And the letter was in the nature of an apology for adopting order No. 7?

Gen. BETHEL. I do not know about it, Senator. I think that letter was a good deal later, if I am not mistaken.

Senator CHAMBERLAIN. Did you favor the adopting of General Order No. 7?

Gen. BETHEL. I do not think I did, Senator, in so far as it related to cases in the A. E. F. It had its advantages and it had its disadvantages, but I do not think that on the whole I was in favor of it at the time. Now it was of great assistance to me in this respect, especially in the beginning, that I was very short-handed and the presence of an office there to make an immediate examination of the records that I had to examine for legal defects was a great deal of help to me, and in that way I did welcome it.

Senator CHAMBERLAIN. You represented—you actually stood in the place of—the Judge Advocate General over there? You were given practically the functions, the authority, of the Judge Advocate General here, so far as the American Expeditionary Forces were concerned?

Gen. BETHEL. I should hardly put it that way, Senator. The law confers certain powers on the Judge Advocate General. I was not his deputy, and really my powers under the law would be uncertain, I think, except as they are derived from the customs of the service. I was the legal adviser to Gen. Pershing, and as such, supervising the administration of military justice throughout France as far as it was practicable.

Senator WARREN. Of course in using names you mean the commander in chief.

Gen. BETHEL. Pardon; I should say that, though we had only one commander in chief.

Senator CHAMBERLAIN. I want you to understand that I am not undertaking to reflect on the commander in chief. I am trying to get at the method of administration under this law.

Gen. BETHEL. Do not think, Senator, that I even suspected that you did.

Senator CHAMBERLAIN. Was your opinion as to matters of law, as representing the department of military justice over there, regarded as final under General Order No. 7?

Gen. BETHEL. No, sir--well, you mean during the short time that I had charge of the branch office, which was about a month?

Senator CHAMBERLAIN. Yes, or any other time.

Gen. BETHEL. I want to understand the question.

Senator CHAMBERLAIN. I will put it this way: Did not Gen. Kernan refuse to take your view of the law?

Gen. BETHEL. Not my view, no sir.

Senator CHAMBERLAIN. Your department.

Gen. BETHEL. I think he refused to adopt Gen. Kreger's view of the law on two occasions. I think he did. I did not see the papers; I don't say that he did.

Senator CHAMBERLAIN. Was Kreger occupying a position in your department?

Gen. BETHEL. No, sir. Kreger's office and mine were entirely distinct.

Senator CHAMBERLAIN. What was his?

Gen. BETHEL. Kreger had charge of the branch office of the Judge Advocate General.

Senator WARREN. That is, the regular office of the Judge Advocate General?

Gen. BETHEL. Yes, sir. The distinction should be clearly borne in mind. I was judge advocate of the A. E. F., the chief law officer of the A. E. F. Gen. Kreger had an office which was a branch of the War Department, a branch of the Judge Advocate General's office of the War Department, and his office was not a part of the A. E. F.

Senator CHAMBERLAIN. He really represented the Judge Advocate General?

Gen. BETHEL. He really represented the Judge Advocate General at Washington.

Senator CHAMBERLAIN. Yes. Did not Gen. Kernan decline to follow his directions?

Gen. BETHEL. I think he did on two occasions. I am saying that only on hearsay.

Senator CHAMBERLAIN. Did not Gen. Hull, for instance—what position did he occupy?

Gen. BETHEL. Col. Hull was judge advocate of the S.O.S. until he became finance officer of the A. E. F.

Senator CHAMBERLAIN. Do you not know of cases where he advised Gen. Kernan not to observe the decisions of Kreger?

Gen. BETHEL. I do not know of that, but it is probable——well, I do not know. I will say in connection with the matter that my office always conformed to the decisions of the Acting Judge Advocate General except that we went and saw him when we thought he was

mistaken, and had him correct some of his decisions, and in two cases where I felt very certain that he was wrong I appealed to the Judge Advocate General's Office in Washington.

Senator CHAMBERLAIN. You were of the opinion that a commanding general's rulings upon questions of law were final, were you not?

Gen. BETHEL. So far as his own action is concerned.

Senator CHAMBERLAIN. Well, yes, in any way, whether official or not.

Gen. BETHEL. They are only in the same way that any man's decisions are final for the time as regards his own action.

Senator CHAMBERLAIN. What was General Order No. 84?

Gen. BETHEL. I think General Order No. 84 modified General Order No. 7, somewhat, but I could not state from memory in what respect.

Senator CHAMBERLAIN. You have a copy of it, have you not?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. Will you not put that in the record, General?

Gen. BETHEL. Yes, sir. General Order No. 84, War Department, 1918? I will insert the part of it which is pertinent here.

(The part of the order referred to is here printed as follows:)

GENERAL ORDERS, No. 84.

WAR DEPARTMENT,
Washington, September 11, 1918.

* * * * * * *

IV. The last subparagraph of Section II, General Orders, No. 7, War Department, 1918, is amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or by part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file. (250.47, A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
Acting The Adjutant General.

Senator CHAMBERLAIN. Yes, sir. You do not question the legality of General Order No. 7, and of General Order No. 84?

Gen. BETHEL. No, sir; I do not think I have questioned the legality of General Order No. 7.

Senator CHAMBERLAIN. Or 84?

Gen. BETHEL. No; I think not. There was one of those orders possibly, that I was about to recommend that its effect be made definite and certain when it was amended. I think that was No. 7.

Senator CHAMBERLAIN. Did you protest against it?

Gen. BETHEL. No; I did not protest.

Senator CHAMBERLAIN. You accepted it without question?

Gen. BETHEL. We discussed it some. We discussed it some there at our headquarters when we first heard of it. I know that Gen. Harbord thought it was inadvisable. The only discussion I ever had of it or concerning it with Gen. Pershing, I think amounted to this, I told him I disliked very much to see a military agency established in the A. E. F. which was not a part of the A. E. F., and I remember that he expressed the same opinion.

Senator CHAMBERLAIN. That was Kreger?

Gen. BETHEL. Yes; it was an office that was not a part of the A. E. F. I think I also stated that it would be somewhat dangerous if when we got into Germany and tried Germans by military commission, to have to send the record some distance and to wait for some time before we could carry the sentence into effect. I think I expressed myself to that effect.

Senator CHAMBERLAIN. Was not that order subsequently revoked?

Gen. BETHEL. General Order 7?

Senator CHAMBERLAIN. Yes.

Gen. BETHEL. Some order, I think 84, modified it.

Senator CHAMBERLAIN. Was not that done, General, at your insistence, and after your discussion of the subject?

Gen. BETHEL. No, sir; I do not think that I had anything whatsoever to do with the modification. I do not think so; in fact, I am sure I did not.

Senator CHAMBERLAIN. Well, did not the War Department go to the extent of abolishing the office of Judge Advocate General in France?

Gen. BETHEL. Yes, sir; and we insisted most strenuously that it be reestablished.

Senator CHAMBERLAIN. That is when you complained about order No. 84?

Gen. BETHEL. No; I never made any complaint respecting General Order No. 84.

Senator CHAMBERLAIN. I would just like to know.

Gen. BETHEL. I will tell you my recollection with regard to the abolition and the reestablishment of the branch office of the Judge Advocate General in France.

Senator CHAMBERLAIN. That was Kreger?

Gen. BETHEL. Yes, sir. In the spring of 1919 a cable was received directing Gen. Kreger to return to the United States, that the office of Acting Judge Advocate General in France was abolished, and that all orders relating to it were revoked. I made a careful study of the effect of that cable, and took the advice of the other military lawyers there, and we all agreed that the effect of that cable was to abolish all review by the Acting Judge Advocate General or the Judge Advocate General's Office before we should confirm the sentence or before we should approve the sentence. I had doubts as to whether the War Department really meant to do that, and so a cable was sent asking if that was the intent. The War Department replied by a cable that it was intended that all records should be sent to the United States for examination in the United States before we should carry the sentence into effect. Now you see what delay that would involve, and we immediately asked that that office be reestablished, and it was reestablished.

Senator CHAMBERLAIN. You had changed your mind about it in the meantime? You did not think it was advisable at first that a representative of the Judge Advocate General's Office should be there in France under General Order No. 7, but you later decided to have a representative there?

Gen. BETHEL. No; I can not say it was so much a change of mind in that respect; but if we had to send the records to the Judge Advocate General's Office for examination before we could carry a sentence into effect, then I wanted the branch office reestablished in order that there might not be delay.

Senator CHAMBERLAIN. I think you were perfectly right about that, sir.

Gen. BETHEL. I had not positively made up my mind as to whether the jurisdiction originally given by G. O. No. 7 to the branch office was a good thing or not.

Senator CHAMBERLAIN. But the department was assuming that, when Kreger was recalled, the records would come here?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And that was what you were protesting against?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. In other words, that there would be this circumlocution?

Gen. BETHEL. This great delay. Men would be waiting to find out what their sentences were, and they would have to be kept in confinement, to the great inconvenience of the military authorities in France, because it is very important that military justice be as quick as possible.

Senator CHAMBERLAIN. How did you do before Kreger went over as the representative of the Judge Advocate General?

Gen. BETHEL. No examination by the Judge Advocate General's office was required before that time, and we would carry the sentence into effect at once. That had been the method in vogue in the Army since the beginning.

Senator CHAMBERLAIN. When did The Adjutant General change the rule with respect to that?

Gen. BETHEL. That was General Order No. 7.

Senator CHAMBERLAIN. I can understand your reason. The Articles of War never define penalties in time of war, but leave it to the direction of the court, do they not?

Gen. BETHEL. Yes, sir; they do not define penalties to any great extent. They authorize the President in times of peace to prescribe the maximum penalties, but that is only in times of peace.

Senator CHAMBERLAIN. Who defines the penalty in time of war?

Gen. BETHEL. In time of war it rests with the court.

Senator CHAMBERLAIN. Do you think the Articles of War ought to define the penalty?

Gen. BETHEL. Ought to prescribe the maximum penalty?

Senator CHAMBERLAIN. Ought to fix the penalty some way, or leave it entirely to the military tribunal, the court?

Gen. BETHEL. In that respect, I favor the articles as they at present exist. The Articles of War authorize the death penalty or the penalty of dismissal in certain cases, and in other cases they leave the sentence to the discretion of the court.

Senator CHAMBERLAIN. You accepted it without question?

Gen. BETHEL. We discussed it some. We discussed it some there at our headquarters when we first heard of it. I know that Gen. Harbord thought it was inadvisable. The only discussion I ever had of it or concerning it with Gen. Pershing, I think amounted to this, I told him I disliked very much to see a military agency established in the A. E. F. which was not a part of the A. E. F., and I remember that he expressed the same opinion.

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Gen. BETHEL. In that respect, I favor the articles as they at present exist. The Articles of War authorize the death penalty or the penalty of dismissal in certain cases, and in other cases they leave the sentence to the discretion of the court.

Senator CHAMBERLAIN. You do not think it is necessary that the Articles of War define the offense?

Gen. BETHEL. Where there is doubt as to the offense I think they should.

Senator CHAMBERLAIN. Do you know that the ninety-fifth and ninety-sixth articles of war are very broad?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And they permit the military authorities to try a man for anything prejudicial to good order and military discipline?

Gen. BETHEL Yes, sir.

Senator CHAMBRELAIN. Do you not think it is a very broad power?

Gen. BETHEL. It is a very broad power. I have often thought that it confided to the court the power of legislator and judge.

Senator CHAMBERLAIN. Do you not think it is too broad?

Gen. BETHEL. My experience has not taught me that it is, Senator.

Senator CHAMBERLAIN. Do you think that it is necessary?

Gen. BETHEL. I believe that you have got to have some general article. Of course the effect of it can be diminished by more specific legislation, by enumerating a greater number of offenses as military offenses.

Senator CHAMBERLAIN. Now, General, what have you to say in reference to a court of appeals, a military court of appeals of some kind, where the appellate tribunal would have greater power than the Judge Advocate General has now?

Gen BETHEL. I have read Gen. Ansell's testimony before this committee very hurriedly and I learned of the cases known as the Texas mutiny cases, and I presume no doubt that there are other cases somewhat similar to those from time to time, and I think there should be a power to correct and reverse any illegal judgment that has been rendered.

Senator CHAMBERLAIN. I am glad to hear you say so. I think there is no question about that.

Gen. BETHEL. I feel that the pardoning power is not sufficient in such cases.

Senator CHAMBERLAIN. It does not remove the stigma of conviction.

Gen. BETHEL. It does not, because a pardon presupposes guilt.

Senator CHAMBERLAIN. Yes, sir.

Gen. BETHEL. It does not establish the fact that there was an illegal conviction.

Senator CHAMBERLAIN. No matter whether there was prejudicial error in the trial or whether the trial was irregular or not?

Gen. BETHEL. If for any reason the conviction was illegal or on insufficient evidence, or if there was a great abuse of discretion on the part of those who imposed and approved the sentence, I believe there ought to be a correcting power somewhere that can sweep away the determination of guilt.

Senator CHAMBERLAIN. Because if a man is guilty, whether clemancy is exercised or not, he goes out into the world with the stamp of the convict on his brow, denied the right of citizenship and deprived of many rights:

Gen. BETHEL. For desertion in time of war, I think now he loses his right of citizenship.

Senator CHAMBERLAIN. Have you formulated in your mind any system of appeals, what it ought to consist of, how its functions should be exercised?

Gen. BETHEL. No, Senator; this subject is pretty new to me. You see we have been very busy in the A. E. F. and have heard nothing of these discussions going on here at all, and I have only been considering it in the last three days, since receiving the summons from this committee, so I am not prepared to say just yet what I would recommend in that line.

Senator CHAMBERLAIN. Well, you know this from your contact with the Judge Advocate General's office, that in his view of the law, his construction of section 1199 of the Revised Statutes, he only has an advisory power where the court had jurisdiction and there were no irregularities in the trial. You think that is not broad enough?

Gen. BETHEL. I think that some one ought to have the power to say that the trial is illegal and that the judgment is void.

Senator CHAMBERLAIN. That there was prejudicial error?

Gen. BETHEL. Yes; that there was error rendering the judgment void.

Senator CHAMBERLAIN. Or impairing some substantial right of the defendant. Would you go that far?

Gen. BETHEL. Yes; substantial right. Well——

Senator CHAMBERLAIN. If evidence was admitted that ought not to have been admitted against a man, for instance, and might possibly have been a factor in his conviction, ought there not be some tribunal to reverse the judgment on that question?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. I am glad to have your opinion along that line.

Now I am monopolizing all the time.

Senator WARREN. We are getting the benefit of all your work, are we not?

Senator LENROOT. Certainly.

Senator CHAMBERLAIN. Now, there is one other question. We have had a very able discussion of the systems in vogue in Great Britain and France, for instance, the functions and powers of the judge advocate general in Great Britain, who is a civilian, and the duties and powers of a judge advocate in the field and in the Army. Now what do you understand are the functions of the judge advocate in France with the expeditionary forces, whether he occupies the position which you do with the commanding general or whether he is with a division commander or corps commander or what not? What is his function?

Gen. BETHEL. The judge advocate of the American forces in France with respect to military justice bears the same relation to that command as the judge advocate of a division does to a division, or the judge advocate of any other court-martial jurisdiction does to that jurisdiction. You understand that the commanding general in France has not the power now to carry into effect the sentence of death or the dismissal of an officer. His power is precisely the same as any other commanding general.

Senator CHAMBERLAIN. What I want to get at particularly is, does the judge advocate in any branch of the service, whether it is with a

larger or smaller unit act only in the capacity of an adviser to the court or does he prosecute for the Government?

Gen. BETHEL. Are you speaking now of the judge advocate of the command known as the American forces in France, or are you speaking of the judge advocate of the general court-martial in France?

Senator CHAMBERLAIN. I am speaking of them generally.

Gen. BETHEL. The conditions among our troops in France with respect to military justice are precisely the same as they are in mobilized divisions in the United States or one of the departments in the United States.

Senator CHAMBERLAIN. Well, now here is a man on trial before a general court-martial. Who prosecutes him?

Gen. BETHEL. The judge advocate of the court, the officer who has been detailed as judge advocate of the court.

Senator CHAMBERLAIN. In a special court he does the same thing?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. And in a summary court he does the same thing?

Gen. BETHEL. There is no judge advocate in the summary court. That consists of only one officer.

Senator CHAMBERLAIN. Now, then, the judge advocate prosecutes or brings out the evidence for the Government?

Gen. BETHEL. Yes, sir.

Senator CHAMBERLAIN. Does he act as an adviser for the court or does he act as an adviser for the defendant or undertake to protect the interests of the defendant?

Gen. BETHEL. The judge advocate of the court-martial is presumed to advise the court, but he does not do so very often unless the court calls upon him to look up the law on some particular point. Unfortunately, however, the judge advocate of a court is much of the time an officer who is not specially skilled in the law, and he is hardly competent to advise the court as to a serious legal question.

Senator CHAMBERLAIN. I believe that is all I desire to ask the General now.

Senator LENROOT. I think I have just one question, General. If a court of appeals were created, making it a legal tribunal and the jurisdiction of that were limited to passing upon errors of law, but with no right to pass upon the case de novo from the record, in other words, to substitute its judgment on the face of the facts for that of the court-martial, do you think that that would be impracticable?

Gen. BETHEL. No; it would not be impracticable.

Senator CHAMBERLAIN. Well, would that interfere with discipline or the command if the passing upon facts was wholly left to the military side?

Gen. BETHEL. And if the court were merely to examine the record to see whether the sentence is legal, whether the trial is legal?

Senator WARREN. You mean a court outside of the military line?

Senator CHAMBERLAIN. Well, of the judge advocate's department, composed of lawyers, but within the service.

Gen. BETHEL. No; I do not see that it would.

Senator CHAMBERLAIN. Do you think that would be beneficial?

Gen. BETHEL. Yes, I think it would; because no matter how careful the reviewing authority, with the advice of his judge advocate—and of course the staff judge advocate is really the reviewing author-

ity—but no matter how careful he may be, or even how learned—and he is not always as learned as he ought to be—of course there is bound to be an error now and then which ought to be corrected. Now, the only thing that I fear in the matter of a court of that kind is that it will draw to itself too much power, try to find error where really no substantial error exists. That will be the tendency, I fear. But still I think there ought to be a court or a board or whatever you may term it. I myself would prefer to have it composed of military officers in the Judge Advocate General's Office, but I think there ought to be a body to make an examination of the record for that purpose.

Senator CHAMBERLAIN. You say there would be a disposition, you think, for that body to draw to itself more power than it ought to and try to find error whether or no?

Gen. BETHEL. Where the error is not substantial, that is the tendency and that will have to be carefully guarded.

Senator. CHAMBERLAIN. General, that is not true of appellate tribunals in the States and in the Federal courts. They usually are just the opposite.

Gen. BETHEL. They try to dodge?

Senator WARREN. In the Supreme Court of the United States even.

Senator LENROOT. Do you think a military tribunal would be more apt to look for errors than a civil court would?

Gen. BETHEL. No; I do not think that they would.

Senator LENROOT. Would not the presumption be to the contrary rather than otherwise?

Gen. BETHEL. Well, I do not know, Senator, I really do not.

Now if you gentlemen will pardon me, I am probably speaking from experience. I have had charge of the judge advocate's office of the A. E. F., and know something of the work in the acting judge advocate general's office then, which was wholly independent of my office.

Senator CHAMBERLAIN. Gen. Kreger?

Gen. BETHEL. Gen. Kreger had an excellent office, and had a number of excellent lawyers as assistants. Now, it does seem to me that at times they were attaching too much weight to inconsequential error. Now, that is the sort of thing I fear. I trust my fears may not be well grounded.

Senator LENROOT. As I gather from such testimony as I have heard with relation to this military court of appeals, I gather that there was the fear that a court consisting of the representatives of the Judge Advocate General's office would pass upon the adequacy of the sentence and the punishments and not having that knowledge of military needs and discipline, would not be in a position to give such judgments as military discipline might require. But it has occurred to me that that could not be true, in so far as their power to review for prejudicial error is concerned.

Gen. BETHEL. I agree with you, Senator. I certainly would not desire to see any court, civil or military, sitting in Washington having the power to set aside and disapprove a sentence on the ground that they thought it was too severe, because such a court will have little or no conception of the necessities of military discipline in the far-away field.

Senator WARREN. It would not have in time of war?

Gen. BETHEL. Of course we must always think of a time of war when we are thinking of military law.

Senator LENROOT. But if such a court had the power to set aside such a verdict and send the case back for prejudicial error, so that military officers, after all, had control of the sentence, there could not be any objection?

Gen. BETHEL. There would not be in theory. I doubt the advisability of sending a case back a long distance. It would be impossible to call the court together again.

Senator LENROOT. You could have a new court like a new trial court in civil life and a new jury?

Gen. BETHEL. But we are rather averse to new trials in the military service, possibly without reason. We feel that military justice ought to be swift and we feel, in striving to convict the most guilty man, the Government had better bear the loss of a conviction rather than pursue it further.

Senator LENROOT. It is your idea that where prejudicial error has occurred that should end the case?

Gen. BETHEL. I would rather not make final answer on that point, Senator. I have always been very much inclined to dismiss a case that has been tried once, even where there has been no jurisdiction, rather than to pursue the man further, although I recognize that there has been no legal trial and you have the right to bring the person to trial. I have just read hurriedly the Kernan report and I find that it does make provision for a new trial. But I have not thought about the matter sufficiently to be willing to express an opinion.

Senator LENROOT. On another branch, I would like to ask one question. In this table of acquittals it appears that in the A. E. F. there were 1,062 acquittals approved and 149 acquittals disapproved. Generally speaking, what became of those acquittals that were disapproved?

Gen. BETHEL. That is merely an expression on the part of the reviewing authority that he does not agree with the court.

Senator LENROOT. That is the end of the case?

Gen. BETHEL. Absolutely.

Senator LENROOT. There was not in any of these cases, so far as you know, where the acquittal was disapproved, a subsequent finding of guilt?

Gen. BETHEL. There could not be.

Senator LENROOT. We have some testimony where there has been in the A. E. F.

Gen. BETHEL. No; where the reviewing authority acts upon a sentence by disapproving a sentence, that is the end of it. The trial is complete. Now, before acting on it at all, he may send it back to the court, or could, until recent orders, send it back to the court for reconsideration, stating the fact that he did not agree with their conclusions.

Senator LENROOT. What is the effect of disapproval of a trial, then?

Gen. BETHEL. It has the same effect in law as the approval of an acquittal.

Senator LENROOT. What is the purpose of a disapproval?

General BETHEL. It is merely an expression on the part of the reviewing authority that he believes the court should have found the man guilty instead of not guilty.

Senator WARREN. But the court dismisses the case?

Gen. BETHEL. The case is at an end. The case has been tried, and the Articles of War say that the accused can not be tried again.

Senator LENROOT. That is part of the Articles of War?

Gen. BETHEL. The Articles of War say that no man shall be tried twice for the same offense, and when a verdict of guilty or not guilty has been reached, the man has been tried, and when the reviewing authority acts on the case, it is at an end. Now until he acts on the case, he could, until recent orders, return the record to the court for a reconsideration of its finding.

Senator CHAMBERLAIN. He might have a conviction where there had been formerly an acquittal?

Gen. BETHEL. That can be done under the Articles of War, or could be until recent orders.

Senator LENROOT. But that can not be done under a disapproval of a trial?

Gen. BETHEL. No, when once disapproved, it is at an end.

Senator CHAMBERLAIN. I want to get that fixed in my mind correctly. We will say—I have a case in mind—here is a man who is charged with embezzlement and absence without leave. He is found not guilty of embezzlement and guilty of absence without leave. He is a commissioned officer and he is dismissed from the Army. Now the commanding officer who appointed the court sends that back and the man is retried on the same charge and found guilty of embezzlement and found guilty of being absent without leave and is sent to the penitentiary and dishonorably dismissed.

Gen. BETHEL. The reviewing authority, if he thought the officer should have been found guilty of embezzlement could return the record for reconsideration of the court on the charge of embezzlement.

Senator CHAMBERLAIN. Then the judgment is not complete until the reviewing authority gets it?

Gen. BETHEL. Yes.

Senator CHAMBERLAIN. But that kind of a case would be impossible?

Gen. BETHEL. That kind of a case was possible until recent orders.

Senator CHAMBERLAIN. A few months ago?

Gen. BETHEL. Just a month ago, quite recently.

Senator WARREN. You spoke of its preparation in June and its adoption in August or July.

Gen. BETHEL. I think that order was published in July. I am not sure. I know a copy just reached us in France before I came away.

Senator WARREN. I think there is nothing more, but we should be glad if the general would offer any suggestions or anything connected with his opinions and judgments on the main subject matter, that is on the bill before us, No. 64.

Gen. BETHEL. Yes, sir. I expressed myself a moment ago in answer to a question of yours as being opposed to the law providing in general, as bill 64 does, a maximum penalty for all times. I think it probably only just to myself and you that I should explain briefly my reasons.

Senator WARREN. I wish you would enter into that quite extensively, because that is a large question of fact as to whether we should specify innumerable maximum penalties or whether we should leave very much of it to the consideration of the various courts.

Gen. BETHEL. Now the penalty proper for an offense differs very much according to the circumstances. Let me illustrate it in this way. The offense of absence without leave for two or three days is under ordinary circumstances regarded as a very minor offense, possibly punished by a fine or forfeiture of three or four dollars, not more than that. Absence without leave in time of war, however, may be most serious. For example, when the Twenty-seventh Division, the New York National Guard Division, was in the line on the English front, there were a number of absentees. There were probably a dozen men who absented themselves, for what causes I do not know, for two or three days or three or four days.

Gen. O'Ryan, the commanding general, brought them to trial by a general court-martial and they were given, I think nearly all of them, a sentence of five years, without dishonorable discharge, for they were to remain with the colors. In other words, they did not escape the dangers of service, but went right on in service. That seemed like an outrageous sentence for the offense, and one of my assistants brought it to my attention immediately with the view of having it cut down. But I felt that Gen. O'Ryan was responsible for the discipline, for the efficiency of his division, and that these sentences had better stand for the time, which they did. Of course, when the armistice came those sentences were remitted by Gen. O'Ryan.

I merely state this case as showing the difference between absence without leave at one place and at one time and absence without leave at another place and another time. Now, if the law is going to prescribe a maximum penalty for every military offense that shall be effective at all times, in war as well as in peace, it must adopt a pretty heavy maximum and it will constitute an invitation to the court, and especially to green courts, which we have in time of war, to inflict that penalty regardless of all considerations.

Senator WARREN. You fear that it will incite severe punishment instead of making punishment less severe?

Gen. BETHEL. To my mind it would, especially if you have a sufficient maximum penalty to meet the more serious cases.

Senator WARREN. Now, in the case of Gen. O'Ryan, I take it the seriousness of that kind of cases was that if a dozen men could do that and pay a few dollars, a good many more would say that it was worth the price and act accordingly. In other words, the idea of the severe punishment was to prevent others from committing the same crime?

Gen. BETHEL. The object of all military punishment is to deter others from committing a like offense.

I would prefer that the Articles of War read, most of them just as they do now, with respect to the penalty, "as the court-martial may direct." If the court imposes too severe a penalty there are ample methods by which it can be remitted promptly. Every general court-martial record gets very critical examination in the office of the Judge Advocate General, where there is a clemency board or division at all times, and I have never known the Secretary of War to refuse to exercise clemency where the Judge Advocate General recommended it.

Senator CHAMBERLAIN. But by that clemency they do not remove the stigma of conviction?

Gen. BETHEL. I am speaking now of cases where the conviction was legal, where the man was duly convicted.

Senator WARREN. Where he should be punished, but where you limit the amount?

Gen. BETHEL. Yes, but where the punishment has been gross and excessive, we have an ample remedy at all times for the removal of the excess.

Senator WARREN. As to the sentences over there, what is your judgment, that they have generally been less severe or more severe than you would approve of, now as you look back over things? Looking back over your entire experience, would you approve of the sentences, under all the circumstances? I am speaking generally, of course.

Gen. BETHEL. Yes, sir, looking backward, I do not think that sentences as a rule were unreasonable under the conditions under which they were imposed. A number of sentences were two or three times as severe as they would be in times of peace. For example, the stevedores at the base ports were robbing boxes of pistols and rifles that were being shipped over for the use of our troops, and I suppose under ordinary circumstances the punishment for such an offense would not exceed a year, but several of those men were sentenced for five years and I think the looting was stopped.

Senator WARREN. They were selling them or just arming themselves with them?

Gen. BETHEL. What became of the stolen property I do not know.

Senator WARREN. But they were stealing them in quantities?

Gen. BETHEL. Yes, sir; breaking boxes open and depriving the United States of them, anyway. They were sent, several of them, for five years, and when hostilities ended, and they had served some six, seven, or eight months, we reduced the punishment to one year, to what it would have been in normal times. Now I think it was perfectly proper for the courts to do as they did, and I think it was perfectly right for us to do as we did later.

Senator WARREN. Has there been a general cutting-down of the sentences since the armistice and before returning to this country?

Gen. BETHEL. Yes, sir; almost immediately after the closing of hostilities we had an officer who had spent several years on clemency work in the Judge Advocate General's Office visit the two camps at Gièvres and St. Sulpice and examine every case.

Senator WARREN. We can understand then, can we, that immediately the extreme danger was over, all of these cases have been reviewed with the idea of clemency, to get them under the common law as soon as possible?

Gen. BETHEL. As soon as hostilities were over we took steps to mitigate the sentences to peace-time standards, or even further when discipline would not suffer.

Senator WARREN. I think you said you did not know much about matters as they were in this country?

Gen. BETHEL. No.

Senator WARREN. I was tempted to ask one or two questions as to the comparative severity, whether the degree of severity was compatible with the difference in surroundings, on this side and the other; then I was about to ask whether the same principles of clemency had been exercised and carried out in this country. I ask because I do not know.

Gen. BETHEL. I think the same steps were taken to exercise clemency over here as over there. Now whether the sentences were more severe here than in the A. E. F. I do not know. I have heard from papers and in other ways of some sentences in this country that appear to be grossly excessive, and I think much more excessive than any in the A. E. F.

Senator WARREN. They were really ridiculous?

Gen. BETHEL. Yes, I think so, Senator.

Senator WARREN. Unless you object to that word "ridiculous" that I used.

Gen. BETHEL. Some were ridiculous.

Senator CHAMBERLAIN. I think I agree that they were not only ridiculous but outrageous.

Gen. BETHEL. Of course there were ways to correct those sentences at once.

Senator WARREN. I assume that some of them were remedied, and I hope all of them.

Gen. BETHEL. I presume they were remedied quickly; they should have been.

Senator WARREN. One point you have not covered, either, is a matter of considerable difference between this present law and the proposed one; that is, the making up of the court by using privates and noncommissioned officers.

Gen. BETHEL. If the Senators have time, I have just marked a few things that I should be glad to speak of briefly.

Senator WARREN. We should like to hear from you on all those points, because that is our business here.

Gen. BETHEL. Shall I go ahead?

Senator WARREN. If you please.

Gen. BETHEL. Article 4 of the proposed bill proposes to place soldiers on courts along with the officers as members. I am not particularly hostile to this, but I think it is desirable that courts be as intelligent as possible and I think that the presence of soldiers on courts will render the court somewhat less intelligent, necessarily. If I felt that the soldiers in our service would feel that they were getting better justice by the presence of one or more of their comrades on the court, I would be willing to lose a little of the intelligence of the court.

Senator CHAMBERLAIN. General, I believe if I were going to be tried for any crime, I would rather be tried by a jury than by lawyers and judges. They do not go into the technical side of the question. They decide on the facts.

Gen. BETHEL. I do not believe a court of soldiers would be any more lenient toward the accused. I was told by the French officers that the soldier of the court was generally more severe in his judgment than the officer.

Senator WARREN. We were told that he was a noncommissioned officer of highest rank usually.

Gen. BETHEL. I think he is, yes. I think if you were to ask the soldiers in the service, I am speaking of regular soldiers, whom I know—the members of the temporary forces can speak better as to what they would want—I do not believe that they would desire their comrades on the court at all. The soldiers of the temporary forces can speak better for themselves than I can.

Article 5 proposes to have eight members in a general court-martial. I do not believe it is desirable to have an inflexible number. The exigencies of the service are such that although we begin a trial with a certain number of men, we are liable to end with a less number. If the law required eight at all times, you would have to add a new member from time to time, even add a member after all the evidence was taken.

Senator WARREN. You mean during the trial?

Gen. BETHEL. Yes, sir. It would sometimes happen that after practically all the evidence was in you would have to have a new member to vote at the end. So I am opposed to an inflexible number. Besides, the flexible number from five to thirteen permits us to convene such number as it is practicable to have sit.

Senator CHAMBERLAIN. You usually have five, do you not?

Gen. BETHEL. No, sir; the usual number is about nine. But it very frequently happened in important cases in the A. E. F., although the court would start with eight, or nine, or ten, that before the trial was over there would be only five.

The next objection I take to the articles in the bill is to article 8, which limits much more than the present law the persons who may appoint general courts-martial, and gives as a reason that to increase the number of appointing authorities is to increase the number of courts. I am in favor of just as few trials by general courts-martial as possible, but I do not believe that you would help that purpose any by putting obstacles in the way of appointment of courts. I would therefore prefer the law to remain as it is.

One very important provision that the bill has is that relating to the judge advocate and the powers that he shall have. It makes a judge advocate the presiding officer of the court, vests him with the power to decide all legal questions, and with many other powers. In other words, he becomes a judge and no longer a prosecutor.

I think it is extremely desirable to have a man learned in the law to preside in courts-martial and to decide all questions of law. It will require a good many more judge advocates, however, possibly a great many more than the person who drew this bill thought. However much we may endeavor to reduce the number of trials by general courts-martial, they are going to be necessary here and there, and in distant places, and the court-martial can not delay the trial of a case until a judge advocate can come from a long distance, or until he can get through presiding over the trial of some other case. In order that we may have prompt trials, trials that shall promptly follow the commission of the offenses, we must have a great surplus of judge advocates if we have one to preside at every general court-martial, so that I regard this proposition more as a practical question for you gentlemen in Congress as to whether you desire to increase the corps of judge advocates so much as will be necessary. The purpose of the office of judge advocate, presiding at a trial is excellent, because it will eliminate a great deal of irrelevant testimony, and I trust reduce the number of serious errors. As it is now, we have to disapprove a considerable number of cases because a serious error has been made to the prejudice of the accused, and learned judge advocates presiding at trials ought to be able to prevent that sort of thing.

Senator LENROOT. How much flexibility is there in the use of your word "prompt?"

Gen. BETHEL. It ought to be as prompt as possible; in time of war, it must be.

Senator LENROOT. What is the rule now between the commission of the offense and the finding of the court-martial? I do not mean rule, but how does it run?

Gen. BETHEL. It runs generally, I would say, from a week to a month, generally speaking.

Senator LENROOT. Generally speaking, a month would be the maximum.

Gen. BETHEL. Yes, sir. Of course, sometimes a witness becomes sick or has been sent a long distance away, and so on.

Senator CHAMBERLAIN. There has been a good deal of complaint that men were held in guard houses a month, two months, or three months before trial.

Gen. BETHEL. That ought not to be, except in the most unusual case where the witnesses can not be obtained.

Senator CHAMBERLAIN. And in other cases he was held a long time in the guardhouse before the court announced his decision.

Gen. BETHEL. Of course the records involving dishonorable discharge or a severe sentence now have to go to the Judge Advocate General for review; and it is impossible therefore under the present arrangement to have as prompt action as we had formerly.

Senator WARREN. Now, as to the length of time, what is the very shortest time in which a court-martial could be completed? I understand the accused has a certain time allotted him.

Gen. BETHEL. Senator, I have forgotten whether our recently enacted Article of War of 1916 provided a minimum time within which the accused should not be brought to trial. I have forgotten. We discussed it at the time. I do not know whether it was made five days or not.

Senator WARREN. I think some period is fixed. I do not know what it is.

Gen. BETHEL. I think it is a five-day period.

Senator WARREN. That is one reason why it could not be brought down less than a week. It would be a week anyway before you could proceed.

Gen. BETHEL. I certainly think an accused ought not to be required to stand an arraignment for three or four days except with his consent.

Senator WARREN. But if he consented to an immediate trial, it should be granted?

Gen. BETHEL. With his intelligent consent; yes.

Senator LENROOT. That is true in civil life.

Gen. BETHEL. I can not favor the transfer of the disciplinary power now vested in the commanding general, with his advisory judge advocate, to the judge advocate presiding at the trial, as is proposed in this bill.

Senator CHAMBERLAIN. What article?

Gen. BETHEL. Article 12. When I say transfer of power, you will observe that it is provided in paragraph (g) that the judge advocate, upon conviction of the accused, shall impose a sentence upon him.

Senator CHAMBERLAIN. Does not that mean that he shall pronounce the sentence that the court has found?

Gen. BETHEL. Maybe it does, Senator. I thought, from my hurried reading of it, that he was sole judge as to what that sentence should be.

Senator CHAMBERLAIN. It was not the intent. It is like the court passing sentence, but the verdict is by the jury.

Gen. BETHEL. Then I withdraw my objection.

Senator CHAMBERLAIN. Well, the context may have the interpretation that you place upon it. So you have discussed it from your viewpoint?

Gen. BETHEL. I think you are probably right, Senator.

Senator CHAMBERLAIN. You see there (g) [reading]:

Announce the findings of the court-martial and upon the conviction of the accused—

that is, by the court——

Gen. BETHEL. Yes.

Senator CHAMBERLAIN (continuing reading):

impose sentence upon him.

I think that would be my interpretation.

Gen. BETHEL. I did not read it that way.

With respect to article 23 of the bill, I heartily approve of giving the accused the right to two peremptory challenges before a general court and one before a special court.

Senator CHAMBERLAIN. Where is that; what section?

Gen. BETHEL. Article 23. I think it is very important that the accused feel that he is getting justice, and there are frequently members of the court against whom no challenge for cause can be made, but whom the accused would like to have removed from the court, as not fair-minded.

Now as to article 41, which provides a statutory requirement that the rules of evidence shall be the same as are recognized in the trial of criminal cases in the courts of the United States, I am doubtful as to whether the enactment would be beneficial. As a matter of fact, under the common law, military courts-martial observe those rules as far as they are capable now. If they were required by statute so to do, and the court were presided over by a judge advocate to enforce such requirement, I am afraid that the accused would be prevented from offering many things in his favor that courts allow him to offer now. Courts-martial are extremely liberal to the accused as to the character of the testimony that he offers. They are willing to make every sort of mistake in his favor.

Senator WARREN. You think that would lead to greater severity rather than to liberality.

Gen. BETHEL. I fear so. I see no necessity for the enactment of such a law.

With regard to article 46, I am in general accord. I have always believed that the mere majority should not be sufficient for conviction. I would go further even than the proposed article does. I would require four-fifths of the court to convict rather than two-thirds, and would make that rule of four-fifths general as to all offenses. I would not require a unanimous vote in the case of a death sentence.

Senator WARREN. Would not that be a little difficult to calculate?

Gen. BETHEL. No, sir; five is the minimum number of members. If more than one man in a court of five or if more than one man in a court of nine believes that the accused is not guilty, that the evidence is not sufficient, I would prefer to see the man acquitted.

Senator WARREN. Now, if you have seven or eight, and you take four-fifths of that, you would have one man where perhaps you wanted two in that number. How would you figure if you had seven or eight men?

Gen. BETHEL. If seven men sat on the court, and two of them voted not guilty, the man would be acquitted.

Senator WARREN. You do not confine it to four-fifths, then?

Gen. BETHEL. My rule would be that four-fifths of the members must concur in the finding of guilty. Then if there are seven members of the court——

Senator WARREN. Just what is four-fifths of seven?

Gen. BETHEL. It is between five and six, and therefore you must have six. In a seven-member court you must have six.

Senator WARREN. I believe the testimony before us is all the way from a majority to your figure of four-fifths, three-fourths, and two-thirds.

Senator CHAMBERLAIN. What is the next one?

Gen. BETHEL. Well, article 49 of course brings up the matter that we were discussing an hour or two ago. Article 49 of the bill provides that no sentence of death shall be carried into execution until approved upon review and in addition confirmed by the President. In other words, it takes from the commanding general of the armies in the field the power that he has always had, I believe, under the law, to carry a death sentence into effect for certain specified offenses. I am not favorable to the change that is here proposed, although my views may be very much affected by the fact that I have just been through an experience where I have had the responsibility of determining in large part these things myself, and I feel that, with the very able assistance I had at the general headquarters of the American Expeditionary Forces, the power to determine whether a death sentence should be carried into effect was not abused and will not be abused under like circumstances in the future. I think it is especially important, where our army is operating in a foreign hostile territory and where there may be guerrillas and other outlaws, that an example and an early example be made of such offenses, and that there would be a great delay if the records had to be forwarded to Washington for review by a court of appeals and a determination by the President.

Senator WARREN. I was just about to ask this: It is perfectly evident, it seems to me, from consideration of this subject, that you have got to have a different line of conduct permissible at the front in time of war from that permissible at home, or in peace time.

Gen. BETHEL. Yes, sir.

Senator WARREN. Now, that being the case, would you have two laws, one for peace and one for war, or one law with alternative provisions?

Gen. BETHEL. That is what we have now, Senator.

Senator WARREN. Or would you have one with different regulations?

Gen. BETHEL. We really have two laws now with respect to the death penalty—one for war and one for peace. In peace time no person but the President can order the execution of a death sentence.

Senator WARREN. That brings up the query again whether questions might not require different treatment at the front than elsewhere, not with the same emphasis, of course, as the death sentence.

Gen. BETHEL. I think I have expressed my views on the main changes which the bill provides. Among the minor changes I know that there are some that I am not in favor of, and there are others that I heartily favor, but I doubt whether it is advisable now for me to say anything about them. I should want, if I were going to express a mature opinion on the merits of this bill, to make a much more complete study of it than I have been able to do in the last two or three days.

Senator WARREN. The committee has been much pleased with your willingness to come and give us the suggestions you have.

Gen. BETHEL. There are two other officers who served in France and who have seen as long service as I have in the Judge Advocate General's Department—Col. Hull and Col. Morrow. They have had more experience in court-martial matters than any other officers in the Judge Advocate General's Department. They are at the War College.

Senator CHAMBERLAIN. Let us have them come up.

Senator WARREN. When we get along to it.

Gen. BETHEL. I wish you could also have Col. Winship, who is now in France. You should have him as well as the other two officers of whom I spoke, were it possible.

Senator WARREN. We are greatly obliged to you, and if we should wish to call you again, you may be able to come?

Gen. BETHEL. Yes, sir; I would feel honored.

Senator WARREN. Before the committee adjourns, I should like to present, for printing in the record, a letter addressed to me by Senator Johnson, of South Dakota, and the memorandum it refers to.

(The letter and memorandum are as follows:)

UNITED STATES SENATE,
Washington D. C., September 24, 1919.

Hon. FRANCIS E. WARREN,
United States Senate.

DEAR SENATOR: I inclose herewith for the consideration of the subcommittee of the Committee on Military Affairs, of which you are the chairman, memorandum containing the views of Mr. Lewis W. Bicknell, of Webster, S. Dak., formerly a major in the Infantry arm of the service, with reference to the procedure in the conduct of courts-martial and submission of evidence before military efficiency boards.

If it can consistently be done, I recommend that this memorandum be incorporated in the record of the hearings on the question of making certain amendments to the Articles of War relating to above subjects, which I understand is now pending before your subcommittee. Thanking you for your attention, I remain,

Yours, very truly, ED. S. JOHNSON.

MEMORANDUM TO THE HON. EDWIN S. JOHNSON, UNITED STATES SENATE, IN RE COURTS-MARTIAL AND MILITARY BOARDS TO DETERMINE FITNESS OF OFFICERS.

1. *The court-martial as an instrument of justice.*—A perusal of the provisions of the "Manual for Courts-Martial," issued in 1917 by the War Department, which is the authority for the administration of the affairs of military tribunals in the Army of the United States, leads to the certain conclusion that the court-martial, therein provided for, is set up primarily as an instrument

of justice for the purpose of affording military persons who are accused of offenses cognizable by a military tribunal a fair trial. Thus, paragraph 98 directs that "the trial judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts, or distort them, to the end that the evidence may so exhibit the case that the court may render impartial justice." Challenges are provided to eliminate prejudiced members of the court. (See Sec. I, Cr. VIII.) The court swear (par. 132) "well and truly to try and determine, according to the evidence, the matter now before" them, and to "administer justice, without partiality, favor, or affection," and in paragraph 198 and succeeding paragraphs, an effort is made to set out the rules of evidence, which govern military trials, under authority of the act of Congress approved August 29, 1916 (A. W. 38). These rules follows those known to the common law, and observed by the civil courts. Section II, Chapter XII, relating to findings, furthers this idea. Paragraph 294 directs that the members must base their votes upon, and be governed by "the testimony of the case, considered with the plea." They must be satisfied of the guilt of the accused "beyond a reasonable doubt" (par. 296).

I have emphasized this proposition, of the nature of military tribunals, for the reason that every criticism of the present system of courts-martial, whether directed to the fundamental idea that the military tribunal should not be subject to the interference of the appointing authority, or merely to matters of procedure, is met by the response that a court-martial is an instrument of discipline, and that the officer having authority to convene the court, being responsible for the discipline of the soldiers of his brigade, division, department, or whatever may be his military subdivision, must needs have control of the administration of "military justice" within such subdivision. This theory has been responsible for much that has led to criticism. Acting under it, commanding generals of divisions and higher units have not hesitated to return findings of "not guilty" for reconsideration, even going so far as to demand a contrary finding, although such a course has never been sanctioned, I believe, by the Judge Advocate General; nor have they hesitated to make officers of a court who refused to comply with these directions for a change of their decision feel the weight of their displeasure. It is well enough to urge in answer to this last suggestion that the ban of secrecy in voting protects the individual, and that in any event his action can not be made the occasion of official rebuke; promotions can be withheld or recommendations therefore disapproved, and in innumerable other ways the offending officers may be made to know that their action, while pleasing to their consciences, perhaps, under their oaths, was not pleasing to the general who convened the court. Not only might these things happen—I confidently assert that they did happen.

Consider, in passing, the utter impropriety of this attitude—that is, that the court is merely an instrument of discipline—the creature of the commanding general. Appellate courts, without exception, refuse to disturb findings of disputed issues of fact, holding that the trial court, which saw and heard the witness, or witnesses, is in a far better position to determine which witness told the truth, and what evidence is credible, than the judges of the supreme or appellate court, whose impression must be gathered from the transcript of the evidence, or an abstract of the evidence printed in the appellant's brief. Yet, if this position is to be sustained, the general of a division, or department, or army, or his judge advocate, are better qualified to determine the guilt or innocence of an accused soldier than a court, sworn to try him, who heard the evidence, saw the demeanor of the witnesses, and, under their oaths, returned such decision as their consciences could justify. I am convinced that courts-martial will only be true instruments of discipline when they are so conducted and their decisions are so safeguarded as to commend them to the consciences alike of those subject to their jurisdiction and the public, and that at present they commend themselves to neither. In the following paragraphs I propose to discuss certain particulars wherein the present system fails as an instrument of justice.

2. *Too great power is vested in the appointing authority.*—Under the present system of courts-martial, the officer having power to appoint a court-martial also has the power to do the following things with reference to the trial of any person subject to military law: (*a*) Name the members of the court; (*b*) select the trial judge advocate; (*c*) pass upon the "reasonable availability" of an officer whose service the accused may desire as counsel; (*d*) order the arrest and trial of a person subject to military law; (*e*) review the proceedings of the trial of such person; (*f*) order the reconsideration of the pro-

ceedings, especially of the sentence; (*g*) approve or disapprove the findings, sentence, or proceedings.

Before discussing the relation of these several functions to the proceedings of the court itself, I desire to trace, briefly, the procedure from the initiatory stages of a charge to the time it ripens into a trial. An examination of the records of the Judge Advocate General's department should disclose that by no means all of the cases which have been tried by courts-martial have been occasioned by the commission of some offense of so notorious a character as to attract public comment. On the contrary, a very large proportion of the cases arise from infractions of orders or breaches of discipline which are known only to a few persons—those intimately concerned in the case. The commission of a grave offense would, of course, be followed by the arrest of the offender, and the filing of charges. The commission of some infraction of orders or discipline would likewise be followed by the placing of the offender in arrest, and the filing of charges by the officer having knowledge of the irregularity. But not infrequently arrests are made by direct orders of the division or higher headquarters. Each division has its inspector, who is responsible for the investigation of alleged irregularities, has authority to examine witnesses, and from time to time, as occasion demanded, this officer would place in arrest persons subject to military law whose irregularities were disclosed by his efforts. And supplementary to his office, in some places at least, there have been organized "intelligence services," which were even carried to the length of having at least one man in every company who was required to report, over the head of his commanding officer and not through military channels of correspondence, any matter which in his estimation would justify investigation. The effect of this arrangement on the morale of the officers of an organization may be imagined.

An official investigation made by an officer who is disinterested is in all cases required after charges have been drawn and before a trial is ordered. This officer forwards the charges, with the statements of material witnesses and his recommendation, to the officer directing the investigation, who in turn is responsible that the charges are sent to the proper officer for further action, his own action in the premises depending upon the nature of the charges, his own authority, and the nature of the recommendation. In the cases mentioned above, where, in fact, an investigation was made before the arrest or before any charges were preferred, the formal investigation would be indeed a formal matter made by the inspector himself.

In all cases where a trial by general court-martial is to ensue, the charges are examined by the organization judge advocate. Unless he approves, the case does not go forward. It follows, then, that in every case before the trial has begun the evidence has at least been partly examined, and the representative of the appointing authority, usually the very officer to whom that authority will look for legal advice in the review of the proceeding, has expressed an opinion as to the sufficiency of the preliminary proceedings to justify a trial. Here should be noted a very important distinction between the functioning of this preliminary investigation and the functioning of the grand jury or committing magistrate in the civil courts, to which it may be likened. Once the grand jury or the committee magistrate has bound an accused over for trial, their connection with the case ceases, but in the military courts the very authority which orders or advises trial is the same authority which will eventually review the proceedings. From this circumstance it results that no distinction is made between finding enough evidence unexplained to justify a trial and seeking enough evidence in the record of the trial to justify a conviction. The attitude of the reviewing authority, speaking through his legal adviser, is apt to find expression in the mere reiteration of the opinion formed before the trial at the time it was ordered, brushing aside any offered explanation as wholly immaterial. Nor should we lose sight of the fact that the same man both orders the trial and reviews the proceedings.

Returning now to the relation of the functions of the appointing authority to the trial itself: It is necessary to preface my criticism with the statement that, given a fair appointing officer, a court composed of experienced, capable officers, and a trial judge advocate, and counsel for the accused, who have sufficient legal knowledge to try the case ably, the court-martial provides a speedy, fair, and effective instrument of justice, provided it is allowed to function as such. Unfortunately, all but the first of these necessary elements are frequently lacking, and at times the fairness of the appointing authority may be at least open to question.

Any instrument provided by men in authority to deal with the lives, or personal liberties, of men accused with offenses, should inherently exhibit and possess a high degree of independence of action, just as those elements which are capable of bringing about a miscarriage of justice should be eliminated, so far as possible. In the suppositions which follow I am not pretending to deal with cases which have happened—though I have reason to believe that I shall approximately state some actual situations—but my purpose is to show what may happen in the selection of a court, and its trial of persons subject to its jurisdiction.

(*a*) *The appointing authority names the members of the court.*—Suppose that Maj. A., a division judge advocate, has at the suggestion of the division inspector made an investigation which satisfies him that Capt. B. is guilty of an offense; he is on bad terms with Capt. B and names a court of officers who are his friends, to one or more of whom he states that he hopes to see a conviction and severe sentence. He adds that the general feels the same way about it. Can the accused have a fair trial? How can he reach the hidden bias against him?

(*b*) (*c*) *He selects the trial judge advocate, and passes upon the availability of the request of accused for counsel.*—It might not be open to criticism, but suppose the appointing authority has reason to believe that the only person who could adequately present the defense in a given case is Maj. ———, and, greatly desiring a conviction in that case, renders him unavailable for the defense by appointing him special trial judge advocate. Or, suppose that Pvt. D, accused of a serious crime, demands the assistant of Lieut. E. The appointing authority can inform him that this officer is not reasonably available. Further, he may suggest the name of another officer who is available. I once was approached by a division judge advocate, who asked me to suggest to an accused—I was trial judge advocate of a general court-martial at the time—that I could procure counsel for him, and he added, "If he agrees, we'll get Lieut. ———. He will stick him if you don't." I may add that I refused this assistance, and convicted my man over the efforts of counsel of his own choosing.

(*d*) *The appointing authority orders the trial of the accused.*—In many instances, as I have shown above, he knows in advance that there is going to be a trial, and has formed a strong personal conviction that the person to be accused is guilty, and an equally strong desire to see the imposition of a severe sentence. With this in mind, he might choose his court carefully, and having thus prepared the way he may order the accused arrested, direct that charges under whatever article of war is appropriate be filed, and bring the matter speedily to trial. He can not, of course, force the trial within the limits fixed by the manual for courts-martial—but he can get ready before the proceeding is started. The accused can not. If he is guilty, it may not matter. Suppose he is unjustly accused?

(*e*) *The appointing authority reviews the proceedings.*—I have previously discussed the effect of the preliminary investigation upon the mind of the officer charged with the review of the proceedings had upon the trial of a person subject to military law. Practically, there is no appeal; instead every proceeding is reviewed before the sentence or finding is promulgated. As this takes the place of an appeal, and is the final step in the whole matter at which the rights of the accused are to be considered, it is essential that the review be thorough, fair, and unprejudiced. Here again the distinction between the court as an instrument of justice, and the court as an instrument of discipline, as that word is unfortunately misused in most military organizations, presents itself. As the appointing authority of an instrument of justice, the reviewing officer might reasonably be expected to review the trial record with the rights of the accused prominently in mind. Suppose he had, at the time of ordering the trial, a strong impression that the accused was guilty. Is he more likely to look for corroboration of this impression, or for an explanation compatible with the idea of the innocence of the accused? Suppose the grand jury which returns the indictment, or the head of the detective agency which looked up what was alleged to be the evidence, or the prosecuting officer, in our civil tribunals, were the duly constituted appellate bodies? Yet where is the material difference? Your grand jury, and your prosecuting attorney are all supposed to be men of the highest order. So is your general officer. Yet if it does not work out of the army, why should it in the army?

(*f*) *He may order reconsideration of the proceedings and findings.*—I do not understand this to mean that a new trial may be ordered, or even that addi-

tional evidence may be taken; but the reviewing officer may order a finding or a sentence reconsidered. Suppose he, or his legal adviser, either by reason of ill will toward the accused, or from any other motive, commendable or otherwise, desires to see a conviction. It is certainly not unknown, though I think it is clearly unlawful, for the reviewing officer to return a record with a finding of "not guilty" with criticism, and a suggestion that the evidence required a judgment of conviction; and it is the practice, if a sentence is deemed inadequate, to return the proceedings with the admonition that a severer sentence should be imposed. If this is to be tolerated, why swear a court to try the case, and do justice? If the reviewing officer is to pass upon these matters with final authority, why have the court or the trial at all? If the reviewing officer, either through malice or mistake, believes a perfectly innocent man to be guilty of a serious offense, he can, under our system of courts-martial, come very near to depriving that man of his liberty and his reputation—indeed, in time of war, of his very life.

(*g*) *He approves the sentence, findings, or proceedings.*—Finally, the appointing authority has the power, except in cases where dishonorable discharge of enlisted men, or in the event of the conviction of an officer, to approve the sentence, and order its execution. Matters involving dishonorable discharge are customarily sent to Washington for final consideration—but this has been avoided in many cases by ordering the execution of the other part of the sentence at once, and deferring that portion involving dishonorable discharge until the execution of the balance of the sentence. This works nicely in the matter of a sentence for life imprisonment, for example.

I have indicated in a few general statements the possibilities of injustice under the present system, but I have by no means exhausted the possible contingencies which are presented by the focus of all of these several and frequently inconsistent powers in one person or office. The wholesale convictions of American citizens and the impositions by military courts of grossly excessive sentences, which were so frequent as to be a matter of common scandal; the wretchedly presented defenses; the shocking abuses in the treatment of military prisoners, all bear abundant testimony of the indifference of the high officers of the army to the rights of the individuals composing the army, as well as their wholly incorrect attitude toward a soldier accused of an offense.

On this last point another matter deserves mention. So far as my observation as an officer of the Army went, no effort is made to make a distinction between soldiers detained awaiting trial, and those convicted and undergoing sentence. All were lodged in the same guardhouse or stockade, and all were subjected to the same degrading hard labor; all were sent about under guard, in the presence of their comrades in their own organizations. Well enough, no doubt, if all were guilty. But how about those who are unjustly accused? What sort of soldiers will they be, after undergoing such treatment?

The several simple cases suggested in the preceding paragraphs, while presenting exaggerated complaints against the system, by no means exhaust the possibilities for error, injustice, undue influence, or the invasion of the rights of an accused by the excessive zeal of the officer who is charged with the enforcement of discipline, and vested with authority to order trials by court-martial. It is a matter of common knowledge, for example, that in some divisions organized during the war with Germany, sentences were uniformly excessive—and investigation would disclose the demand on its courts that this sort of sentence be imposed, by the division commander, or some one empowered to speak for him. And, at the risk of repetition, I can not refrain from suggesting the impropriety of a review of a proceeding by the very authority which caused the prosecution to be commenced. It is not enough to point out the great reliability of the officers discharging this duty. Granting that they are all that is claimed for them, they are being permitted to exercise a power over trials by military tribunals which experience has taught us can not be allowed to men of equal dignity, honor, and probity in civil offices. I am convinced that so long as they are allowed this power, abuses in courts-martial will continue.

3. *There is no adequate provision for retrial, in case of mistrial.*—Under paragraph 149, subdivision 3 (*a*), (*b*), (*c*), (*d*), and (*e*), it is provided that no person convicted or acquitted by a court-martial may be tried twice for the same offense. Among those situations specified as not constituting a "trial" within the meaning of this paragraph, is the reservation "where, for any cause, without fault of the prosecution, there was a mistrial." I can not see how the

inference is to be avoided that, if the "mistrial" is the result of a "fault of the prosecution," there could not be another trial, however plain the case against the accused. So, if a soldier be accused of a felony, and on his trial the trial judge advocate, not being learned in the law, seek to convict him with illegal testimony, and the record, on reaching the reviewing authority, disclose such errors that it can not be approved, it will follow that this man can not be again tried, with the result that he escapes all punishment for his misdeed. I have had personal knowledge of such disposition of cases involving capital offenses, as well as lesser crimes; and have known of numerous instances where a sentence which was wholly inadequate had to be approved because the record was in such shape that no further proceedings could be had.

Under similar circumstances in criminal prosecutions before the civil tribunals, if indeed it appear upon review that there has meen a mistrial, the accused does not escape, but is held for a retrial in order that his rights may be fully protected and the conviction secured, if any be secured, may be based upon lawful evidence, taken in a proceeding lawfully conducted throughout.

It should not prove difficult to remedy the present procedure in this respect, so that this most serious defect might be removed, and justice be thereby made more certain.

4. *Injustices due to lack of authority for the procedure of "Efficiency boards."*—During the period of military preparation incident to the war with Germany, it was necessary to consider the conduct, character, efficiency, and professional fitness of many of the officers, both temporary and permanent, in the army—the question in the case of the permanent officer being usually only whether he was fitted for the duties of the temporary rank he was holding, while in the case of the temporary officer the matter to be decided was frequently whether he should be dismissed from the service.

Under the authority of standing orders from the War Department divisional and other commanders established boards for this purpose, and ordered officers before them.

As late as September, 1918, there were not in existence any prescribed rules of procedure for such boards; neither were there rules relating to evidence, review, hearsay testimony, sufficiency of the showing required, receiving and considering testimony in the absence of the officer under investigation. Necessarily, the authority conferred in these matters was very great; and it was important, above all else, that all inefficient officers be eliminated, lest their inefficiency cause unnecessary loss of life in the zone of active operations; but an instant's reflection will show the very great danger incident to the exercise of this authority, and the necessity for every possible safeguard against injustice, the gratification of personal malice, the elimination of officers, to make vacancies for the promotion of others, and the employment of this means of securing the dismissal of officers where the charges would not have been sufficient for proceedings before a court-martial.

In the Thirty-fourth Division, in which I served before going overseas, I observed the following instances of the misuse of this power (i. e., to order officers before a board). At the hearing in the case of one Behr, a colonel of Artillery, a junior officer, a lieutenant, who discharged the rather discreditable duties of espionage officer (he was called "intelligence officer," but his business was to gather data on the conduct of officers of the division, by means of operatives distributed throughout the division), was called, asked if he had made an investigation as to whether Col. Behr was guilty of certain charges, and over objection insistently urged, was permitted to state his conclusion as to whether the officer in question was guilty. In the same case the board refused to compel this lieutenant to disclose the names of his witnesses for examination in the presence of Col. Behr. Later, during the hearing of the same matter, it appeared from letters introduced in evidence that the proceeding was initiated to make room for another officer as commanding officer of the One hundred and twenty-seventh Field Artillery. On such evidence Col. Behr's dismissal was recommended and secured.

An officer named Brome was promoted from captain to major, on recommendation of division headquarters. He was assigned to the military police. Two months later he was put before a board by the same headquarters, and his dismissal secured. In a published statement after leaving the service he intimated that he, as an officer of military police, had interfered with the pleasures of certain staff officers, to his subsequent misfortune.

At the hearing of the matter of Lieut. Col. Hollingsworth, One hundred and thirty-fourth Infantry, before a board of officers at Camp Dix, when an objec-

tion to some hearsay testimony was urged the president of the board, Col. Downing, One hundred and ninth Engineers, stated that no objections were to be considered; that the officer under investigation was only present by courtesy, and that other evidence could be and would be received and considered in his absence.

At hearings in the cases of numerous other officers, all that was received by way of evidence against them was the statement of their immediate commanding officers to the effect that in the opinion of such officer the officer under investigation "was incompetent to discharge the duties of his office," or that he did not properly perform interior guard duty, or that he was deficient in close-order drill. Upon such showing these officers were dismissed.

In the case of Lieut. Col. Hollingsworth, mentioned above, the division inspector made an investigation and reported that he did not find enough evidence to justify a court-martial trial, but recommended that the officer be gotten rid of before a board.

I appeared as counsel in a number of the cases I have mentioned, and write of them with intimate knowledge of what was done. I state unhesitatingly that the system of eliminating officers which was employed made every form of injustice, every desire to play favoritism, every kind of petty tyranny a thing easy of accomplishment and in many instances these things were accomplished.

Consider, now, this situation with reference to the objections I have previously urged to the system of courts-martial. Here was an added means for a commanding general to employ in getting military tribunals to register his views in a given case—for it was easy to put members of a court before a board, make formal charges of inefficiency, and get the officers out of the service—and let others profit by the example. And, as I have suggested, if the trial by court-martial failed, the efficiency board was always available. In one instance, I defended an officer—and I believe successfully—against charges which would have resulted in dismissal if sustained. Pending the trial he was put before a board, and discharged for the good of the service.

5. *The remedy suggested.*—With reference to the matter discussed under the subtitle No. 3 above, the remedy is suggested at the conclusion of the discussion of that item.

In the matter of the too great authority of the officers having power to appoint courts-martial, it seems that this ought not to be difficult to correct. If a board of review, wholly independent of the appointing authority, and possessing final authority to approve or disapprove proceedings, subject to such reservations in capital and other important cases as the Secretary of War might see fit to make, be established, in every military department in time of peace, with such additional personnel detailed as the greater activity of war organization might demand, and all proceedings be referred to such boards for final action or recommendation, the greatest objection to the present system would be removed. The board might properly be made up wholly of military persons, of suitable rank, and experience. The argument that such a board would lessen the power of the commanding general of a tactical unit to maintain discipline does not possess much weight, if we recall that the commanding general would still have the power to order the arrest and trial of all persons under him, and would only be deprived of the right to review and approve the findings.

In making up the courts-martial, it would be a very great improvement if the court be selected by lot, from the lists of eligible officers, and this course would eliminate another possible abuse of power.

The inefficiency and inexperience of trial judge advocates and counsel for the defense might well be corrected by provision for the permanent detailing of officers possessing the necessary qualifications, for duty with the courts-martial, thus providing men of experience both for the court and the accused, who, however, should have the privilege of securing other counsel if he so elect.

The accused, before his conviction, should not be detained in the same place with, and subject to the same treatment as, men already convicted and serving sentence. Not only is such a course manifestly unfair, in the case of one wrongfully accused, but it has a most detrimental effect upon the discipline of the soldier who is unjustly detained, and tends to bring the whole system of military justice into discredit with the very persons who should hold it in highest respect.

Provision should be made that the commanding officer having power to appoint the court-martial be notified at once of the result of the trial, with

the privilege of forwarding to the reviewing board his reasons, if any, for asking that the case be disapproved, reconsidered, or retried, and the board should be required to give due consideration to his expression, their final action to be governed by all of the evidence and circumstances in the case.

Owing to the inherent possibilities of oppression, injustice, and injury to the reputation of officers called before such boards, in the operation of efficiency boards, these boards should be provided for in a special article of war, which should plainly prescribe the procedure, proof required, and reasons justifying a hearing concerning any officer; and these boards, so constituted, should be invested with the same dignity as a military court, with record of their proceedings, and proper processes of review. In no other way can many gross injustices be avoided.

(Prepared and submitted by Lewis W. Bicknell, Webster, S. Dak., Major, United States Army.)

Thereupon, at 4.50 o'clock p. m., the subcommittee adjourned until to-morrow, Friday, September 26, 1919, at 2.30 o'clock p. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

FRIDAY, SEPTEMBER 26, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS.
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations, at 2.30 o'clock p. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

STATEMENT OF LIEUT. COL. W. C. RIGBY—Resumed.

Senator WARREN. You may proceed, Colonel.

Lieut. Col. RIGBY. I was asked yesterday to put into the record statistics concerning the restoration to the colors of men from the disciplinary barracks. These statistics we do not have complete in the office. They have been telegraphed for, and we can get them in time, so that if desired we can put them in my testimony when it is being written up.

Senator WARREN. At the proper place, where we made the inquiry?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. Very well.

Lieut. Col. RIGBY. And the same thing is true also of the statistics that were desired as to the recommendations of the Judge Advocate General. Those statistics were made up one time last winter for one year during the war, but we can have them ready to insert in the same way covering the entire period of the war.

As to the form of the French trial, it occurred to me that the quickest way perhaps to put that before the committee would be to write out the form of an actual trial as it would take place in a French court, and for the purpose of comparison I took the testimony of the record in the Ledoyen case, one of the cases spoken of as the "four French death cases." That is already in your record, I think. I turned that into the form of a proceeding in a French court in the armies on active service.

Senator WARREN. That would be not as to what judgments the judges would give, but as to the modus operandi.

Lieut. Col. RIGBY. The complete showing on it, making it with the same judgment that our judges gave, but the complete showing.

Senator CHAMBERLAIN. Why did you not take an actual French case?

Lieut. Col. RIGBY. Simply in order to get the absolute comparison. I could put in also, if desired, the record of some actual French cases which I attended, and of which we got stenographic reports.

Senator WARREN. Would you like to have one of these?

Senator CHAMBERLAIN. I do not care.

Lieut. Col. RIGBY. If desired, I would be glad to put that in.

(The form of record of trial prepared by Lieut. Col. Rigby, referred to, is here printed in the record as follows:)

MEMORANDUM SHOWING THE COURSE OF PROCEDURE IN THE FRENCH CONSEIL DE GUERRE IN THE ARMIES ON ACTIVE SERVICE; ASSUMING THE TRIAL OF A CASE LIKE THAT OF PRIVATE OLEN LEDOYEN, C. M. NO. 110751.

1. The accused, Private Olen Ledoyen, is charged with disobedience, the morning of December 14, 1914, of an order from First Lieut. Fred M. Logan to get his equipment and fall in for drill, in France, in the zone of operations at the front near the front lines in time of war. We will assume that this happened in a French organization.

2. The offense occurred at 8 o'clock in the morning, December 14. Ledoyen is immediately placed in arrest. Lieut. Logan telephones the company commander and the latter telephones the colonel, who directs the captain to investigate the circumstances and report. During the forenoon the captain procures written statements about the occurrence from Lieut. Logan and from a sergeant and a corporal who were present. He also has another lieutenant interview the accused in the guard house. The accused is sharply cross-questioned and is not warned of his right to refuse to answer. (Technically he has that right, but in practice really not.) The accused admits that he received the order from Lieut. Logan and that he did not obey it; that he refused to obey; says that the lieutenant "had us out on the hill yesterday, and we nearly froze to death, and this morning I was so stiff that I could not drill."

The captain sends the statement to the colonel about 1 o'clock with a memorandum that the accused has already been punished four times (by summary disciplinary punishment, not put on his service record) for failing to appear for drill at the appointed time and for disobedience of orders. The colonel receives the papers in the course of the next half hour and forwards them to the division headquarters through channels. They arrive by 3 o'clock and are referred to the chief of the section of military justice, immediately examined and an order prepared for the signature of the commanding general referring the case for trial by "direct order" (under section 156 of the code) without any formal investigation. The general signs the order directing trial at 5 o'clock the same afternoon before a special court-martial (emergency war court) under the presidential decree of September 6, 1914. The court is composed of a major, a first lieutenant, and a regimental sergeant major. The major is president of the court. A captain is appointed "commissaire" (judge advocate), and a young lawyer who is a private soldier is appointed counsel for the accused, by the same order referring the case to trial. The accused is immediately notified and served with a copy of the order, which contains the charges against him, and is advised of the appointment of his counsel and asked whether he desires to choose any other counsel for himself. He says no; he does not know anyone else whom he wants as counsel; and he is given an opportunity to talk the case over with his counsel.

3. Promptly at 5 o'clock the court convenes. At one end of the room is a high bench for the judges, at their left hand is a desk for the commissaire, in front are a few benches, behind that a rail partly across the room, and behind that half a dozen benches and a small open space. At the rear of the room eight soldiers are drawn up at attention with fixed bayonets. The court file in, wearing side arms, and take their seats. The commissaire takes his seat and the greffier (clerk of the court) is seated at a little desk at the right hand of the court. A noncommissioned officer is in charge of the guard of soldiers and another noncommissioned officer is at the door.

4. The procedure is as follows:

PRESIDENT. The court is open. Guard, bring in the prisoner.

(The prisoner is brought in under guard of two soldiers and is seated between them on a bench in front of the court; his guards have their bayonets

fixed. His counsel, wearing an advocate's robe over his private soldier's uniform, is seated on the first bench behind the rail—not inside the rail.)

PRESIDENT. Clerk, read the order convening the court and appointing the judges.

(The clerk reads the convening order.)

PRESIDENT. Accused, stand up. What is your surname—your first name?

ACCUSED. Olen Ledoyen.

PRESIDENT. Your age?

ACCUSED. 19 years.

PRESIDENT. Where were you born?

ACCUSED. Marseilles.

PRESIDENT. Are you married?

ACCUSED. No.

PRESIDENT. Your business?

ACCUSED. Mechanic.

PRESIDENT. Where was your last home?

ACCUSED. Marseilles.

PRESIDENT. Your rank?

ACCUSED. Private.

PRESIDENT. Your regiment?

ACCUSED. 111th (French) Infantry.

PRESIDENT. Sit down. Mr. Clerk, read the order referring the case for trial and the names of the witnesses.

(The clerk reads the order referring the case for trial, and the names of the witnesses, and then says:)

CLERK. The only witness called by the commissaire is Lieut. Sidney M. Logan.

PRESIDENT. Guard, see that the witness retires.

(Lieut. Logan, who has been sitting in the rear of the room, retires.)

PRESIDENT. Mr. Clerk, read the report of the rapporteur.

CLERK. There is no report from the rapporteur, the case being here under a direct order from the general. The report of the company commander is here.

(He then reads the report of the company commander with the statements of the lieutenant, the sergeant, the corporal, and the accused's own statement.)

PRESIDENT. Ledoyen, stand up. [Accused rises.] It appears from these papers that you are charged with disobeying an order to drill given to you by First Lieut. Logan, your superior officer, at 8 o'clock this morning. The law gives you the right to say anything which you consider useful for your defense. [Turning to accused's counsel.] I also warn you, Mr. Counsel, that nothing is to be said against your conscience nor against the respect due to the laws and that you must express yourself with decency and moderation. [Turning again to accused.] Ledoyen, you heard and understood the order given you by Lieut. Logan, did you not, and you knew that he was your superior officer, and that it was your duty to obey his orders?

ACCUSED. Yes, sir.

PRESIDENT. And you did not obey the order? You refused and stated that you refused?

ACCUSED. Yes, sir.

PRESIDENT. You were ordered to get your pack ready and get ready for drill with your squad?

ACCUSED. Yes, sir.

PRESIDENT. And Lieut. Logan gave you this order personally?

ACCUSED. Yes, sir.

PRESIDENT. Did you tell the lieutenant any reason why you refused to go to drill?

ACCUSED. No, sir.

PRESIDENT. The lieutenant repeated the order to you and you still refused, and then you were ordered under arrest?

ACCUSED. Yes, sir.

PRESIDENT (turning to commissaire). Mr. Commissaire Rapporteur, have you any questions to ask the accused?

COMMISSAIRE. No, Mr. President.

PRESIDENT (turning to the counsel for the accused). Mr. Counsel, have you any explanations to give or observations to offer?

ACCUSED'S COUNSEL. I have a few questions which I respectfully request the President to put to the accused.

PRESIDENT. State your questions.

ACCUSED'S COUNSEL. Please ask the accused why he was not willing to go to drill this morning.

PRESIDENT (to accused). You may answer that question.

ACCUSED. Lieut. Logan had us out on the hill yesterday, and we nearly froze to death; and this morning I was so stiff I could not drill.

PRESIDENT (to accused's counsel). Have you any further questions, Mr. Counsel?

ACCUSED'S COUNSEL. No, Mr. President.

PRESIDENT (to accused). You were able to walk this morning?

ACCUSED. Yes, sir.

PRESIDENT. You had not reported yourself on sick call?

ACCUSED. No, sir.

PRESIDENT. You did not give Lieut. Logan any reason for your refusal to obey the order?

ACCUSED. No, sir.

PRESIDENT (turning to commissaire). Mr. Commissaire Rapporteur, have you any further questions?

COMMISSAIRE. No, Mr. President.

PRESIDENT (turning to counsel for accused). Mr. Counsel, have you any further questions or any explanations to give or observations to make?

ACCUSED'S COUNSEL. No, Mr. President.

PRESIDENT (addressing his fellow judges). Gentlemen of the court, have you any questions to ask the accused?

(Both judges shake their heads.)

PRESIDENT. Ledoyen, sit down. [Addressing the guard.] Guard, have the witness, Lieut. Logan, come in.

(Lieut. Logan enters the court room, walks up to the railing, and stands facing the court.)

PRESIDENT. Raise your right hand. [Lieut. Logan raises his right hand.] You swear to speak without hatred and without fear, to tell the whole truth and nothing but the truth? Say, "I swear it."

Lieut. LOGAN. I swear it.

PRESIDENT. Put down your hand.

(Lieut. Logan lowers his hand.)

PRESIDENT. What are your surname and first name?

Lieut. LOGAN. Logan, Sidney M.

PRESIDENT. Your age?

Lieut. LOGAN. Twenty-six years.

PRESIDENT. Your rank?

Lieut. LOGAN. First lieutenant.

PRESIDENT. Your regiment?

Lieut. LOGAN. One hundred and eleventh Infantry (French).

PRESIDENT. Do you see the accused?

Lieut. LOGAN. Yes, Mr. President.

PRESIDENT. Did you know him before the occurrences with which he is charged?

Lieut. LOGAN. Yes, Mr. President.

PRESIDENT. Are you related to him in any way, by blood or marriage?

Lieut. LOGAN. No, Mr. President.

PRESIDENT. You have never been in his service, nor he in yours?

Lieut. LOGAN. No, Mr. President.

PRESIDENT. Give your testimony.

Lieut. LOGAN. This morning, about 8 o'clock, I gave the accused, Olen Ledoyen, an order to get his pack and get ready for drill with his squad. He did not obey that order. He refused and stated that he refused. He did not state any reason why he would not obey. He did it willfully and was warned at the time. I gave him the order in person, and he did not say anything as to why he disobeyed. He just said that he would not go to drill. I then told him of the consequences of such an act and gave him another opportunity to go get his pack and drill, and he again refused, saying, "I refuse to go to drill." I warned him of the consequences of his act.

PRESIDENT. State as nearly as you can remember, the exact words that you used in warning accused of the consequences of his act.

Lieut. LOGAN. I told him that he was making himself liable to trial by a court which might impose a very heavy penalty. There were four who first refused to go to drill, and two reconsidered and went to drill later. I asked the accused

if he understood what he was doing, and he and Pvt. Fishback refused to go to drill.

PRESIDENT. Did the accused know that the court might impose a death penalty for his act?

Lieut. LOGAN. I think not; I do not believe that I told him that.

PRESIDENT. You stated a heavy sentence?

Lieut. LOGAN. Yes, sir.

PRESIDENT. Did the accused offer any reason as to why he refused to drill?

Lieut. LOGAN. No, sir.

PRESIDENT. Was it simply a positive flat refusal with no excuses?

Lieut. LOGAN. Yes, sir.

PRESIDENT. Is it of the accused, here present in court, that you have been speaking?

Lieut. LOGAN. Yes, sir.

PRESIDENT (to the accused). Ledoyen, stand up. [Accused rises.] Have you any observations to make on the testimony of this witness?

ACCUSED. As I have already stated to the court, Lieut. Logan had us out on the hill yesterday and we nearly froze to death, and this morning I was so stiff that I could not drill.

PRESIDENT. Anything further?

ACCUSED. No, sir.

PRESIDENT. (turning to the commissaire). Mr. Commissaire-Rapporteur, have you any questions to ask the witness?

COMMISSAIRE. No, Mr. President.

PRESIDENT (addressing counsel for the accused). Mr. Counsel, have you any explanations to give or observations to offer on the testimony of this witness?

ACCUSED'S COUNSEL. No, Mr. President.

PRESIDENT (addressing the other judges). Gentlemen of the court, have you any questions to ask this witness?

(Both judges shake their heads.)

PRESIDENT (to witness). You may retire or be seated.

(Lieut. Logan salutes and retires.)

PRESIDENT. The commissaire du gouvernement has the floor.

COMMISSAIRE. I have no observations to offer, Mr. President.

PRESIDENT. The counsel for the accused has the floor.

(The counsel for the accused, standing in his place behind the railing, addresses the court for between 10 and 15 minutes. He makes an impassioned and rather flowery speech, appealing to the sympathy and mercy of the court, calling attention to the youth of the accused, his suffering the day before, his hard service for some time past, and his failure to understand the gravity of his offense and the nature of the punishment which it was within the power of the court to impose; and, admitting the technical guilt of the accused, pleads for as light a sentence as possible.)

PRESIDENT. Accused, stand up. [Accused rises.] Have you anything else to add in your defense?

ACCUSED. No, sir.

PRESIDENT. I declare the trial ended. Let the accused be removed.

(The accused is escorted out of the room by his guard; the judges retire to their private room. In about 10 minutes the judges return to the bench, the sitting is reopened, but the accused is not brought back into the room.)

(The president reads the judgment in the prescribed form, finding the accused guilty and sentencing him to be shot, reciting that the vote of the court is unanimous.)

PRESIDENT. The court is closed.

(It is then about 5.45 p. m., the trial having occupied about 45 minutes.)

The judges file out of the court room; the commissaire and the greffier go to the adjoining room where the prisoner is waiting with his guard and with half a dozen other prisoners under like guard who have been tried during the day. All of these prisoners are drawn up in line, and the greffier reads the various judgments and sentences in their different cases in the presence of all of them. Ledoyen is then removed by his guard to await the execution of his sentence.

5. The commissaire du gouvernement at about 8 o'clock the same evening, presents to the general a copy of the judgment of the court and an order for the general's signature, directing the execution of the sentence (no appeal lies from the judgment of the special court). The general carefully looks through the papers, asks the commissaire whether they are all in order and whether the commissaire recommends carrying out the sentence immediately, and upon

receiving the commissaire's affirmative reply signs the order, fixing the hour of execution at 7.30 the next morning.

6. At 7.30 the following morning the death sentence is carried into execution by a firing squad in the presence of accused's battalion. Immediately after the execution, while the body is lying on the ground, the battalion is marched past the body so that every man may have a close view of it for the purpose of impressing upon him the punishment meted out.

7. If instead of ordering the case before one of the emergency war courts (special courts), as above assumed, the commanding general had referred it to the regular conseil de guerre, the procedure on the trial would have been precisely the same, the only difference being that the accused would have been entitled to 24 hours' notice before the sitting of the court. In that case the court would have sat at 5 o'clock (or perhaps an hour earlier) on December 15. And in that case the accused would have had a right to appeal within 24 hours to the court of revision of the division, which would have resulted in 7 days delay in the execution, as follows:

1. One day for accused to pray appeal.
2. One day for papers to be filed with the clerk of the court of revision.
3. One day for accused's counsel to file his "memoir" with the court of revision.
4. Three days for the member of the court acting as rapporteur to examine the case and prepare his report for the court.
5. One day for the session of the court.

Upon affirmance by the court of revision, the judgment is carried into execution in the same way as above outlined.

Senator CHAMBERLAIN. This is for the purpose of showing that the American proceeding is more in detail than the French?

Lieut. Col. RIGBY. It is for the purpose of a comparison. With that I want to offer the form prescribed in the French "Guide Pratique et Sommaire" for the conduct of a case, upon which—together with my observation of the trial of cases—this is gotten up. That form occurs on pages 59 to 61 of the "Guide Pratique et Sommaire."

TRANSLATION OF PAGES 59–61 OF "GUIDE-PRATIQUE ET SOMMAIRE DES CONSEILS DE GUERRE AUX ARMEES": 1914 EDITION.

[Model No. XVI.]

GUIDE FOR A SESSION OF THE COURT.

NOTE.—Words italicized are those which are to be said by the president.

The members of the court take their respective places; the president declares:

The session is open.
Guard, bring in the accused, X———.
Mr. Clerk, read the order appointing the judges.
(Identification of accused:)
Accused, stand up.
What are your surname and given name?
Your age?
Your birthplace?
Are you married? (If yes) *How many children?*
Your business?
Your last place of residence?
(If the accused is a military person:)
Your rank? To what regiment ("corps") *do you belong?*
Sit down.
Mr. Clerk, read the order referring the case for trial and call the witnesses.
Guard, see that the witnesses retire.
Mr. Clerk, read the report of the rapporteur.
Accused, stand up.
It appears from these documents that you are charged with [taking up the charges set out in the order referring the case for trial].
I advise you that the law gives you the right to say whatever you have that is useful for your defense.

I advise you also, Mr. Counsel ("M. le Défenseur"), *that he ought not to say anything against his conscience nor against the respect due to the laws, and that he must express himself with decency and moderation.*

The interrogation of the accused follows.

(At its end:)

Mr. Commissaire Rapporteur, have you any questions to put to the accused?

Mr. Counsel, have you any explanations to give or observations to offer?

Have any of the judges any questions to put to the accused?

(Examination of witnesses.)

Guard, bring in the witness X———.

(To the witness:)

Raise your right hand.

Do you swear to speak without hate and without fear, to speak the whole truth and nothing but the truth?

Say "I swear it." Put down your hand.

What are your surname and given name?

Your age?

Your business? (For military persons before entering the service.)

Your residence? (For military persons before entering the service.)

(For military persons only.) *Your rank? Your regiment?*

Do you see the accused?

Did you know him before the events out of which the charges grow?

Are you related to him by blood or marriage?

You are not in his employment, nor he in yours?

Give your testimony.

(At the end of the testimony.)

Is it assuredly of the accused here present that you have been speaking?

(To the accused.)

Accused, stand up.

Have you any observations to make upon the testimony of this witness?

The Commissaire du Gouvernement has the floor.

The counsel for the accused has the floor.

Accused, stand up.

Have you anything else to add in your defense?

I declare the trial ("les débats") *finished.—Let the accused be removed.*

THE COURT RETIRES TO DELIBERATE ON THE CASE.

(The court is reconvened and the president reads the judgment; Model I.)

(If there is no other accused to be tried.)

The session is closed.

(Otherwise.)

The session will continue.

Guard, bring in the accused, Y.

(For a recess.)

The session is suspended for —— minutes.

Senator WARREN. Of course if you put in the actual French case, you would have to translate it, would you not?

Lieut. Col. RIGBY. I could do that also.

Senator WARREN. Unless the Senator feels that it is necessary you need not do that.

Lieut. Col. RIGBY. I will put in a translation of this form with my testimony.

Then I want to offer a report which Maj. Wells made to me of his attendance on a British field general court-martial in the Rhine district, together with the stenographic reports of those trials, and a letter to which I rather specially desire to call attention, or a carbon copy of the letter.

Senator WARREN. Those are trials in the American Army?

Lieut. Col. RIGBY. In the British army. The British field court-martial in the Cologne district.

(The report referred to is here printed in the record as follows:)

DESCRIPTION OF SITTING OF FIELD GENERAL COURT-MARTIAL OF THE BRITISH ARMY.

On Thursday, July 24, 1919, the undersigned, Maj. W. Calvin Wells, judge advocate, United States Army, accompanied by Army Field Clerk A. R. Hitchings, attending a sitting of a field general court-martial, held at Frankenfort, about 12 miles from Cologne, Germany. Brig. Gen. Mellor, deputy judge advocate general, stationed at Cologne, Germany, drove us out in his auto from Cologne to Frankenfort. Before going to the meeting place of the court, I had a conference with Capt. G. E. Sykes, a barrister in civilian life who in the army had been appointed as the legally qualified member of the field general court-martial. As hereinafter set forth, this legally qualified member really conducted the whole proceedings of the court, questioning the witnesses, there being practically no questions asked either by the prosecutor for the Government nor for the counsel for the accused.

The court was held in a pavilion or band stand in a beer garden which was a popular resort prior to the war for the citizens of Cologne. The band stand acted as a sounding board, having a solid back and the front being open toward the garden. The front of the band stand was curtained in by blankets and the court sat on one side and at the two ends of a table. The table covering and chairs were rough and crude and the blankets as curtains added to the roughness of the effect of the scene. The proceedings were entirely informal and without any pomp or ceremony whatsoever. The president of the court, a major, sat at the center of the side of the table, the two representatives of the American Army, myself and Mr. Hitchings, sat at the table at the right of the president, and at the right of Mr. Hitchings sat a member of the court, a captain, and at his right at the end of the table a first lieutenant sat. At the left of the president of the court sat Capt. Sykes, or legally qualified member of the court, and at the left of Capt. Sykes sat two officers of the British Army who were sitting for the purpose of instruction—at the left of those two officers sat the prosecutor at the end of the table, and at his left away from the table sat the counsel for the accused, a British officer who was not a lawyer or barrister. A noncommissioned officer, a sergeant, stood at the door and brought in the accused and witnesses during the progress of the sitting. This sergeant had in his hand a list of the cases to be tried and the names of the witnesses. Before calling the first case, the legally qualified member of the court swore the president of the court who in turn swore the members of the court. The legally qualified member also swore the two officers under instruction. The prosecutor was not sworn, whether this was an error or omission or not I do not know. The legally qualified member keeps a record of the proceedings in longhand. There is a folder with a printed form on the opening page and the concluding page, which was filled in by this legally qualified member with the names of the members of the court and certain other statements as to certain requirements of the statute. This folder is known as Army Form A-3, and a copy of the entire record of one of the cases, except the name of the defendant is entered as "A. B." is filed herewith marked Exhibit A hereto. There is also filed as Exhibit B for information, but having no connection with the field army trial here being described, the form for a general district and regimental court-martial, being Army Form A-9, which was given me by the president of the court. The legally qualified member of the court is used in a great many different courts and is ordered by telegram to go to the various courts to sit, and as above stated he practically conducted the court. A carbon copy of the telegram (in bad shape when handed me) addressed to Capt. Sykes is filed hereto marked Exhibit C. The original showed that the substance of the telegram was about the following: "Your services required at general headquarters 10th Queen's Royal Regiment, Frankenfort, on July 24 for the trial of five cases. You will be present at such G. H. Q." This telegram was sent from division headquarters, London, to Capt. Sykes at Cologne. When the court had been duly sworn and was ready to proceed to business, the legally qualified member directed the sergeant to bring in all of the accused, together with their guard and the witnesses for and against each accused. These were marked in by the sergeant and the accused appeared uncovered. The guards were covered and wore sidearms and the witnesses were covered. The members of the court, the prosecutor, and the counsel for the accused appeared unarmed and sat covered only uncovering when they were sworn in as members of the court. All of the accused and

witnesses, etc., were sent from the room after verification of their presence with the exception of the accused and his guard who was first to be tried. The charge was then read to the accused who plead not guilty. This first case tried was a charge of desertion, but as shown by the technical charge and specifications in the Exhibit A hereto, it appears to fail to charge anything more than absence without leave. I asked the legally qualified member about this and he stated that it was unnecessary in the pleadings to charge with a greater certainty than was done the charge of desertion, but that proof would establish the offense, to wit, desertion. Their pleadings appeared to be much less technical than ours. The witnesses against the accused were then called in and duly sworn by the interesting old common law custom of having the oath read to them by the legally qualified member while the witness held in his right hand the open Bible with his cap in his left hand, and at the conclusion of the reading to the witnesses, the witness repeated the words, "So help me God," and kissed the open Bible. The witness was then examined by the legally qualified member, who reduced the substance of his testimony to writing in longhand on paper to be placed in the folder, which testimony as so reduced to writing appears in Exhibit A hereto. At the completion of the questioning by the legally qualified member, he asked the prosecutor, the counsel for the accused, and the other members of the court if they had any questions to ask, and with the exception of two times during the whole trial no one else asked any questions. The proceedings were wholly informal and the questioning was efficiently done and a gist of the witnesses' knowledge on the subject quickly gained. Upon the completion of the testimony of the witness, he was marched from the room by the sergeant. There appears as an exhibit to the report to be made of the study of the English system an account of a preliminary hearing held in the Wellington Barracks in the Scots Guards in London where there was great pomp and ceremony and a tremendous noise made by the noncommissioned officers in giving their commands in marching the soldiers in before the court. There was none of this ceremony or noise before the trial in this field general court-martial. On the contrary, the orders of the sergeant directing the troops was in a low voice, and while witnesses were marched in and out, it was without ceremony and quietly done. The whole proceedings occupied about half an hour. The proceedings of this sitting of a field general court-martial as well as of others are so informal that it was difficult that we secured permission to have a stenographer present and take down a verbatum report of questions and answers as the British authorities thought it would give a misleading and wholly erroneous impression to any person who had not been present at the trial. After discussing the matter with Gen. Mellor, however, I secured permission to take this shorthand transcript of the testimony in one case, which testimony is filed herewith marked Exhibit D hereto. A carbon copy of the letter from the commander in chief of the British Army of the Rhine, answering the request of the war office at London to permit our presence at the sitting of the field general court-martial and take a stenographer verbatim report of the proceedings is filed herewith marked Exhibit E. It is easy to understand after seeing the informality of the quickness with which this case was tried, how the case described by Maj. Gen. Childs of the trial of a British soldier accused of cowardice on the retreat from Mons in France at the beginning of the war, could be actually brought to trial within an half hour after the commission of the offense, tried, sentenced to death, and executed and have the Germans marching over his grave within an hour after the commission of the offense. The value of such rapidity was emphasized and the righteousness of the proceeding was defended, and apparently satisfactorily, by Maj. Gen. Childs before the preliminary committee investigating court-martial procedure in the British Army. It appeared that some action was absolutely necessary at that time and the field general court-martial provided the means.

It is to be noted that on the conviction of the charge of desertion the penalty was 56 days' special punishment, which is field punishment No. 2, upon the finding of guilty by the court. Special punishment or field punishment No. 1, which provides for tying a prisoner to a wheel for so many hours each day for so many days, exposed to the public view, is not inflicted now since the armistice has been signed, though it can be inflicted by a field general court-martial still. It was very evident that the court, while finding the accused technically guilty, believed that the explanation made by the accused reduced the penalty to be inflicted to the minimum.

At the conclusion of the taking of the testimony the prosecutor made no arguments. The counsel for the accused made a short argument, clearly stating his position in very few words. The speech of the counsel for the accused was not reduced to writing and does not appear in the record. The prosecutor, who had the right to close the argument, did not do so.

The assistance rendered the court by the legally qualified member was very great, he practically conducting the entire proceeding; and being learned in the law, he permitted no evidence to be introduced which was not competent. If a witness undertook to state something which he did not know of his own knowledge, either for the prosecution or for the defense, he was stopped by him and told that such evidence was not competent and not to state it. He seemed desirous of getting at the exact truth in the briefest possible period of time, and after writing the substance of each witnesses' testimony, he read it over to the witness and had him approve it or change it according to his suggestion before the witness left the stand.

The accused was notified, just as in our courts, with reference to his rights to testify under oath or making an unsworn verbal or written statement, in which latter events he was informed that he could not be cross-examined, but that the unsworn statement would not have the same weight with the court as the testimony on oath. He was also told that he could do neither if he so desired. When the accused elected to be sworn and testify, he was directed to secure his cap and testify covered. The next case tried was one in which the accused pleaded guilty. He was fully informed that he did not need to do so, and if he did not plead guilty, all the testimony necessary to establish his guilt would have to be produced for the prosecution. Having stated that he still desired to plead guilty, there was placed in the record of the case the statements of the witnesses taken on the preliminary investigation of the case, and those statements went up as a part of the record and were read to the court in order that they might know what penalty to inflict.

This rough and ready court guided by a learned lawyer presented to me the best example of arriving at the truth in the least possible time of any court I have ever seen. To function properly and adequately protect the rights both of the Government and of the accused, it is absolutely necessary that the legally qualified member shall be a man learned in the law, of judicial temperament, and more concerned with arriving at the truth than in securing convictions, acquittals, or pursuing the fine shades of distinction between that which is competent and that which is incompetent. In the hands of a learned British lawyer of the above type it is a splendid instrument for enforcing justice; in the hands of another not so well qualified it could be made the instrument of oppression. If he desired to present only one side of the case in reducing to writing the substance of the testimony, he could omit such parts as were favorable to one side or the other, and all that he might reduce to writing be true, yet that which he omitted might be of the greatest weight and might in truth entirely change the sentence or finding which should be rendered in the case, and the reviewing authority would know nothing whatever of such testimony.

For the enforcing of discipline it is a wonderful instrument, but for the protection under all circumstances of the rights of the accused it can not be compared with the procedure of our general court-martial which protects in so many ways the rights of the accused, which protection does not appear before these field general courts-martial.

There is filed also herewith as Exhibit F a copy of a pamphlet styled "Circular Memorandum on Courts-Martial for Use on Active Service," given me by Capt. Sykes.

WILLIAM CALVIN WELLS,
Major, Judge Advocate.

EXHIBIT NO. A.

Army Form A. 3. Form for assembly and proceeding of field general court-martial on active service. Proceedings.

On active service, this twentieth day of July, 1919.

Whereas it appears to me, the undersigned, an officer in command of Second London Rifles, on active service, that the persons named in the annexed schedule, being subject to military law, have committed the offences in the said schedule mentioned.

And whereas I am of opinion that it is not practicable that such offences should be tried by an ordinary general court-martial.

I hereby convene a field general court-martial to try the said persons, and to consist of the officers hereunder named.

President: Rank, major; name, W. S. Hooker; regiment, L. R. Members: Rank, Capt. C. H. Long, Lieut. H. J. Tuffle, Corpl. G. Sykes; regiment, 10 Queens Reg.

(Signed) ——— ———,
Commanding London Infantry Brigade, Convening Officer.

Schedule.—Number, rank, name, and unit of accused[1]: No. 10026; Pte. A. B., 10th Queens. Offence charged: When on active service, "Absenting himself without leave" in that he in London on the 2d December, 1918, failed to rejoin his unit (on expiration of leave granted from 19/11/18 to 2/12/18) until surrendering himself to the garrison military police at Victoria Station at 23:50 hours 24/6/19 (section 15, 1A). Plea: Not guilty. Finding, and if convicted sentence[2]: Guilty; 56 days; S. P. No. 2.

(Signed) A. B. C.
(Signed) X. Y. Z.
COMMANDING LONDON INFANTRY BRIGADE.
Convening Officer.[3]

Maj. C. D., *President.*

COPY OF THE RECORD AS WRITTEN BY THE LEGALLY QUALIFIED MEMBER OF THE COURT WHICH CONSTITUTES ALL THAT WAS WRITTEN BY THE RECORD OF THE ATTACHED EVIDENCE.

Record of trial of No.———; Private A. B., 10th Queens, 124th Tr. Mortar Battery; prosecutor, Second Lieutenant———; counsel for defense, Lieutenant ———.

Prosecution:

First witness: No.——— Sgt.———, 124th Trench Mortar Battery.

On or about November 16, 1919 last, I saw accused pack up to go on leave to England. This was the last I saw of accused until July 15, 1919. I left the unit the day following I saw the accused packing up.

By the court: The unit broke up the day I left it.

Second witness: Captain———, ———.

Sworn stated: Accused belongs to the ———. He was attached to ——— when it broke up on or about November 19, 1918. Accused's duty was then to rejoin his unit. Accused reported to the battery on March 7, 1919. I produce certificate of surrender (marked A) signed and attached. I produce certificate of accused A. B. 103 (marked B), signed and attached.

By the court:

There were about nine other men of ——— in ———. These men all rejoined the battery.

Case for prosecution.

Defense:

The accused, duly warned and sworn, states:

I came to France in May, 1916, with ———. Before this leave I had one previous leave in October, 1917, from which I returned in proper time. I went on leave on November 19, 1918. I was due to return on December 2, 1918. I reported to the Victoria Station December 12, 1918, between —— and —— hours. I met a party of men coming away from the leave train. I was told by them that they had been granted an extension of leave and they were to await further orders. I thought it referred to me also, so I returned home. I expected to hear from the war office, and I waited a month. Then I went up to the war office and a noncommissioned officer told me to return home and await orders. I did so. Ultimately thought I had better return, so reported to the police at Victoria Station on June 24, 1919.

No. ———

By the court:

I do not know any of the men I spoke to on December 2, 1918. I took no steps to see an officer or the R. T. O. at Victoria Station to see if it was true,

[1] Unless unavoidable, not more than three names are to be entered on one form, and in very serious cases one only.

[2] Recommendation to mercy to be inserted in this column.

[3] Must be signed by the same officer who signs on the first page, and all alterations in the first two columns of the schedule to be initialed by him.

thought I might return home and await orders. I did not go to the proper inquiry office at the war office, I went to the recruiting office. The men did tell me who had given them the extension. They said it was for 14 days. I wore a uniform all the time I was away. I returned with all my equipment. I was at the same address I had left with the orderly room all the time I was away.

No witness for defense.

Address for the defense: Addresses the court.

After finding the prosecutor sworn, produces certificate of accused's, signed and attached.

No evidence called as to character.

Particulars of service: Enlisted November 21, 1915; not wounded; age, 21 years; overseas, May 5, 1916; not married; civil occupation, rully man; attached Exhibits A and B, referred to above, and the qualification sheet of accused.

Another case.—Enclosed in the Army Form A 3; record of trial of Pvt. A. B. ———, Queens; prosecutor, Lieut. ———; plea, guilty. (Effect of plea explained to soldier). Summary of evidence read (marked A) signed and attached. After finding: Prosecutor sworn produces accused's certificates A. F. B. 122, signed and attached (2 sheets). Accused in mitigation says: I got with some men I did not know who gave me some drink and I remember nothing more.

Particulars of service: Enlisted February, 1915; wounded, Albert, 1915, and evacuated to England; returned to France, October, 1918; overseas, November, 1916; not married; age, 22 years; civil occupation, laborer.

For the defense: (Statement read by the officer.)

I certify that the above court assembled on the 24th day of July, 1919, and duly tried the persons named in the said schedule, and that the plea, finding, and sentence in the case of each such person were as stated in the third and fourth columns of that schedule.

I also certify that (1) the members of the court, (2) the witnesses, (4) the officers under instruction were duly sworn, (5) that S. S. 412 was laid before the court.

Signed this 24th day of July, 1919.

Maj. C. D.,
President of the Court-Martial.

EXHIBIT B.

A.

Army Form A. 9.

[All printed matter not applicable to the particular court being held should be struck out and initialed by the president.]

Form of proceedings for general, district, and regimental courts-martial.

Proceedings of a ——— court-martial held at ——— on the —— day of ———, 19—, by order of ———, commanding, dated the —— day of ———, 19—.

——— ———,
President.

——— ———,
Members.

——— ———,
Judge Advocate.

Trial of ——— ———.

At — o'clock the trial commences.

(1) The order convening the court is read and is marked ———, signed by the president, and attached to the proceedings.

The charge sheet and the summary of evidence are laid before the court.

The court satisfy themselves that ——— is not available to serve owing to ———.

——— ———, waiting member takes his place as a member of the court.

The court satisfy themselves as provided by rules of procedure 22 and 23.

(2) ——— ——— appears as prosecutor and takes his place.

The above named, the accused, is brought before the court.

——— ——— appears as counsel for the accused.

The names of the president and members of the court are read over in the hearing of the accused, and they severally answer to their names.

Question by the president to the accused. Do you object to be tried by me as president or by any of the officers whose names you have heard read over?

Answer by accused. ——— ———.

(N. B.—If objection is made it should be recorded, together with the decision of the court, on a separate sheet.)

The president, members, and judge advocate are duly sworn.

The following officers under instructions are duly sworn.

CHARGE SHEET.

(3) The charge sheet is signed by the president, marked B 2 and annexed to the proceedings.

(Instruction. If the accused has elected to be tried under Army act, sec. 46 (8), the fact should be here recorded.)

The accused is arraigned upon each charge in the above-mentioned charge sheet.

Question to the accused. Are you guilty or not guilty of the [first] charge against you, which you have heard read?

Answer. ———

Question. Are you guilty or not guilty of the second charge against you, which you have heard read?

Answer. ———

Question. Are you guilty or not guilty of the third charge against you, which you have heard read?

Answer. ———

The accused having pleaded guilty to ——— charge, the provisions of rule of procedure 35 (B) are here complied with.

Instruction. If the trial proceeds upon any charge to which there is a plea of "not guilty," the court will not proceed upon the record of a plea of "guilty" until after the finding on those other charges, such finding being recorded on Sheet E.

C.

PROCEEDINGS ON PLEA OF NOT GUILTY.

(5) The prosecutor makes the following address [hands in a written address, which is read, marked ———, signed by the president, and attached to the proceedings].

The prosecutor proceeds to call witnesses.

First witness for prosecution.

Being duly sworn, is examined by the prosecutor.

D.

The prosecution is closed.

DEFENSE.

Question to the accused. Do you apply to give evidence yourself as a witness?

Answer.

Question. Do you intend to call any other witness in your defense?

Answer.

Question. Is he a witness to character only?

Answer.

(7) [If the accused gives evidence himself, but calls on no other witness to the facts of the case, his evidence will now be taken on a separate sheet.]

(6 and 7) * [The prosecutor addresses the court upon the evidence for the prosecution (and the evidence of the accused) as follows:

(Hands in a written address, which is read, marked ———, signed by the president, and attached to the proceedings.)

Question to the accused. ‡(6, 7, and 8) Have you anything to say in your defense?

Answer.

The accused in his defense says:

[Hands in a written address, which is read, marked ———, signed by the president, and attached to the proceedings.]

Instruction. * If the accused calls other witnesses to the facts of the case, whether he himself gives evidence or not, this paragraph will be struck out, and the course laid down in R. P. Appendix II (8) will be followed.

† This question will always be asked, unless the accused has himself given evidence and is represented by counsel or by an officer having the rights of counsel, in which case such counsel or officer only will be entitled to address the court.

C.

PROCEEDINGS ON PLEA OF GUILTY.

To be struck out in case no plea of "Not guilty" has been proceeded with.

(4) The court having been reopened, the accused is again brought before it, and the charge to which he has pleaded "Guilty" read to him again.

The accused ——— ——— is found guilty of———.

The summary of evidence is read, marked ———, signed by the president, and attached to the proceedings.

Question to the accused. Do you wish to make any statement in mitigation of punishment?

Answer. The accused in mitigation of punishment says: ——— (or hands in a written statement, which is read, marked ———, signed by the president, and attached to the proceedings).

Instruction. If there is no summary of evidence, sufficient evidence to enable the court to determine the sentence and to acquaint the confirming officer with the facts of the case will be taken on a separate sheet in the same manner as on a plea of "Not guilty."

If from the statement of the accused or from the summary or abstract of evidence or otherwise it appears to the court that the accused did not understand the effect of his plea of "Guilty," the court shall alter the record and enter a plea of "Not guilty" and proceed with the trial accordingly.

Question to the accused. Do you wish to give evidence yourself or to call any witnesses as to character?

Answer. ———

Evidence as to character.———

E.

FINDING.[1]

(10) The court is closed for the consideration of the finding.

(10 and 11) The court find that the accused ———.

PROCEEDINGS ON CONVICTION BEFORE SENTENCE.

(12) The court being reopened, the accused is again brought before it.

Evidence of character, etc.: ——— ——— is duly sworn.

Question by the president: Have you any evidence to produce as to the character and particulars of service of the accused? (Answer by the witness.)

The above statement [with the schedule of convictions and of cases in which trial has been dispensed with] is read, marked ———, signed by the president, and annexed to the proceedings.

Question by the president: Is the accused the person named in the statement which you have heard read? (Answer by the witness.)

Question: Have you compared the contents of the above statement with the regimental books? (Answer.)

Question: Are they true extracts from the regimental books, and is the statement of entries in the conduct sheets a fair and true summary of those entries? (Answer.)

Cross-examined by the accused.

(Instruction: If by reason of the nature of the service of the accused in a departmental corps, or otherwise, the finding of the court renders him liable to any exceptional punishment in addition to that to be awarded by the court (for instance, forfeiture or reduction of corps pay), the prosecutor must call the attention of the court to the fact, and the court must inquire into the nature and the amount of such additional punishment.)

Question to the accused: Do you wish to address the court? (Answer.)

The court is closed for the consideration of the sentence.

[1] To be omitted, except in cases of a plea of not guilty having been proceeded with.

F.

SENTENCE.

The court sentence the accused ——— ———.

EXHIBIT D.

VERBATIM REPORT OF BRITISH FIELD COURT-MARTIAL HELD AT FRANKENFORT, NEAR COLOGNE, GERMANY, ATTENDED BY MAJ. W. CALVIN WELLS, JUDGE ADVOCATE.

[Transcribed by Army Field Clerk A. R. Hitchings.]

Questions by legally qualified member of the court:

Q. Your name, please?—A. Capt. C. H. Lawrence.

Q. Your unit?—A. Tenth Queens.

Q. Your name, please, lieutenant?—A. Lieut. H. J. Trythall, Tenth Queens.

Questions asked by legally qualified member to prosecuting attorney:

Q. Whom are you prosecuting?—A. Pvt. A. B., Eleventh Queens.

Questions asked by legally qualified member of accused:

Q. Do you object to being tried by me or any officer of the court?—A. No, sir.

The president of the court was sworn in by the legally qualified member; the members of the court were sworn in by the president; the officers under instruction were sworn in by the legally qualified member of the court, each holding the open Bible and kissing the Bible and repeating "So held me God" at conclusion of oath.

Questions by legally qualified member to accused:

Q. ———, Pvt. A. B.?—A. Yes, sir.

The charge was read by the legally qualified member of the court.

Question by legally qualified member to:

Q. Do you plead guilty or not guilty?—A. (Accused) Not guilty.

The prosecutor calls for witnesses.

First witness for prosecution called was Capt. S. W. Gilbert, who was sworn in by one of the officers under instruction.

The captain was sent out and another witness was called and questioned by the legally qualified member:

Q. Your name?—A. S. W. Martin.

Q. Will you give evidence, please?—A. On or about the 16th of November last I saw the accused packing up to go on leave to England. That was the last I saw of him until some evidence was taken.

Q. When was that taken, the 15th of July, I suppose there is no question about that.—A. None. The unit was smashed up the day I saw him packing up.

Q. Did you remain with the unit?—A. Until it was transferred.

Q. But on the 16th of November you were with the unit.—A. I left the unit the next day.

Q. The day you left the unit, was accused with the unit?—A. He proceeded on leave that day.

Q. Do you know that he was on leave that day?—A. I know his warrant had come.

Q. Did you see the warrant?—A. No.

The evidence as taken by the legally qualified member was read over to the witness and he replied that it was O. K. The court had no questions to ask.

Further questions asked of witness by legally qualified member:

Q. You know the accused had a warrant but you did not see it?—A. I can not say anything more about it. They were all congratulating him as usual as he was going on leave, that is all I can say.

The witness was excused and Capt. Gilbert was called in again.

Questions by legally qualified member:

Q. You are Capt. F. W. Gilbert, Tenth Queens?—A. Yes.

Q. Will you give your evidence?—A. The private was attached to One hundred and twenty-fourth Light Trench Mortar Battery of the Tenth Queens.

Q. At what time?—A. I don't know, but the battery broke up somewhere about the 20th of November and at that time he was attached to same. A message was received by the battalion.

Q. We can not accept that as evidence. Can you tell the court what his duty would be on the breaking up of the battery?—A. His duty was to rejoin his unit.

Q. I suppose the leave, if any, was granted by the One hundred and twenty-fourth Light Trench Mortar Battery.—A. Yes.

Q. When did you next see accused?—A. Not until he arrived back the 3d of July of this year.

Q. You saw him on that date?—A. Yes; about half hour after he arrived.

Q. Can you say whether or not he was with the unit at the time the battery broke up until the 3d of July?—A. He was not with the unit.

I produced a document, a certificate of surrender. This document was read to the court.

Q. Is that your evidence?—A. I produce a paper.

Q. This can not be accepted as evidence. You are entitled to put in a certified copy of the whole thing. This is not the original?—A. No; it is not.

There was introduced in evidence a copy of the record showing accused going on leave.

Q. Do you, if others came back to the unit?—A. Sergt. Martin was one that did come back.

That is all the evidence for the prosecution.

The charges were read to the accused, that he was absent without leave from expiration of leave to date of surrender.

By legally qualified member to accused: You need not necessarily say anything, but if you wish to make any statement, the statement may or may not be made on oath. If you make it on oath, you swear that it is true and it has more weight with the court. It has this disadvantage that you are likely to be asked questions. If you do not make a statement on oath you can not be questioned.

By the counsel for the defense: I am going to call him on oath.

By the legally qualified member to accused:

Q. You understand that you become a witness in your own defense?—A. I do.

The accused was sworn in same as the other witnesses.

Questions by counsel for defense to accused:

Q. How long have you been in France?—A. Since May, 1916.

Q. Did you come to France with the battery?—A. I joined the battery when first formed and came to France with it.

Q. Have you had any leave?—A. I had one previous leave before this one.

Q. And what date was it about—the previous one?—A. It was about 14 months before this one, about October 1917.

Q. You returned from that leave quite all right?—A. Yes.

Q. Now you went on leave on the 19th of November, 1918, you were due to return on the 2nd of December. Will you tell the court why you did not come back?—A. I returned back to Victoria Station when my leave expired, and there was a party of men coming off the train.

Q. At what time in the day?—A. About 8.30 or 9 in the morning. The party of men were returning back from the train.

Q. Do you mean from the leave train?—A. I was informed by them that they had been granted an extension of leave and that I was to await further orders. I thought that that referred to me as well, so I returned with them. I expected to hear from the War Office and I waited a month. After that month, about a month expired, so I went to the War Office. All the satisfaction I got was to return. I asked a noncommissioned officer and he said to return and await orders, and I returned back and then I thought it was best for me to come back and I reported to Victoria Station.

Q. You did return home to wait orders, and then——A. I thought it better to go back and report there to the police.

Q. What date was that—I suppose there is no question about the date, on the 24th of June?—A. Yes. That is all, sir.

His evidence was read back to him and he approved it.

Q. Did you know any of the men?—A. No.

Cross-examination by the legaly qualified member:

Q. Did you yourself take any steps to go to the battalion or any officer on the 2nd of December to make sure that what these men told you was true?—A. No.

Q. Who did you see at the War Office?—A. There was a bunch of men there recruiting and I asked a noncommissioned officer and he told me to return back to await until I got orders.

Q. Where did you go to?—A. To the recruiting office, on the righthand side in Whitehall.

Q. You did not go to the proper inquiry at the War Office. Have you ever been there before?—A. No.

Q. And that would be about the end of January was it?—A. Yes; in January I do not know the exact date.

Q. You went home and waited for five months?—A. Yes.

Questions by a member of the court:

Q. When you saw these men coming from the leave train, did they say what the extension was?—A. I believe it was about 14 days.

The counsel for the defense wished to ask a question through the court:

Q. Were you wearing your uniform all the time?—A. Yes; I was dressed as I am now.

Q. You came back complete as a soldier?—A. Yes.

Q. What address did you stop at?—A. At my home.

Q. At the address you left in the orderly room?—A. Yes.

Q. Did you ever leave it?—A. No.

The accused then resumed his position as an accused.

Statement to the court by the counsel for the defense: You have got here a man who has been out to France the whole time of the battery; he goes on leave; after a certain time he returns all right; he remains with the battery until after the armistice, then goes on leave again, and he tells you he returned on the day that he was due. He meets a party of men who tell him he got an extension of leave. It was at the time of the trouble at Dover. He is a young soldier, he hears it, and he thinks it true. He does not hear after a month and goes to the war office. He had never been there before. The noncommissioned officer there told him to go home, and he waits at home. He keeps on his soldier's clothes. He goes to Victoria Station and reports to the police there. You have got two witnesses who can simply prove he went on leave and you have got the documentary evidence to show he reported at Victoria Station. You have got to believe his story just as much as you have the other two. I suggest to the court that there is not enough evidence in the case to prove this man guilty.

The court was closed.

The court was opened again.

Q. Is there anything in his record of previous convictions?—A. No; there is not.

Q. Will you give the court some proof of your service?—A. I joined the army the 21st of November, 1915.

Q. You came to France in May, 1916, the first time?—A. Yes.

Q. Have you been wounded?—A. No.

Q. How old are you?—A. I am 21 now.

Q. What were you before a soldier?—A. I was a carman.

The court was closed for a finding.

EXHIBIT E.

GENERAL HEADQUARTERS,
Cologne, July 8, 1919.

1. With reference to war office letter No. 0153/4572 (A. G. 3), dated July 6, 1919, I have the honor to inform you that I have no objection to the attendance at field general courts-martial of the members of the special mission. Col. Rigby should communicate, as regards details, with Brig. Gen. Mellor, D. J. A. G.

2. As regards your second paragraph, I do not consider it desirable that the course proposed should be followed in its entirety. It will be borne in mind that throughout the war attention has been continuously given to making a field general court-martial a tribunal whose sole object is to ascertain and act upon the truth with as little formality as possible, and all formalities beyond those which are strictly indispensable have been discouraged. In no case (with the possible exception of some colonial trials) has a shorthand note been taken of the proceedings, and I am of opinion that if any such course were followed on this occasion the very object of the special mission, which is assumed to be to ascertain our normal and ordinary method of procedure, would be defeated, inasmuch as the presence of a shorthand writer would be likely to embarrass the court and tend to disturb the normal course of procedure.

For the above reasons a verbatim report of the proceedings (which presumably it is intended to publish) would give a misleading and, in fact, a wholly erroneous impression to any person who had not been present at the trial. I am therefore entirely averse to the taking of a shorthand note.

As regards the proposal to supply (presumably for publication) a copy of the record, I have no objection to this, provided that the army council are prepared to depart from the established practice of refusing copies of proceedings to anyone except the person specified in section 124 of the army act. As at present advised, I am not prepared to supply copies without the express sanction of the army council. In any case, I consider that all proper names should be omitted.

I have the honor to be, sir,

Your obedient servant,

(Signed) R. HUTCHISON, D. A. G.,
for General, Commanding in Chief,
British Army of the Rhine.

Senator CHAMBERLAIN. Did you in making a selection of the case choose one that is typical of all the others?

Lieut. Col. RIGBY. These are the only ones of which we have stenographic reports, and we simply attended the ones that happened to be there being tried on that day.

Senator CHAMBERLAIN. I know that the two you put in during the retreat of the British forces at Mons were extreme cases, and I think you admit that.

Lieut. Col. RIGBY. They were death cases, Senator, and I gave them to you because they were the only two that were released from this confidential status by Judge Advocate General Cassel, therefore the only ones that I could give you, and the only field general courts-martial that I have except those which we took ourselves, which were the ordinary cases, and in that way I give both sides of it.

Senator WARREN. Anyone who reads that would understand that the circumstances were extreme, because it speaks of it as being in the face of the enemy. Would not that be so?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I may say that the letter of July 8, 1919, the carbon copy of which is attached to Maj. Wells's report, was received in London only on July 21, and that is the reason that I was not able to get over earlier and attend any of those courts, and had to send Major Wells after July 21, and when I was on my way home, all ready to sail.

Then I also want to offer Maj. Wells's report to me on the Belgian system, of which he made the examination covering the courts they have in Belgium and the administration of justice as he found it there.

(The report referred to is here printed in the record, as follows:)

PARIS, FRANCE, *June 16, 1919.*

From: Maj. William Calvin Wells, judge advocate, United States Army.

To: Lieut. Col. William C. Rigby, judge advocate, chief of special mission for study of court-martial practice and procedure of France, Great Britain, and other countries.

Subject: Study of the court-martial practice and procedure of Belgium.

1. Having completed the study of military practice, according to the practice and procedure of the military courts in Belgium, as directed by you, as completely as could be done by me in the time assigned for the investigation, I beg leave to report as follows, to wit:

MANNER OF INVESTIGATION.

1. Before proceeding to Belgium for study on the ground there I familiarized myself with the translation which had been prepared in the office of the special mission, of the Belgian military penal code, of the rules and regulations of

discipline, together with the decrees of Albert, King of Belgium, in which legislation was enacted with reference to military justice, together with the instructions issued by way of explanation of such decrees of the King, which decrees made changes in the military penal code which the experience of the war showed was necessary.

2. I proceeded to Brussels, Belgium, in company with you, where we were introduced by Maj. W. W. Hoffman, the American military attaché for the legation of the United States at Brussels, to M. Masson, minister of war; Gen. Merchie, chief of staff to the minister of war; Col. Corneil, chief of the first division, office of the minister of war; Maj. Michen, in the minister of war's office; Gen. Maglinse, assistant chief of staff, Belgian general headquarters; Lieut. Col. Hennon, third section, general headquarters. The introduction thus secured an entrée which assured a cordial reception to my efforts, and a wholehearted cooperation by the Belgian officers in giving to me the information desired.

3. I requested compliance with the request for statistical information, according to the questionnaire previously prepared by you and sent to Maj. W. W. Hoffman, military attaché, some weeks prior to my visit to Brussels, and which he had already presented to the Minister of War.

4. I soon ascertained that, in the opinion of the Belgian officers, a thorough understanding of the Belgian system would be better obtained through interviews with Baron (Gen.) van Zuylen van Nyevelt, the Auditeur General of the Belgian Army, which position corresponds generally to the office of the Judge Advocate General of the American Army, and with such other officers, most of them serving in that branch of the army, as would be designated and introduced to me by Baron van Nyevelt. I therefore interviewed Baron van Nyevelt, after having been introduced to him, at great length. At his suggestion I also interviewed, at great length, Maj. Jacques van Ackere, Auditeur Militaire en Campagne, who is a distinguished member of the Brussels bar and who during the early stages of the war was assigned for the defense of a large number of accused before the courts-martial, and who in 1917 was appointed by the King, Auditeur Militaire, and from that time until the present time has filled that position, prosecuting for the Government before the military courts.

5. I also interviewed the Minister of War, M. Masson, General de Ceuninck, who is one of the most distinguished generals of the Belgian Army, considered perhaps their best disciplinarian, and Baron de Broqueville, Minister de l'Interieur, who is probably the most distinguished official in Belgium, having been Prime minister, Minister of Reconstruction, and now holds the position of Secretary of the Interior.

6. I talked with various other officials at times when I did not find it feasible, or whose conversations I did not deem of sufficient importance to have present a stenographer and have such statements taken down verbatim.

7. I visited, in company with Baron van Nyevelt, and sat through a session of a Judicial Commission, which is the tribunal where the preliminary judicial hearing is first had on each complaint of a Conseil de Guerre, one of the courts before which all soldiers and officers up to and including the rank of captain are tried, and of the Cour Militaire, the supreme court to which every case tried by a Conseil de Guerre may be appealed and the court of general jurisdiction for trial of general and field officers. At each of these courts I had present with me a Belgian stenographer, who was recommended as being the most expert obtainable in Brussels, who, as far as could be done, took down in shorthand in French the proceedings in each of these tribunals. As these courts do not have official stenographers who take down the testimony and proceedings as done in our courts, and as the acoustic properties of the halls where the courts sat were very poor, and as frequently several of those present at the trials were talking at the same time, and at a very high rate of speed, and as some of the witnesses spoke Flemish and frequently in such a low tone as not to be heard, the transcripts made by this stenographer were not a great success, but will indicate in a way the character of questions asked, etc. There was obtained also, to be filed with this report, a copy of a dossier, that is the individual papers contained in the folder which constitutes the record, of a case which was heard before the Judicial Commission, and also a copy of the dossier in a case before the Cour Militaire, the court of appeal, which record had previously been before the Conseil de Guerre. The original papers which appear in the dossier before the Judicial Commission where the case is first investigated, go up and constitute the dossier before the Conseil de Guerre, and that

same record with such additions as are made at the hearing before the Conseil de Guerre go to the Cour Militaire and compose the record upon which the Cour Militaire bases its decision. The copies of these dossiers are filed as exhibits to this report and will show the manner of precedure in all of these military tribunals.

BRIEF NARRATIVE FORM OF THE PRACTICE AND PROCEDURE OF MILITARY JUSTICE AS ADMINISTERED IN THE BELGIAN ARMY.

A complaint may be lodged against a soldier, on account of an offense, by a civilian or by a soldier. If lodged by a civilian it is referred to an auditeur militaire who, in addition to his duties as a member of the judicial commission, prosecutes before the conseils de guerre, who has the witnesses summoned before the judicial commission and has there a preliminary investigation, informal but thorough. If the commission does not think the offense with which the soldier is charged has been committed, the complaint is dismissed and this dismissal is final.

If the complaint is lodged by a soldier, it is placed in legal form corresponding roughly to our charge and specifications, by an officer over the soldier, usually his captain, who has the complaint investigated in an administrative way by two officers of the regiment. This investigation is not a judicial but rather an administrative investigation for the purpose of securing certain facts with reference to the antecedents of the accused, his crinfinal record, if any, and statements of his character as a soldier by his commanding officer and also his general character, etc. To the complaint there is attached a form on which are made indorsements by the captain of the company to which the soldier belongs, as to whether trial is recommended, which is in turn indorsed by the battalion commander and by the reginfental commander and thus is transmitted to the commanding general who refers the complaint for investigation to the auditeur nfilitaire of the judicial commission for the division to which the soldier belongs. The judicial commission then makes a very complete investigation of the charge. It summons before it the accused who, not on oath, practically always makes a full and complete statement of his side of the accusation. He is not compelled to make any statement but in practice, as above stated, always does so. He is not warned that anything he says may be used against him on trial, but the soldiers generally understand that this is true. After he has been very thoroughly exanfined by auditeur militaire in the presence of the other two military members of that tribunal, the substance of his statements is dictated by the auditeur militaire to the clerk or greffier, who writes down on a form prepared therefor this statement, after which it is read over carefully to the accused. If he wishes any changes made in the statement, or additions thereto, they are carefully made; whereupon the accused signs this statement and it is verified by the signatures of the greffier, the auditeur militaire, and the two military nfembers of this tribunal. This statement forms the basis usually of the prosecution, in that it eliminates all undisputed elements of the offense and narrows the issue to the disputed point, which is usually very narrow. If the statement admits guilt it is practically the sole evidence used before the court-martial. The accused coming before that court is briefly questioned as to the statements contained therein, and, beyond character witnesses for the defense, usually very little more testimony is introduced. Where the accused only admits some of the elenfents of the offense on the trial before the court-martial only such witnesses are summoned on their testimony previously obtained and read, which go to the issue left before the court for determination.

After the statement of the accused before the judicial commission, the commission hears the testinfony of any witnesses which the accused desires to be heard in his behalf, and also any witnesses which the injured person, if the offense has been committed against the person or property or any other person, desires to be heard. The hearing is not all at one time and may be taken up from time to time as the witnesses are available. Usually it is completed in a few hours, the auditeur militaire having had summoned for the sitting all the witnesses having knowledge of the facts with reference to the charge. After the completion of the hearing of the testimony the commission finds as to whether or not the complaint should be referred to the court-martial for trial, or dismissed. If trial is recommended the case is sent to the court-nfartial having jurisdiction, where it is tried in due course.

If it is recommended that the complaint be not so referred and the complaint has been referred to the judicial commission for investigation by the general commanding, the recommendation is made to him that trial be not had on the charges, but this is not conclusive, he is not bound by the recommendation, and, if the general insists, the trial must be had before a court-martial. Before that court, however, the auditeur militaire can recommend an acquittal, which practically invariably follows such a recommendation.

The judicial commisison is composed of three members. The presiding officer is an auditeur militaire who must have the qualifications of being at least 30 years of age, also holding the degree of doctor of law, and he is appointed for an indefinite period by the King and is removable by him alone. This plan provides for the Government a skilled lawyer who investigates the case, prepares it for trial, and prosecutes in the name of the King. There are two other members of the judicial commission, a captain and a lieutenant of the army, who sit with him, advise, and vote with him in the final determination of the commission; but in practice the auditeur militaire does all of the work, but has the benefit of advice of these military members of the commission.

The questions and answers of the witnesses before the military commission are reduced to writing in longhand in as brief form as possible. On the trial before a court-martial the defendant has the right, and exercises it if he so desires, to have the witnesses present before the court, and there any witness may be cross-examined by the president of the court-martial at the suggestion of the counsel for the accused. Unless the testimony is important this is not done, however, and the time consumed in a trial before court-martial is very short by reason of this preliminary investigation and testimony so taken. It is thus possible for an accused to be tried and condemned to death without a single witness actually appearing and testifying personally.

If the case be referred for trial to a court-martial it is then docketed and in due course heard by that tribunal. There are seven permanent courts-martial for the various districts in Belgium in time of peace, and usually one for each division in time of war, with such others as are necessary for smaller bodies detached from the division. A court-martial consists of five members. The president and three others are officers in the army who are chosen to serve one month, unless sooner relieved by detail elsewhere, and are chosen by lottery from a list of each grade of officers available to serve on the court. Each must be a line officer serving in the body of troops over which the court has jurisdiction. The presiding officer is the ranking military member of the court. He presides and propounds all questions which are asked either of the accused, who is first examined during the trial, and of all the other witnesses.

The presiding officer sits in the center of the bench. On his right is the civil judge, a doctor of laws, and a magistrate who has had at least 10 years' experience as a judge on the civil bench, who sits in his black robe of office and is next in authority to the president of the court. He is appointed by the King for a period of three years. The other members of the court sit on the left of the presiding officer and on the right of the civil judge alternately, according to rank. The Government is represented, as above stated, by the auditeur militaire who has investigated and prepared the case for trial. The accused, while the regulations do not require that he be defended by a lawyer, in practice is almost invariably represented by a lawyer, either a civilian or soldier, but who always appears in his robes of office as an advocate. The accused may, if he is able, secure a lawyer of his own choosing for his defense, but if unable to do so, in time of peace one is detailed for his defense by the president of the bar association when requested to do so, and in time of war the president of the court secures an attorney either from the civil bar or from amongst the lawyers serving in the division or body of troops in which the accused belongs, and if thus chosen he must serve without compensation.

When a case against an accused is called before a court-martial the charge against him is read and no formal plea is entered. The president of the court reads to the court his report on the case, which is a statement of the charge and the evidence thereon. Evidence may then be taken of the witnesses for the Government. As many as are desired to do so appear personally, after which the testimony for the witnesses for the defendant may be heard.

During the examination of the witnesses for the State, frequently accused arose in his place and, while the witness was still upon the stand, denied statements made by the witness and was himself examined with reference thereto by the president of the court.

The witnesses, as stated above, are questioned by the president of the court, and after he concludes his interrogation he asks the auditeur militaire if he has any questions which he desires asked, and if there are any, they are propounded through the president. Likewise he asks the counsel for the accused if he has any questions, which, if any are propounded through the president of the court. The president also asks the accused if he has any questions to ask, and, frequently the accused denies statements made by the witness, and asks further questions through the president with reference to those facts.

After the testimony is all in the auditeur militaire argues the case for the King, is followed by the argument of the attorney for the accused, and the auditeur militaire has the right to conclude the argument, but frequently he does not exercise such right.

The court then retires to chambers to consider its finding and there the civil judge first casts his vote as to the guilt or innocence of the accused and also as to the penalty which should be imposed. During the war this was changed and voting on both questions was by secret ballot, the junior member of the court voting first.

During the interrogation of the witnesses and after the court retires to consider its verdict or finding, the civil judge advises the court with reference to the law and it usually accepts his statements of the law as correct, and acts thereon. This statement of the law is not reduced to writing and does not appear in the record. It is claimed that, in this way, very few errors creep into the record, especially errors of sufficient nature to cause a reversal of a case on appeal, and the cases are thus correctly tried in the first instance, in a large proportion of the cases. The proceedings on investigation as to the sanity of an accused resembles our own, but is not as complete.

The time consumed in the trial of the cases is very much shorter under this system than that consumed in our trials. The presence of the civil member of the court of the auditeur militaire, who is a skilled lawyer, and of the counsel for the accused, also a lawyer, minimizes the errors committed by the court to a very small percentage.

As soon as a verdict or decision of the court is reached, it is announced in open court, is final, subject only to appeal (except in case of trials before the cour militaire), and requires the approval of no officer of the army. The administration of military justice is entirely separate and distinct both in theory and practice in this system from control by executive officers.

Appeal may be taken from this decision by any one or all of three parties, to wit: by the accused, by the auditeur militaire or auditeur general for the government, or by the person injured. If taken by the last it operates only with reference to recompense, if any, ordered made to him, as the military courts have power under certain circumstances to order recompense made to the injured party for property wrongs. If appeal be taken by this third party, no change can be made by the court of appeals as to the punishment of the accused, but only as to such recompense.

The appeal, if any, must be taken by the auditeur militaire within three days, by the accused within three days, by the injured party within three days, and by the auditeur general within 15 days. After appeal, in actual practice, the time which elapses before the case is actually heard by the court militaire varies It is frequently heard in two weeks, very often three weeks or more. The law requires the hearing and judgment of the court of appeals within a month, but there are no penalties attached for not concluding the hearing within the month.

On the hearing before the cour militaire, the final court of appeal, a synopsis of the case is presented in writing by the president of the court. Witnesses can be called before the court if desired, though in practice it is seldom done. The court hears the cases anew on the law and the facts. Usually at the conclusion of the report of the president of the court argument is made by the auditeur general, or one of his two assistants who appear before that court, the auditeur general appearing in person only in very important cases. After the argument by the auditeur general or one of his assistants, called the substitute auditeur general, the case is argued by an attorney for the accused chosen as before the court-martial, such counsel appearing, whether civilian or military (soldier or officer) in his robe as an advocate. In conclusion, the auditeur general or his assistant has the closing argument, but frequently does not exercise that right.

The cour militaire does not retire at the conclusion of the arguments of each case before it considers its finding or verdict therein, but waits until the sitting for the day is concluded, when it reaches its verdict in all of the cases heard at the sitting.

If the auditeur militaire has not taken an appeal the court of appeal (cour militaire) can not increase the sentence, but can only diminish it or approve it as it stands. If the cour militaire holds that the case was sufficiently well tried to arrive at the truth before the court-martial but void for some error of law, it may substitute its own judgment for the judgment appealed from. Or if reversed for an error of law, the case may be sent back to be taken up anew from the point where the mistake in law was made, and a new verdict is then rendered by the same court. In case there was no preliminary examination—that is, no judicial examination and the case was tried by a court-martial—the entire judgment of the court-martial is null and void, and the case would be retried from the beginning, before the same court which tried it first, that is, the court for the same district or division. For mistakes in form, where, for instance, a judge or clerk failed to sign some part of the record, the cour militaire will hold the judgment void and will substitute the missing part and enter final judgment in the cour militaire.

When the case is finally decided by the cour militaire the commanding general can suspend the enforcement of the sentence if he so desires, and, if the conduct of the soldier is not good, he may afterwards enforce the sentence. The auditeur general has no power to show clemency or in any way diminish the sentence, but he may propose clemency to the King, in which event, in practice, invariably the King acts upon recommendation of the auditeur general in conformity therewith.

During the present war, however, an act was ordained by the King (it being impossible for Parliament to assemble, hence the King was held to have power to legislate alone) by the terms of which suspension was had of all sentences inflicted in the war until the termination of the war.

The military members of the cour militaire are chosen by lottery from the eligible list made by the minister of war for each rank, from line officers of the army. The president of the court is appointed for life by the King, must be a lawyer and doctor of laws, and must be a counsellor of the civil court of appeals, and must have had 10 years' experience as judge on the bench. He is retired on pay at 72 years of age. The military members of the cour militaire serve for one month.

The auditeur general is appointed by the King for life, but may be made to resign by order of the King at any time. He is usually appointed from the civil bench and is of the very highest standing as a lawyer and a judge. The office is considered one of the most honorable in the gift of the King. Baron van Nyevelt, the present incumbent, was a judge on the highest civil court of appeals at the time of his appointment as auditeur general.

In brief the above is an outline of the machinery and of the procedure before the Belgian courts-martial.

COMMENTS ON THE BELGIAN SYSTEM.

1. Both under the Belgian Constitution, and under the settled belief of the people of Belgium that it should be so, there is no commingling of the executive power of an officer of the army with the judicial power in the courts-martial for trial of those subject to its jurisdiction. In fact, a provision of the penal code which was enforced at the beginning of this war, which code dated back to 1815 before the constitution of Belgium was adopted in 1830, was held by the courts null and void where it sought to bestow on a commanding officer some judicial authority or power over the court martial, it being held by the courts that the two powers were separate and distinct. The practice and procedure in force cleary keep in view this line of demarcation.

2. The Belgians are jealous of the manner in which their judges are chosen, in order that no judges be chosen for the purpose of inflicting any special verdict or form of punishment. Only one member of a court-martial is chosen by the King and the other four are chosen by lottery from lists. When an officer is drawn he serves for one month as a member of a court, and it must be recited of record that he was thus drawn by lot in conformity with law.

3. The Belgian conception of the court-martial is that in truth and in fact it is a court and not an aid to the commanding general in the administration of discipline. This is shown by the fact, first, that a civil judge is a member of

each court in order that its proceedings may be properly conducted as a court, and by the fact that the officer who prosecutes in the name of the King is a skilled lawyer, and by the further fact that the counsel who defends the accused is a lawyer and appears as such in his robes of office as an advocate.

4. The penalties inflicted in the courts-martial do not appear as severe as those inflicted in the other allied armies or those of its enemies. Full statistics are exceedingly difficult to obtain, because of the fact that practically all of Belgium was occupied by the enemy, and since the signing of the armistice the State of the nation has been so disturbed and disorganized that it has been almost impossible for the department of military justice to classify the records of its military proceedings. Nevertheless, from the statistics which have been obtainable the above fact is clearly shown. During the entire war only 126 death sentences were imposed for all military crimes, and of this number only 14 were executed and the other 112 either commuted or suspended. When it is recalled that for one military offense alone in the French Army it was stated to us by Capt. Emile Martz, director of military justice with the armies, over 1,500 French soldiers were sentenced to death and over 1,000 actually executed, the leniency of the Belgian courts is readily observed.

When we recall that in the American Army during the war not one soldier was executed for a military offense, we see that in severity of punishment our courts are not in a class with those of the European courts, nor even of Belgium.

The kindly treatment accorded the accused at the hearing before the judicial commission was especially impressive to me. It indicated apparently a desire to assist the accused to explain away the offense charged against him. On the wall of the office of the minister of war appears in French, in substance the following motto: "Speak, for a friendly living ear hears you, but be brief, for you deal with busy people."

IMPORTANT DIFFERENCES BETWEEN THE BELGIAN SYSTEM AND THE AMERICAN SYSTEM.

1. The elaborate investigation made in practice by the Belgian authorities is much more complete than the preliminary investigation made in actual practice under the requirements of our Manual of Courts-Martial. The fact that the auditeur militaire is appointed practically for life, and is a lawyer and a doctor of laws at least 30 years of age is important. The association with him on the commission of a captain and a lieutenant familiar with military service give to the lawyer the technical knowledge from the army standpoint. The fact that the witnesses are called and examined in this preliminary hearing in the presence of the accused, and the recording of the testimony of such witnesses to be submitted to a court-martial as a basis of the evidence for trial there requires careful preparation.

But this very careful preliminary investigation must of necessity and does carry with it a serious drawback, to wit, delay.

The figures with reference to the percentage of acquittals in the Belgian courts do not bear out the conclusion that a careful preliminary examination will necessarily reduce the proportion of acquittals to an inconsiderate number. The deduction drawn by some that a percentage of acquittals as high as 10 or 12 per cent is indicative of a victorious court-martial procedure I do not believe to be correct. My experience in civil life teaches me that the proportion to be expected is far above 10 per cent. I prefer to draw the deduction from such a proportion of acquittals that the members of the courts are dealing out justice to the accused as they see it, by acquitting them in that proportion of cases, dominated and controlled by no authority, save their own consciences.

2. Under the Belgian system there is a court of appeal of the type recognized in our civil courts, to which either the accused personally or by counsel, the government, or the person injured in his property may appeal (the latter for pecuniary recompense only). In our system the office of the Judge Advocate General performs functions such are are usually performed by a court of appeals; but his findings are recommendations. This is the logical result of the view held by British and American text writers on military law, to the effect that courts-martial in the armies of those countries are not courts in truth and in fact, but are aids to the commanding general for the purpose of enforcing discipline. If that view, as has been held in those two countries in all times past to be the correct view, is continued, then it logically follows that the functions of the judge advocate general should be those of

an adviser to the military commander responsible for discipline and not the action of a court of last appeal. In this connection the views of Baron de Broqueville in his interview with me on June 13, 1919, should be carefully considered. As secretary of war of Belgium during a portion of the late war he had experiences which convince him, he stated, that the American system was the correct system. (See p. — of this statement.) I call your attention further to the statement made by Gen. Gouraud, one of the most distinguished French generals, to the same effect.

If our time-honored system is to be overturned and our courts-martial are to be strictly and solely courts, and not aids to discipline, then it follows logically that such courts should be entirely divorced from the control of the commanding generals, and a court of appeal in fact established for the reviewing of all trials in time of peace. In time of war it should be determined what, if any, cases should be permitted to be appealed. It is of interest further to note the statement of Baron de Broqueville on this subject also, if such court of appeal be founded. It is his settled belief that in time of war no appeal should be granted. Maj. van Ackere expressed his belief that no appeal should be granted in time of war, save those involving the question of the jurisdiction of the court.

3. A third difference between the military courts of the Belgian army and the court-martial of the American Army consists of the fact that in each of the Belgian courts one member is a civil judge of long experience, a doctor of laws, while in ours each member of the court is a commissioned officer in the Army.

Whether we continue our views of the province of the court-martial or whether we adopt the Belgian system of viewing courts-martial as pure courts of law, separate and distinct from executive power, it seems to me that less errors would be committed in the trials with such civil judge as a member of the court. If appeals be allowed, the number of reversals would be cut down. If no appeals be allowed, then more surely and certainly the action of the lower court would be right, and justice more certainly attained.

4. Likewise, the use of a trained lawer as the prosecuting officer for the Government in our courts, under either view, would tend to the same end as that above described in having a civil judge as a member of the court.

5. The fifth difference lies in the fact that in our courts-martial, the accused seldom has the benefit of a trained lawyer in his defense. Usually he is some commissioned officer of low rank who is his friend, but who has no legal training. So long as the judge advocate prosecuting for the Government has no more legal training than has been the case in the past, the Government had little advantage over the accused, whether he be defended by a lieutenant or not. But should the officer representing the Government, and prosecuting the case, be a trained lawyer, the accused should have the benefit of a trained lawyer for his defense. It would be inequitable and unjust to have the case for the Government skillfully presented, and the case for the defendant unskillfully and illogically presented.

Every safeguard should be devised possible, however, to prevent the courts-martial being transformed into the farce of a maze of technicalities, such as has become, in large part, the modern criminal trial in civil courts of America. The adoption of the plan used in the Belgian cour militaire, by which (in original trials before that court) neither the prosecuting nor defending counsel questions the witnesses, but in which that duty rests upon the president of the court, a civil judge, would prevent many long and frivolous delays and quibbles which might otherwise ensue.

6. The sixth difference between the two systems, lies in the fact that the military members of the Belgian courts are chosen by lot from the list of eligibles of each rank who are line officers of the army, while under the American system they are chosen by the commanding general. This manner of choice illustrates clearly the different viewpoint of the two systems. Under the Belgian system, whoever happens to be chosen by lot serves, whether he be specially qualified, or not. The judge who tries the accused is chosen by chance. On the other hand, under the American system the members of the court are chosen for their special qualifications. If discipline be lax and morale be low in a division, and the commanding general who is responsible for the upholding of discipline and morale feels that officers who especially feel the responsibility of correcting such condition should be chosen, he is at liberty to do so. That which under our past system is considered a virtue, however, from the Belgian viewpoint is a vice. It follows, therefore, that each system is logical in its manner of choos-

ing judges. The system of choosing judges which is adopted for the American Army in the future should depend upon the viewpoint which shall control as to our military courts in the future.

7. The seventh difference noted is, that in the Belgian system, while the military members serve for only one month, the civil member of a court-martial serves for three years. In the American system all the members of the court are chosen for an indefinite period and may serve either less or more than a month, but usually more.

I can see neither especial advantage nor disadvantage in either the Belgian or American system with reference to length of service of the military members. As to the Belgian system of having one civil member sit for three years, although all the military members are constantly changing, it appears to me that this plan may have some virtue. Within that period of time the one member of the court who is permanently sitting should become very thoroughly familiar with the military laws, practice and procedure and much more apt to advise the other members of the court correctly than if he should change monthly or in very short periods of time.

8. The eighth difference is that officers in the Belgian army of the rank of major and above are tried only by the cour militaire, which is the court of appeals as to all soldiers and all other officers. In our Army no officer, unless unavoidable, is tried by a court consisting of members of the court who are junior in rank to the officer being tried. As the composition of the Belgian court-martial is usually composed in part of officers under the rank of major, it appears that in practice there is little difference between the two systems. Doubtless more dignity is had in the trial of an officer of high rank before the court of appeal than before the court usually of original jurisdiction.

9. The ninth distinction between the two systems noted is that after final decision by a court-martial in the Belgian Army, the judgment of the court is immediately announced, is final, and needs the approval of no executive officer to give it validity. Under the American system the decision of the court is kept secret until first reported to the commanding general, who is the reviewing officer, whose approval or disapproval is necessary to the finality of the judgment of the court-martial, and who has the power to return the record to the court, and to suggest a different verdict on the question of guilt or lack of guilt, and a different penalty. This power of the commanding general under the American system is the logical result of the viewpoint that the court-martial is merely an aid to assist him in the enforcement of discipline. So long as that viewpoint is held by us, it logically follows that the officer who is responsible should in a large measure have the determination of the guilt or innocence and amount of penalty meted out to the accused.

10. The tenth and last serious difference, speaking in broad terms, between the American and Belgian systems, is the fact that the Belgian court always consists of five members, who have each an alternate, and if any member be disqualified for any reason, the alternate sits in his place. The American system provides for not less than 5 members nor more than 13 members, with no alternates. This larger number of 12 or 13 may be founded upon the similarity to the number of jurors sitting in our time-honored petty-jury system which we have from the common law of our English ancestry, which number is always 12. Personally, I see no sanctity in a court being composed of 12 men, where they have the right to decide issues of law as well as of fact. While it may seem illogical to cling to the jury of 12, and yet approve the court-martial of 5, I believe that justice would be quite as well attained with less disturbance to the military service if our general courts-martial consisted of 5, rather than from 5 to 13.

GENERAL OBSERVATIONS.

1. In considering a system of practice and procedure for military justice, it is necessary to consider the racial characteristics, traditions, and heritage of the people to be judged and tried thereby. One system which may be perfectly satisfactory to one race of people may be entirely unsuited to another. Our close kinship in habits of thought, systems of laws, racial characterisites, and inheritance may well cause us to look to the British system rather than that of any other nation. If the British system produces what is desired, to wit, morale and discipline with justice, it follows that more serious consideration should be given to that system than to other systems suited to other races different from, and adverse to, our race in the habits, customs, and traditions.

2. It is seriously questioned by many whether the Belgian Army had during the recent war the discipline which is desired in our Army. Many with whom we have talked do not seem to think that the Belgian Armies had such discipline. The answer to that question largely depends upon the viewpoint as to what good discipline is. Maj. W. W. Hoffman, American military attaché at Brussels, insists that the Belgian Army had discipline. As he aptly says, we must in viewing the question, consider the disadvantage under which the Belgians fought in this Great War. At the very outside their country was overrun by a neighboring country, overpowering in wealth and overwhelming in numbers. Their magnificent forts were, many of them, utterly destroyed in a few weeks by the most enormous guns ever used in warfare up to that time. Their whole country, save a very narrow strip, was overrun within the first few weeks of the war and held in the grasp of a powerful enemy. The Belgian soldiers for the most part were unable to know the fate of their loved ones at home. They held about 30 miles of the long battle line from the English Channel to Switzerland, which sector was located nearest the coast, in the lowest and most disagreeable portions of the trenches. All these things combine to destroy morale. More than that, over half of the Belgian people were Flemish, allied in a way by race with their enemies, who persistently sought to win them over in a clumsy sort of way. Nevertheless, and in spite of all of these disadvantages, the Belgians fought magnificently from the onset of the war, August 1, 1914, until the curtain fell on the drama by the armistice on November 11, 1918, and even afterwards, now when it was uncertain whether the peace treaty would be signed by the Germans, perhaps the Belgians stood ready more eagerly to continue the conflict than any of the other allied powers.

And yet in many ways the discipline of the Belgian Army is not what we desired and what we desire now in our Army.

As an illustration of this, one of the cases examined by the judicial commission the day it was attended by me in Brussels was that of a corporal, who during the period of hostilities was ordered to report in the rear, from the front line where he was serving, to a school for sergeants. Upon the completion of the course of training, he, a corporal, would have been promoted and made a sergeant. He refused to obey the order, and never did obey it. He stated, in refusing to obey the order, that he was well qualified to act as a corporal and could there best serve his Government in the front-line trenches, and that he did not want to go to the rear while fighting was in progress. A complaint was made against him, but no steps taken to prosecute until months later in June, 1919, the matter was investigated by this judicial commission. At the preliminary administrative inquiry in the regiment he was asked if he regretted his action in refusing to obey the order of his superior officer, and he replied that he did not. In one sense the refusal of the soldier to go to the rear to a place of safety and for the purpose of winning promotion was commendable, and yet if the inferior is to substitute his idea of the rightfulness or the wrongfulness of each order issued him, there could be no discipline in any army. Yet the auditeur militaire told me that unquestionably this man, although he must go to trial before a court-martial, would be acquitted.

3. A troublesome condition in connection with the administration of military justice in Belgium consists in the fact that all of their laws and regulations are written both in French and Flemish. Although a majority of the population is Flemish, most of those high in position of state, whether Flemish or Wallon, speak the French language and understand with difficulty the Flemish as it is spoken. The first question asked each accused on appearing before a military tribunal is whether he desires to be interrogated in French or Flemish. Each section of the population, with great determination, clings to its language.

CONCLUSION.

It is stated by Maj. Jacques van Ackere, whose observations appear as an exhibit to this report, that the system of punishment in force in each of the armies engaged in this great war proved to be a failure in time of war. Founded on the experience of the Belgians in this war, he has suggested a system of punishment for use only in time of war, which appears to me to be exceedingly logical and valuable. Briefly stated, it is as follows, to wit: For a few military crimes of heinous character, such as treason, spying, and the taking of deliberate steps to start a stampede of soldiers, the death penalty should be carried into execution without mercy. For practically all other military offenses and many civil offenses which do not in civil life require the

death penalty, on conviction of first offense the accused should be sentenced to serve for a term in a disciplinary battalion, where the accused may wipe out the disgrace of the trial and conviction and rehabilitate himself in his own eyes and in the eyes of his country. Whatever may be the term to which the accused on conviction may have been sentenced, he may rehabilitate himself in one of three methods and be restored to his former regiment and his colors, to wit: First, by some conspicuous act of bravery; second, by receiving a wound at the hands of the enemy; and, third, by good service for a period of eight months or a year. This service in the disciplinary battalion is to be served at the front, and not in the rear, in a place of greater safety than that in which the other and obedient soldiers are compelled to serve. If the soldier thus rehabilitates himsedf, the very fact of his conviction is wiped out, and across the face of the judgment on the judgment roll on which is recorded his guilt is written in red ink the word "rehabilitated," after which no reference to such judgment can ever be made, or copy of same obtained, nor can his decorations previously won, if any, be taken from him.

If, however, in the disciplinary battalion the soldier purposely again violates the laws, on conviction his arms should be taken from him and he should be placed at hard labor at the front in a penal battalion with all privileges taken from him, and this service should be rendered in the front-line trenches in places as dangerous or more dangerous than those occupied by good soldiers in their regular regiments.

Opportunity should be granted likewise to the soldier to win his way back from the corrective or penal battalion to the disciplinary battalion and thence to his regiment. If, however, the soldier in the penal or corrective battalion further violates the laws, military or civil, thus throwing away such opportunity of rehabilitation and showing evidence of being incorrigible, he should then be shot. A few executions would be all that would be necessary to curb such a spirit.

This system, in a way, was adopted and used toward the close of the war in the Belgian Army and proved highly efficacious, and, in the opinion of this distinguished soldier and lawyer, is the solution of the problem and the blazing of the way which will have to be followed in times of war in the future by other nations. It resembles in a marked degree, in a way, our disciplinary barracks, of which he had no knowledge, and apparently their system was worked out separately and apart from any knowledge of our system, above referred to, in the United States.

Whether we continue our present view of the status of courts-martial, or adopt the other view referred to hereinbefore repeatedly in this report, it appears to me that the system pointed out by Maj. van Ackere is worthy of serious consideration.

In your (Lieut. Col. W. C. Rigby's) report heretofore made and submitted to the Judge Advocate General, in the analysis of the practice and procedure of military justice, you have subdivided the subject matter into 26 subdivisions. By reason of the exhaustive nature of such analysis, and further by reason of the fact that by following such analysis in this report, anyone investigating the subject may easily find considered in the same numbered subheadings the same subject matter. I beg leave to present to you the result of my investigation under such subheadings:

I. PRELIMINARY INVESTIGATION OF THE ACCUSED.

In practice the preliminary examination in the Belgian system is very elaborate. It is performed by a commission styled a judiciary commission, or, as interpreted in some instances, judicial commission. The statutes creating such commission are found in articles 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44 of the code of military penal procedure of the Belgian Army, the English translation of which code is file dwith this report, marked "Exhibit No. —."

This judicial commission is composed of three members. Two are line officers of the Belgian Army and one is a military auditeur who is appointed from civil life by the King, must be 30 years of age, and having the degree of doctor of laws. Each military auditeur is appointed for an indefinite period and is removable solely by the King.

The preliminary investigations made by these commissions are extremely exhaustive, full, and complete. They are made in an informal manner, being conducted practically entirely by the military auditeur, a trained lawyer, and the Belgian officers with whom I conferred think it of great benefit from many standpoints

I attended a sitting of such commission in Brussels, Belgium, and immediately after leaving the commission dictated a complete description of the sitting of the commission, together with a statement of their practices and customs, which description I file herewith as Exhibit No. — for your consideration.

I was told, however, by these Belgian officers in interview with them, that while these complete preliminary investigations are exceedingly valuable, yet in time of war they have serious drawbacks and entail serious inconveniences. The chief of these is in the delay caused thereby. Every officer to whatever army he may belong, with whom I have discussed this matter of military discipline, places as the first and perhaps the prime requisite of such administration of military justice the having the punishment follow swiftly upon the commission of the offense. Delay in infliction of punishment causes it to lose a large portion of its disciplinary effect. Baron de Broqueville, former minister of war of Belgium, in his interview with me on June 13, 1919, made the following statement with reference thereto, to wit: "However, I wish to emphasize that there is a difference between courts-martial in war time and in peace time. The thorough preliminary investigation, while of the highest value in either time, must not cause any delay in war time in proceedings of justice." (See Exhibit No. —, p. —.)

Likewise Commandant Jacques van Ackere, auditeur militaire en compagne, in his interview with me on May 29, 1919, had the following to say: "In examining this system of preliminary investigation, one must make a distinction between peace time and war time military justice. In time of peace, in the administration of military justice the proceedings were made as far as possible according to the law, in having the complete preliminary investigation; but in war time the system of having a preliminary investigation sometimes presents three serious inconveniences. In the first place, too much time may elapse before the accused is brought to trial—from 15 days to three weeks. The preliminary investigation may take place at a certain point and witness may be heard, but in the war of movement, the armies will have traveled, and before the accused is brought to trial the witnesses may have been taken away, and it may be difficult to bring them back. The second inconvenience is that in war time military justice must be rapid.

Punishment must be exemplary, especially in such infractions of discipline as desertion, cowardice, etc., which must be judged as rapidly as possible, so that judgment may be made. The third inconvenience that might be mentioned is that offenses in time of war consist mostly of having been caught in the act of sleeping on post, desertion, etc. In cases of that type, all the evidence is right at hand in the beginning, and it is not necessary to have a double preliminary investigation; but there are other cases which are delicate, and in those cases the judiciary inquiry is of value. The best system would be to have the auditeur militaire decide as to whether there should be a preliminary investigation. For instance, in cases of violation of military law such as desertion or sleeping on post, particularly when the accused acknowledges his having done so, the auditeur militaire should have the power to try the case immediately before the court-martial. In case the auditeur militaire decides that the case is not very clear he would bring the case before the Judiciary Commission for preliminary investigation. It could further be noted that when the court-martial finds that the case is not sufficiently clear it may order a further preliminary investigation before proceeding further." (See Exhibit No. ——, p. —.) It seems to me that this last suggestion of Commandant van Ackere, coming as it does from such a distinguished lawyer in civil life and from as soldier with such extended experience as was had by him, both in defending accused before the military courts and later on during the war in prosecuting them, should have very great weight. I am inclined to believe that he states the basis for the correct procedure.

There has not yet been furnished to me the statistics asked for in your elaborate questionnaire of the Belgian Government. It is doubtful to me whether such statistics can ever be furnished in view of the disorder consequent upon the actual occupation of practically all of the Belgian territory by the enemy, and the destruction of all records upon which the enemy could lay their hands. The records of trials by courts-martial during the war in the field have been returned to Brussels, but are stored away in boxes and as yet the Government has not been able to find opportunity to analyze them. At my instance, however, a specific request was made from the various courts-martial for such statistics as they could give, showing the percentage of acquittals during the various years of the war, and one such report has been shown me, but this is not in my hands at this time. All of these reports will be turned in at one time. This report

showed during some years an extremely high rate of acquittals, running in some instances between 20 and 30 per cent, and practically none less than 10 per cent for any year. The estimate made by Commandant van Ackere was that the percentage of acquittals during the entire war would be somewhere between 10 and 20 per cent rather than 20. Apparently it does not follow, then, that the elaborate preliminary investigation cuts to a very low rate the percentage of acquittals.

My own experience of about 20 years in the criminal practice in the courts of my native State has led me to believe that 12 per cent of acquittals shown in the trials before our courts-martial during the war is very moderate, as it is far less than the percentage of acquittals in our State courts. There are many cases where the testimony for the prosecution and for the defense is in absolute conflict, and whether conviction of the accused is to be had or not depends upon the determination of the issue of fact which must be settled by the court. In the total number of cases tried the 12 per cent of acquittals represent some of the cases determined in favor of the accused. Rather to my mind that percentage indicates that the testimony of the accused is given due weight, and the accused is getting a fair deal rather than that convictions follow in practically all the cases in which charges are preferred by commissioned officers and which are referred to courts for trial.

It is also recommended by Maj. van Ackere that the services of the two military members of the military commission should be eliminated, and that the entire investigation be made by the military auditeur. In practice these two line officers take practically no part in the investigation. In time of war it is exceedingly difficult to obtain them, their time being so fully occupied by their other duties. In cases where it is necessary especially that military customs or procedure should be considered in connection with the evidence Commandant van Ackere recommends that the military auditeur call in line or staff officers as witnesses as experts on those questions. It is his belief that in the vast majority of cases the presence of the line officers is unnecessary and a useless consumption of their time. If this be true, the preliminary investigation becomes practically that provided for in our procedure, to wit, the investigation of the judge advocate of the division.

The practice in the Belgian Army, however, has been to make an elaborate investigation without detailed directions in the statute as to how it shall be done. In our own Army, according to my information, in some divisions the preliminary investigations have been carefully made while in others the work has not been so carefully done. The thoroughness with which the investigation was made depended upon the personnel of the judge advocate and the views of the commanding general whom he was to advise. It appears to me, therefore, that the recommendation made of elabofating the manner in which the preliminary investigation shall be made, as is done in the British procedure, would be a wise one.

(See Military Penal Code, Ex. 107, Title II, Chapter I; see articles 35 to 44. See Military Penal Code; Ex. 107, Title II, Chapter III.)

II. Summary Disciplinary Punishment by Commanding Officer, Without the Intervention of a Court-Martial.

The powers granted to commanding officers of summary disciplinary punishment in the Belgian Army are very extensive. They are set forth in the Rules and Regulations of Discipline, an English translation of which book is filed herewith, marked Exhibit No. —. The punishments which may be thus inflicted are as follows, to wit:

For officers, whatever their rank, article 28.—(1) Reprimand; (2) arrest for a period not longer than 21 days; (3) arrest under close confinement for a term not exceeding 2 weeks.[1]

For noncommissioned officers, article 29.—(1) Reprimand; (2) confinement to camp for a term not exceeding 21 days; (3) confinement to quarters for a term not exceeding two weeks; (4) placing in solitary confinement ("cachot," not exceeding a week.

For all other soldiers, article 30.—(1) Reprimand; (2) confinement to camp for a term not exceeding 21 days; (3) confinement in the guardhouse for a term not exceeding two weeks; (4) placing in solitary confinement ("cachot," dungeon) for a term not exceeding a week.

[1] This punishment shall not be inflicted on Chiefs of Corps or on Commandants of Detachments. (See Art. 57.)

Article 31.—(*a*) Soldiers who, by reiterated infractions, prove that they are not amenable by means of simple discipline, and who persevere in spreading trouble and giving a continual bad example in the corps to which they belong, shall be placed in the special corps;[1] (*b*) those who give proof that they are absolutely incorrigible or unworthy of wearing the uniform shall be cashiered from the army.[1]

(The above is an exact copy from the Code of Discipline.)

In 1830 corporal punishment was abolished in the Belgian army by governmental decree. Prior to that time, corporal punishment could be inflicted as summary disciplinary punishment without the intervention of a court-martial. The following are the provisions of the code of such rules of discipline with reference to who can inflict the above punishment:

The right to punish.—(*a*) The right to determine punishments for soldiers of all grades belongs to general officers; to commanders of divisions, brigades, regiment, battalion, company, district, or mobile force of the gendarmerie, each one for the fraction or the part of the service that is commanded by him, be it normally, on occasional service, or temporarily.

Reprimands and provisional arrests may be inflicted by any superior on his inferior.

Confinement to camp for a term not exceeding a week may be inflicted on officers by the commander of the company, or by the officers on inferiors. Confinement to camp over a week and up to three weeks may be inflicted by commanders of battalions or by higher authorities.

Arrest under confinement for officers, guardhouse sentences for noncommissioned officers, and solitary confinement for all other soldiers may be inflicted only by chiefs of corps, commanders of brigades and divisions, or authorities that have equal power, and by generals.

An elaborate system of reports upon such disciplinary punishment is prescribed. It is further provided that "in every case before being punished, the culprit shall be allowed to give an explanation and to defend himself either orally or in writing, according to the circumstances."

Additional disciplinary measures which may be inflicted summarily are the following, to wit:

Disciplinary measures—Article 55.—Independently of the punishments mentioned in chapter 3, the following disciplinary measures may be inflicted:

A. To officers.—(1) Reprimand; (2) reprimand by the minister of war; (3) erasure of name from the active list; (4) suspension; (5) loss of office; (6) loss of grade.

B. To sergeants.—(1) Deprivation of high pay; (2) temporary deprivation of supplementary remuneration; (3) deprivation of certain favors and advantages; (4) deprivation of extra pay, and additional pay for reenlistment; (5) demotion; (6) reduction to ranks; (7) recall and maintenance under arms.

C. To corporals.—(1) Deprivation of high pay; (2) temporary deprivation of supplementary remuneration; (3) deprivation of certain favors and advantages; (4) deprivation of extra pay and additional pay for reenlistment; (5) demotion and maintenance under arms.

D. To soldiers.—(1) Deprivation of high pay; (2) temporary deprivation of supplementary remuneration; (3) deprivation of certain favors and advantages; (4) deprivation of extra pay and additional pay for reenlistment; (5) deprivation of the right to be either drummer or trumpeter; (6) incorporation in the special corps; (7) maintenance under arms; (8) dishonorable discharge.

A commanding officer may have the advice of a court of discipline in inflicting his punishment, the provisions governing which are as follows, to wit:

Article 83.—Courts of discipline (disciplinary courts) charged with the advising upon such matters as the deprivation of grade and demotion of sergeants and sergeant majors (under officers), the incorporation of soldiers into the special corps or dishonorable discharge, shall be composed of the following personnel: One major (presiding), one captain, two lieutenants, one sergeant major or sergeant senior to the offender.

If the offender is the highest ranking sergeant major of the corps, this last shall be replaced by a lieutenant.

These places shall be filled by each officer and noncommissioned officer in turn.

Those designated by the commandant of the place shall be those that belong to the corps or troop of the garrison.

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[1] See chapter 4.

Article 84.—In no case may the following fill any of the places in such court: (*a*) The officer commanding the detachment; (*b*) the officer commanding the battalion nor the officers of the offender's company; (*c*) officers directly over the offender; (*d*) the officer or noncommissioned officer who reported the infraction and caused the offender to appear before the court. In default of a major the disciplinary court may have two captains, the senior of which shall preside.

The rules and regulations for the procedure of such courts of discipline are provided in extenso.

All soldiers punished with disciplinary punishment summarily have a right of appeal to the higher officers, such procedure being set forth in articles 101, 102, and 110 of the Rules and Regulations of Discipline, hereinbefore mentioned as Exhibit No. — hereto

In the opinion of the Belgian officers interviewed, this system of summary disciplinary punishment is of the very largest and highest benefit in the enforcement of discipline. The fact that the punishment follows practically immediately on the commission of the offense, even though the punishment be not as severe as that meted out by a court-martial, makes such punishment exceedingly effective and efficacious.

Maj. van Ackere is of the opinion that even the broad punishment provided in these rules and regulations of discipline may be further enlarged with benefit to the discipline of the service, and it is his opinion that, inasmuch as appeals are freely granted, no injustice will be done in such punishment of infractions of discipline.

Certain it is that the power to punish summarily to such a large degree must, in practice in the Belgian Army, and does cut down very extensively the number of trials by courts-martial, with all the attending circumstances of delay and inconvenience to the service in the taking of the time of officers in hearing the trial of such offenses.

I believe that changes leading to such a system may well be carefully considered as to its advisability for introduction into the penal system of the armies of the United States. (See Rules and Regulations of Discipline, Ch. III.)

III. Consideration of, and Report Upon, Preliminary Investigation: Attendant Requirements: Ordering Accused to Trial.

As pretty fully set forth hereinbefore in this report (see pp. to pp. inclusive), the report of the judicial commission recommending trial is made to the commanding officer for the division in which accused is serving. Such commanding officer is not bound to follow the recommendation made by such commission, but in practice practically always does so.

In case the accusation was made by a civilian, a finding of the judicial commission that the accused should not be prosecuted is final and no trial can be had upon such charge.

In case, however, of a charge preferred through military channels, such a recommendation, however, to the commanding general, to the effect that the accused should not be tried, need not be followed by the commanding general and he is at liberty to order the case for trial in spite of the adverse finding of the judicial commission. This is seldom done, but has been done. The auditeur militaire who sat upon the judicial commission, and makes the recommendation, is the same auditeur militaire who prosecutes the case before the court-martial, if ordered there for trial. He has full authority, and sometimes uses that authority, to advise the court-martial to bring in a verdict of acquittal when the case has been ordered for trial by the commanding general over the adverse finding of the judicial commission. (See Military Penal Code, Ch. V.)

IV. Composition of the Court.

(*a*) *Permanence.*—The military officers composing the judicial commission, the court-martial, and the cour militaire, sit for a period of one month, unless sooner relieved, because of change of station or disqualifications for any other cause. The auditeur militaire as a member of the judicial commission sits indefinitely, being appointed for an indeterminate time. For the permanent courts this means appointment for life.

The civil member of the court-martial sits for a period of three years.

The civil member of the cour militaire, being appointed for life, sits for an indefinite period with that court.

(*b*) *Personnel.*—The personnel of the court making the preliminary investigation—the judicial commission—is, first, the auditeur militaire, who presides and questions the witnesses; and second, two army officers, a captain and a lieutenant.

The court-martial (conseil de guerre) consists of five members, four of whom are army officers of the line, of rank usually lieutenant colonel and less, and one civil member who in authority is next to the president of the court.

The cour militaire is composed of five members, four of whom are army officers of the line and one a civil judge appointed for life, who is entitled to the honors due to a general and who in practice wears the uniform of a general. The army officers have the following rank, to wit: One lieutenant general or one major general, one colonel or lieutenant colonel, and two majors.

(*c*) *Independence of convening authority.*—The members of the three courts of Belgium are absolutely independent of any convening authority. No executive officer can exercise any authority whatsoever over them, and if any officer undertook to influence the decision of a court in any case he would be subject to punishment for so doing. The courts are absolutely, in theory and practice, independent of any executive authority. Nevertheless, the convening general has the power, if he sees fit, to suspend any sentence imposed by the court.

(*d*) *Qualifications of judges, experience, rank, time in service, previous instruction.*—Each of these subheads has been answered above under heads (*a*), (*b*), and (*c*), except that the civil judges appointed to serve on these courts must have had 10 years' experience as a judge on the civil bench and have the degree of doctor of laws. (See Military Penal Code, Ch. II.)

V. Assessor to the Court: Judge Advocate or Commissaire.

(*a*) *Appointment.*—The Belgian officer corresponding to the above titles appearing before the court-martial is termed an auditeur militaire and the officer appearing before the cour militaire, so corresponding, is the auditeur general or his assistants, termed substitute auditeurs general. These are appointed by the King for life.

(*b*). *Position, duties, impartiality.*—The position of auditeur militaire is an honorable one, and carries with it the rank of a field officer. The position of auditeur general is one of the highest in dignity and authority, and the present auditeur general, when appointed, had long been a civil judge of the highest civilian court of appeals in Belgium. The duties of the auditeur militaire are to investigate cases as a member of the judicial commission, and to prosecute such cases before a court-martial. He is subject to the direction of the auditeur general and reports to him. The auditeur general not only has the direction of the auditeurs militaire, but either personally or through his assistants, prosecutes all cases on appeal before the cour militaire, and all cases triable there as a court of original jurisdiction. He also recommends to the King what, if any, clemency, shall be shown those convicted, upon their application for clemency. In practice the King accepts the recommendations of the auditeur general and practically always does as recommended by him with reference to such clemency. While the auditeur militaire and the auditeur general are apparently in no sense, in their prosecutions, vindictive, they in truth and in fact, represent the Government and the interests of the accused are looked after by the advocate who represets him.

(*c*) *Legal attainments required.*—As above set forth, the auditeur militaire must be 30 years of age or above and a doctor of laws. The auditeur general must be a doctor of laws and 35 years of age.

(*d*) *Powers, including power to give authoritative advice to the court.*—The auditeur militaire and the auditeur general are held in the highest esteem, as to their legal learning and generally, by the court; but the civil member of the court-martial and of the cour militaire, in practice, advises the court upon the legal principles and practice and procedure on the questions arising before the court, they being especially appointed for that purpose. The power of the prosecuting officers for the government, then, do not include the right to decide for the court what the law is, but they may submit their opinions of the law to the court, just as can the advocate for the accused. (See Military Penal Code, Title II, Ch. IV.)

VI. Prosecutor.

(*a*) *Appointment, powers, duties.*—The prosecution is conducted in the court-martial by the auditeur militaire and before the cour militaire by the auditeur

general or one of his assistants. Their appointment, powers, and duties are all described in subdivision 5.

(*b*) *Is he also a judicial officer or representative of the government or of the department of justice?*—The auditeur militaire and the auditeur general are not judicial officers in the sense that they are members of the court or that their advice on questions of law must be taken by the court. They prepresent the government in the prosecution, and the auditeurs militaire are under the direction and supervision of the auditeur general, who is the head of the department of justice of the army. (See Military Penal Code, Title II, Ch. IV.)

VII. Counsel for Accused.

The counsel for the accused, though not required so to be by the statutes, is, in practice, always a practicing lawyer or advocate. The accused may employ his own advocate if he be able financially to do so. If not, in time of peace, an advocate is designated by the battonnier, or president of the bar association, for his defense, and, in time of war, an advocate is designated by the president of the court sitting for the trial of the accused, usually a lawyer serving in the division of the accused, but sometimes a civilian advocate is secured by such president of the court. When so designated by the battonnier or the president of the court, the advocate serves without compensation. The advocate in practice appears in his black robes of office and, whether soldier or civilian, appears as an advocate. The question of rank of the advocate, if any, in the army, seems to cut no figure whatsoever.

VIII. Closing Court for Findings and Sentence.

(*a*) *Vote required.*—The guilt or innocence of the defendant, the existence of aggravating circumstances or of extenuating circumstances, is controlled by a majority vote. Formerly the vote was taken openly, the civil judge who is a member of the court first expressing his opinion on each of these questions, and then afterwards the military officials, beginning with the junior in rank. (See p. —, Exhibit No. —, interview with Gen. de Ceuninck.) During the progress of the war, however, a law decree was entered by Albert, King of the Belgians (see Exhibit No. —), of which article 8 is as follows, to wit:

"Art. 8. The decisions of the military court and courts-martial are taken by majority of votes. Voting must be done by secret ballot, as much for the principal fact and the aggravating circumstances as for the existence of extenuating circumstances, and the application, if need be, of the conditional condemnation. East judge gives his opinion by depositing in the ballot box a bulletin bearing the words 'Yes' or 'No.'"

(*b*) *Method of taking the vote.*—This subhead is answered by the quotation just last above made on article 8.

IX. Character of Sentences.

Although the statistics with reference to the sentences imposed during the last war are not yet available for the Belgian Armies for the reasons heretofore set forth in this report, it is manifest that the sentences were not so severe as those of their allies, but was greater than those imposed by the courts-martial of the United States Army in some respects. For purely military offenses there were imposed 126 death sentences of which 14 were actually carried into effect, and 112 commuted by the King. The sentences to imprisonment appeared not to have been for the length of time imposed in the armies of the United States. This seems, however, not to have been due to any tenderness toward the accused, but rather to the desire to have the soldier back in the line where he could render active service to his country, so sorely beset, at the earliest possible date. To serve a sentence in prison at hard labor was less of a hardship in actual suffering than that endured by the good soldier, fighting desperately in the flooded trenches held by the Belgians near the English Channel. So unjust did it appear to the Belgian officials that the malefactors should work in safety in the rear in prison in large numbers, while the brave and good soldiers who had committed no offenses should sustain greater hardships at the front, that before the termination of the war by the armistice, a decree was promulgated by the King suspending the enforcement of all imprisonment of offenders until the conclusion of the war. By this de-

cree thousands of soldiers were returned to the ranks where they were so sorely needed by the Belgian Government. The system of punishment suggested by Maj. van Ackere, hereinbefore set forth in time of war, I repeat, is worthy of the most serious consideration. (See p. — of this report.)

X. Announcement (or Not) of Sentence at Conclusion of Trial.

(*a*) Of acquittal.
(*b*) Of conviction.

Immediately at the conclusion of the trial before either the courts-martial or the cour militaire in cases of original jurisdiction, the decision of the court is announced.

XI. Authentication of Record.

There is no such record of each trial by courts-martial or the cour militaire as is prepared of the trials before our general courts-martial. There is no stenographer who takes down in shorthand the testimony and afterwards transcribes it as a part of the record. The record consists of a dossier which comprises a large number of original papers in a folder such as is commonly used for the filing of papers in the filing cabinet of a lawyer in America. (For an exact copy of such dossier see Exhibit — to this report.)

XII. Approval or Confirmation.

(*a*) Necessity of (yes or no).
(*b*) By whom.

The judgment of the courts-martial and of the cour militaire requires the approval or confirmation of no one. It is a decree, final in effect, unless appealed from in the case of the courts-martial. However, the commanding general has the right to suspend the execution of the sentence if he so desires.

XIII. Appeal and Review.

Appeal.

(*a*) *Right to.*—The right to appeal exists in all cases in first, the accused, second in the Government, whether the decree be a conviction or an acquittal, and third, where some person is injured in his property, appeal may be taken by such person with reference to the recompense to be made to him as to his property rights, but such a person can not take an appeal which can operate, on appeal, to change or modify in any way, the guilt or innocence, or extent of punishment, of the accused.

(*b*) *Necessity of.*—Any one of the three parties named above need not appeal unless he so desires. If not appealed from, however, there is no automatic appeal or revision by any court or officer.

(*c*) *Time allowed for.*—The appeal if taken by the accused, the auditeur militaire for the Government, or the person injured in his property rights, must be taken within three days. If the appeal be by the Government through the auditeur general, such appeal must be perfected within 15 days.

Review Without Appeal.

There is no review without appeal in the Belgian system.

XIV. Court of Review.

(*a*) *Approving or confirming authority.*—As above stated there is no approving or confirming authority, the decree of the court being final.

(*b*) *Judge advocate general.*—The auditeur general, corresponding in a way to the Judge Advocate General of the United States Army, has no power of review nor power to equalize sentences, nor power to reverse or remand any case.

(*c*) *Formal court of revision.*—Under subhead 4 above entitled composition or review nor power to equalize sentences, nor power to reverse or remand any is set forth the fact that the court militaire is in fact and in truth, in theory and in practice, a court of appeal. (See also description of this court in brief

narrative description of the Belgian system hereinbefore in this report, page ——thereof.)

XV. Stay of Execution During Review.

Death sentences are not executed pending review before the cour militaire. Accused, sentenced in the courts-martial to imprisonment, remain in prison pending the appeal. (For time usually elapses pending appeal see report hereinbefore, p.—.)

XVI. Execution of the Sentence.

Unless suspended by the commanding general of the division of the accused, or stayed by appeal, the sentence is immediately put into execution.

XVII. Maximum Limits of Punishment.

(*a*) *In peace.*—At the beginning of the present war in Belgium, the limits were fixed in a good many cases, not only maximum but minimum. By reason of the experience had during the war, however, in 1918 the law was changed so that the court could fix the penalty from the maximum, which might be death, down to any minimum. It was found especially that to have a minimum penalty which was higher than the court thought should be inflicted caused the court to stultify itself in its findings. For instance, where there were violations which took place in the presence of the enemy, and the minimum penalty for same was heavy, the court would arbitrarily find that the offenses did not take place in the presence of the enemy, so as to save the soldier the minimum penalty, which they believed too severe, when, in fact, they did take place in the presence of the enemy. Maj. van Ackere was decidedly of the opinion, based on his experiences during the war, that the maximum should be that fixed by the law and there should be no minimum less than that fixed by the law, and that the greatest elasticity in punishment and discretion in the court should exist. He believed this absolutely necessary in order that the penalties which the varying circumstances of the cases demanded might be adjudged. (See p. —, Exhibit No. —, interview with Maj. van Ackere.)

(*b*) *In war.*—For (1) military offenses; (2) ordinary crimes and offenses. This subhead has been discussed under subhead (*a*) above.

STATISTICS OF ACTUAL PUNISHMENT AWARDED.

(*a*) In peace.

(*b*) In war.

Statistics on this subject have not been submitted to us, although requested. If furnished prior to delivery of this report to you, they will be marked "Exhibit — to this report."

XVIII. Standardization of Punishments.

(*a*) *Existence.*—There appears to be no effort made, after the infliction of punishment by the courts-martial, to standardize such punishments. Appeals may be taken to the cour militaire, but usually not for the purpose of complaining of the severity of the punishment. In practice, appeals for clemency are made to the King, who acts upon the same upon the advice of the auditeur general.

(*b*) *Means for assuring.*—As stated above, the only means for assuring standardization of punishment is by appeal for clemency to the King, and apparently such appeals are not based on the ground of standardization but of mitigation of such punishment.

(*c*) *Desirability.*—According to Maj. van Ackere, punishments can not and should not be standardized, either by limitations of punishment, by maximum and minimum, or any other way. Exactly the same offenses committed under different circumstances make it necessary that the punishments should widely differ if justice is to be properly administered. For instance, it was his opinion that even the sleeping on post of a sentry in the face of the enemy in time of war on an active sector should sometimes be very lightly punished, where the soldier had a good record for military service and in civil life, and where he had performed exhausting laborious duties the previous day, to such an extent that he was absolutely physically exhausted and was, by the most

powerful exertion of his will power, unable to maintain consciousness. Although frequently the death sentence was pronounced and executed in the armies of Europe in this present war for such an offense, under the above circumstances it was Maj. van Ackere's idea that practically no punishment whatsoever should be inflicted. This illustration of his makes clear his contention and settled belief, based upon the experiences of this war, that standardization of punishments is not the wisest plan with which to reach exact justice or the nearest possible approach to that standard.

XIX. Revision or Review of Acquittals.

The Government, through the auditeur militaire within three days, or through the auditeur general in 15 days, may appeal from a decision of the courts-martial to the cour militaire against an acquittal of an accused. The auditeur general, Baron van Nyevelt believed that such right was of the greatest benefit to the Government and no wrong whatsoever to the accused. He gave as an illustration of the wisdom and justice of such right, a case where the courts-marital held an improper belief as to the law controlling some certain acts as not constituting treason, such as the selling of gold to the German authorities in Belguim. The possession of this gold was absolutely necessary to Germany in order to pay the bills contracted in foreign countries in the prosecution of the war, and to form a reserve for the protection of the paper money issued by the Government. An acquittal by a courts-martial on such charge was followed by an appeal by the Government to the cour militaire, which court reversed the ruling of the lower court. Thus, in a very large class of offenders by the reversal, they were tried and the trials resulted in the punishment of the guilty parties. If the Government had not the right of appeal, the entire class of offenders described above would have gone unwhipped of justice.

XX. Increasing Punishment—Weight of Sentence.

(*a*) *On revision.*—There is no revision of a judgment of a Belgian military court.

(*b*) *On new trial.*—On an appeal by the accused or the person injured in his property hights, the cour militaire can not increase the penalty inflicted over that pronounced by the courts-martial. On an appeal taken by the Government, however, the cour militaire can increase the penalty adjudged over that adjudged by the courts-martial. Likewise, if a new trial is ordered by the courts-martial in its entirety on an appeal taken to the cour militaire for the Government, an increased punishment can be adjudged by said courts-martial upon the new hearing.

XXI. New Trial.

(*a*) *Right.*—At the present time (and at the conclusion of the war by the signing of the armistice on November 11, 1918), the absolute right exists in the Government, the accused and the person injured in his property rights to appeal from the decision of the courts-martial to the cour militaire. However, as above stated, herein before, the right of the person injured in his property is only entitled to a revision of such pecuniary compensation to him and not to any chance of the punishment of the offender. During a short period of the war, on account of the exigencies of the service, the right of appeal was limited to certain classes of cases, but the right was soon extended so that all classes of cases were appealable.

(*b*) *Conditions.*—The right of appeal as set forth in above head (*a*) is unconditional except as to the time limit, to wit, such appeal must be taken by the accused, the person injured in his property rights or the Government acting through the auditeur militaire within three days, while an appeal for the Government taken by the auditeur general must be taken within 15 days.

(*c*) *Desirability.*—It is the belief of most of the Belgian officials, including Maj. van Ackere, based upon their experience in this war, that, in time of war, it is not desirable to grant appeals at all except, if any exception be made, on the question of the jurisdiction of the court. Baron de Broqueville, former minister of war, on this subject stated as follows, to wit, "It is my firm conviction that in time of war there should be no appeal at all from any courts-martial decision; but I wish to emphasize again that in time of war the preliminary instruction (investigation) should be very thorough, so that the court

narrative description of the Belgian system hereinbefore in this report, page ——thereof.)

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powerful exertion of his will power, unable to maintain consciousness. Although frequently the death sentence was pronounced and executed in the armies of Europe in this present war for such an offense, under the above circumstances it was Maj. van Ackere's idea that practically no punishment whatsoever should be inflicted. This illustration of his makes clear his contention and settled belief, based upon the experiences of this war, that standardization of punishments is not the wisest plan with which to reach exact justice or the nearest possible approach to that standard.

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XXI. New Trial.

(*a*) *Right.*—At the present time (and at the conclusion of the war by the signing of the armistice on November 11, 1918), the absolute right exists in the Government, the accused and the person injured in his property rights to appeal from the decision of the courts-martial to the cour militaire. However, as above stated, herein before, the right of the person injured in his property is only entitled to a revision of such pecuniary compensation to him and not to any chance of the punishment of the offender. During a short period of the war, on account of the exigencies of the service, the right of appeal was limited to certain classes of cases, but the right was soon extended so that all classes of cases were appealable.

(*b*) *Conditions.*—The right of appeal as set forth in above head (*a*) is unconditional except as to the time limit, to wit, such appeal must be taken by the accused, the person injured in his property rights or the Government acting through the auditeur militaire within three days, while an appeal for the Government taken by the auditeur general must be taken within 15 days.

(*c*) *Desirability.*—It is the belief of most of the Belgian officials, including Maj. van Ackere, based upon their experience in this war, that, in time of war, it is not desirable to grant appeals at all except, if any exception be made, on the question of the jurisdiction of the court. Baron de Broqueville, former minister of war, on this subject stated as follows, to wit, "It is my firm conviction that in time of war there should be no appeal at all from any courts-martial decision; but I wish to emphasize again that in time of war the preliminary instruction (investigation) should be very thorough, so that the court

would have all the necessary information and would proceed in a careful and just way. In that way there should be no necessity for any appeals in war time. It has been my personal observation during the present war that appeals from courts-martial have a bad influence on the discipline of the army. However, in peace time, appeals should be allowed to a higher court from courts-martial." (See Exhibit —, p. —, interview with Baron de Broqueville, June 13, 1919.)

XXII. Security Against Second Trial for Same Offense.

(*a*) "*Once in jeopardy.*"—There appears to be no statutory or constitutional provision that prevents the trial of the accused a second time for the same offense where the decision of the court in the first instance was reversed upon appeal.

XXIII. Jurisdiction of Courts-Martial Over Civil Offenses Committed by Persons Subject to Military Law.

(*a*) *In time of peace.*—The provisions of Belgian law with reference to this subject are quite elaborate, being found in chapter 2 of the Code of Military Penal Procedure of the Belgian Army, articles 21 to 34, inclusive. (See Exhibit — hereto.) Briefly stated the military courts have full jurisdiction to try all soldiers for violation of civil offenses with the exception of the following matters, to wit:

"1. For anything concerning public taxes, direct or indirect.

"2. In matters concerning hunting and fishing.

"3. For the infractions of the laws and regulations concerning public roads, carriages, coach officers, post offices, gates, railway police, rural or forestry police; also for the infractions of the provincial and criminal regulations.

"4. In matters concerning duels, when a soldier fought with a nonmilitary person, even when the latter will not be prosecuted. The infractions indicated under No. 3 remain, however, subject to the military jurisdiction when they have been committed during the service, or by a soldier billetted by a particular person, upon request of the public authorities, or being a part of a troop marching on campaign."

Under some limited circumstances, the military courts have jurisdiction over civilians attached to the army, and joint offenders with military persons.

(*b*) *In time of war.*—The same provisions as above quoted seem to apply in time of war as well as in time of peace. However, in time of war, the jurisdictions of the courts-martial are greatly extended, particularly as to persons not in the military service. Practically during the present war all penal matters of both civilians and soldiers were settled by the military tribunals.

XXIV. Insanity.

The code of military penal procedure seems to be silent on military procedure in cases of insanity. The practice is described by Baron van Nyevelt in his interview (see Exhibit No. —, p. —) in the following to wit:

"Q. If a question of the insanity of the accused arises, is that question of insanity settled at this preliminary hearing, or is that settled before the courts-martial; and if so, in either case, what method of procedure do they so ascertain the sanity or insanity of the accused?—A. In the beginning of the preliminary inquiry, the question is always put as to whether the man is sane or insane, and it is a medical officer belonging to his regiment who gives the first decision as to his sanity or insanity.

"Q. Are any other medical experts called in if the matter is still in doubt in addition to the surgeon of the regiment?—A. If during the preliminary hearing the question is raised as to the man's sanity, the judiciary commission has the right to name experts who are generally medical officers to examine as to the man's sanity.

"Q. This commission determines before taking this testimony that the accused is sane. Is his counsel permitted to raise the question later before the courts-martial or is that prohibited?—A. Yes; he has the right to raise the question again."

XXV. Officers.

(*a*) Conduct unbecoming an officer and gentleman: I find no specific charge in the Belgian Code of Military Penal Procedure or in the rules and regula-

tions of discipline or in the military penal code corresponding to the charge under the ninety-fifth article of war of "Conduct unbecoming an officer and a gentleman." In many of the cases of officers in our Army during the present war, charged under the ninety-fifth article, the specification therein set forth drunkenness in public and gross immorality. Not only does such misconduct in the Belgian Army not call for dismissal from service, but usually it is punished without the intervention of a courts-martial by summary disciplinary action, which punishments are described in article 28 and article 55 of the rules and regulations of discipline. (Exhibit No. — hereto.) Without in any wise expressing my own personal opinion in the matter, it is very evident that there is a very wide difference of opinion held in the Belgian service and in the American service as to what conduct is unbecoming an officer and a gentleman in the sense in which we use it under the ninety-fifth article of war. In private conversation with Belgian officers, not reduced to writing, and not filed as exhibits to this report, great astonishment was expressed at our dismissing from the Army in time of war an officer for being drunk and disorderly and being guilty of immoral conduct. It is my opinion that entirely too many cases against officers in the American Army were charged under the ninety-fifth article of war, and most of them should have been charged under the ninety-sixth article of war, where dismissal was not mandatory upon conviction. If the armies of our allies had proceeded upon the theory upon which we acted, with reference to this conduct, according to my best information, they would have deprived themselves in this conflict of some, and perhaps I may say very many, of their most competent officers. I do not wish to be understood in any way as condoning such misbehavior in an officer, but I do wish to be most thoroughly understood as believing that some other punishment than dismissal in most cases should be the penalty therefor.

(*b*) What charged as.

(*c*) Mandatory dismissal for.

Both of these subheads have been discussed under subhead (*a*) last above.

XXVI. Death Sentences—Vote Required.

I am informed, as above stated in this report, that during the entire war only 126 death sentences were pronounced against soldiers of the Belgian Army, and that of these only 14 were carried into execution and the other 112 being commuted by the King. These death sentences I have reference to were solely for military offenses. You will recall that President Wilson, for our Army, did not permit any death sentences to be carried into effect during this war for strictly military offenses. The number of death sentences pronounced in the Belgian Army, however, for military offenses alone seems to have been infinitely less even proportionately than that in the armies of our other Allies. Their statistics as to death sentences in the Belgian Army are not available as yet.

There seems to be no difference in the vote required for the infliction of the death penalty from that for any other punishment—the majority vote being all that is required. (See art. 8, law decree, dated Feb. 24, 1917, Exhibit No. —.)

In Conclusion.

From what I have learned in this investigation the administration of military justice in the Belgian Army during the present Great War has been carried on with distinguished ability, and the personnel of the department of military justice well deserve the bestowal of the distinguished-service medal at the hands of our Government. Especially is this true with reference to Baron (Gen.) van Zuylen van Nyevelt, auditeur general, and Maj. Jacques van Ackere, auditeur militaire, both of whom are men of distinguished ability and learning, and who have been indefatigable in their service to me in this investigation. I trust you may see it consistent with your duty to recommend to the Secretary of War, therefore, the bestowal of this medal upon each of the above-named officers.

I file as exhibits to this report the following documents, to wit:

Translation into English of Code of Military Penal Procedure of the Belgian Army, marked "Exhibit No. 1."

Translation into English of Rules and Regulations of Discipline of the Belgian Army, marked "Exhibit No. 2."

(8) The powers conferred by this section shall be in addition to and not in derogation of any powers as to the mitigation, remission, commutation, or suspension of sentences conferred by the Army act, and a superior military authority under this act shall, as respects soldiers so employed as aforesaid, be an authority having power to mitigate, remit, or commute sentences of penal servitude or imprisonment under subsection (2) of section 57 of the army act.

(9) In this act the expression "superior military authority" means the officer commanding in chief of any force employed on active service beyond the seas, or any general officer commanding an army comprised in that force; the expression "competent military authority" means a superior military authority, or any general or other officer not below the rank of field officer duly authorized by a superior military authority.

2. This act may be cited as the army (suspension of sentences) act, 1915, and shall be construed as one with the army act.

CHAPTER 103, AN ACT TO AMEND THE ARMY (SUSPENSION OF SENTENCES) ACT, 1915. (JANUARY 27, 1916.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) The army council, and any general officer whom the army council may appoint for the purpose, shall be a superior military authority within the meaning of the army (suspension of sentences) act, 1915.

(2) Subsection (5) of section 1 of that act shall have effect, and shall be deemed always to have had effect, as if for the words "intervals of not less than three months" there were substituted the words "intervals of not more than three months," and subsection (8) as if for the words "superior authority" there were substituted the words "superior military authority."

2. This act may be cited as the army (suspension of sentences) amendment act, 1916, and the army (suspension of sentences) act, 1915, and this act may be cited together as the army (suspension of sentences) acts, 1915 and 1916.

Lieut. Col. RIGBY. Those acts were drawn, I was told, by Maj. Gen. Childs, and he says in his statement, which is already in evidence, that by the operation of these acts between 30,000 and 40,000 men were restored to the colors during the war.

Senator WARREN. That was before the armistice?

Lieut. Col. RIGBY. Before the armistice; yes, sir. They were very well pleased with the results of the operation of this act. It is the act of 1915 and the amendment of 1916 which they call the "cat and mouse act." The gist of that plan is that the soldier sentenced, perhaps for a long term of confinement, has no certainty that he is thereby getting out of danger. He might be sentenced to a long period of imprisonment and suddenly find himself ordered to the front line, and then back into prison, and then perhaps again to the front line. He never had any feeling of safety from danger by reason of the fact that he had been sentenced to confinement, and the result was that they found after the men were ordered to the front once or twice that they were perfectly content to do their duty, and almost all of them made good soldiers.

Senator WARREN. The idea was that if they felt that they were redeemed they would suspend the sentence?

Lieut. Col. RIGBY. Yes.

Senator WARREN. Now, right there: How does that compare with the American troops? Was there any such percentage or any such number of sentences suspended?

Lieut. Col. RIGBY. No, Senator. I think I can give you the total number of suspensions. Of course it was much smaller, because we were just barely getting into it in a way, whereas the British had an army of four or five million men for the whole war.

Senator WARREN. Had we the same or, if not the same, something that corresponded with that procedure?

Lieut Col. RIGBY. We could not suspend and then order back to prison and then suspend again and so bring the men back and forth, as they could. We did not have the "cat and mouse power," as they call it, and of which they think a great deal.

Senator WARREN. And in our case, if it was desired to put the men back into service and expose them to danger at the front, the sentence would be carried out in the first instance?

Lieut. Col. RIGBY. The sentence may be suspended at the time of its approval; but we do not have the right to send a man to prison and then take him out and send him to the front, and then to send him back the second time, and play with him, which was the object of the British suspended-sentence act, of which they think very highly.

I might say in connection with the figures on the restoration to duty from our disciplinary barracks which I have furnished, that every restoration from the barracks, as I am informed—of course I am only speaking now from information—with, I think, one exception—represents an actual shortening of the term. When a man is allowed to serve out his full term, of course, the dishonorable discharge takes effect at the end of his term, and he goes out of the service; and there has been only one case where he was allowed to serve until within one day before his term expired and was then restored to the colors. In one case they let him come back into the service in that way, without being discharged.

Senator CHAMBERLAIN. Where a man is restored to the colors, there is no provision of law which would prevent the War Department from then honorably discharging him the next day, is there?

Lieut. Col. RIGBY. Oh, no, sir; but it would be an honorable discharge.

Senator WARREN. Is it fair for us to assume that every one of these men who have gone to the disciplinary barracks afterwards received an honorable discharge?

Lieut. Col. RIGBY. You are speaking of men restored to the colors in this way. That depends on the men, when they come back. There is this "blue ticket;" and under the 139th and 150th Army Regulations, if he is an undesirable man, there is a way of letting him go without dishonorable or honorable discharge; simply "discharge."

Senator WARREN. He will not be fit for a soldier, but that does not debar him from getting the benefit of his service if there is anything accruing to him?

Lieut. Col. RIGBY. Not at all.

Senator CHAMBERLAIN. If a man is sentenced to dishonorable discharge from the Army and forfeits his pay, that carries with it deprivation of citizenship?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Now, in such a case, if a man is restored to the colors and gives a good account of himself, and then he is honorably discharged from the Army, that wipes out the former conviction, does it?

Lieut. Col. RIGBY. Yes, of course, Senator. Or, rather, in that case the sentence of dishonorable discharge never takes effect. That

(8) The powers conferred by this section shall be in addition to and not in derogation of any powers as to the mitigation, remission, commutation, or suspension of sentences conferred by the Army act, and a superior military authority under this act shall, as respects soldiers so employed as aforesaid, be an authority having power to mitigate, remit, or commute sentences of penal servitude or imprisonment under subsection (2) of section 57 of the army act.

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Senator WARREN. He will not be fit for a soldier, but that does not debar him from getting the benefit of his service if there is anything accruing to him?

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Senator CHAMBERLAIN. If a man is sentenced to dishonorable discharge from the Army and forfeits his pay, that carries with it deprivation of citizenship?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Now, in such a case, if a man is restored to the colors and gives a good account of himself, and then he is honorably discharged from the Army, that wipes out the former conviction, does it?

Lieut. Col. RIGBY. Yes, of course, Senator. Or, rather, in that case the sentence of dishonorable discharge never takes effect. That

is the value of the suspension of the dishonorable discharge. With the suspended sentence there is the opportunity for the man if he makes good to get back into the service and simply wipe the dishonorable discharge out. It never does take effect.

Senator CHAMBERLAIN. Suppose the sentence is dishonorable discharge from the Army, and forfeiture of pay for a certain length of time, and imprisonment in the penitentiary for a given number of years. Now, in that event, while the man is restored to the colors and makes good, do you mean to say that that wipes out the dishonorable discharge.

Lieut. Col. RIGBY. Of course, Senator, you are putting a case that is not likely to happen; that is, his restoration to the colors from the penitentiary. Almost invariably when a man is sentenced to the penitentiary, the sentence of dishonorable discharge is not suspended, but is executed, so that when he gets through his service in the penitentiary he is out of the Army.

Senator CHAMBERLAIN. Suppose before his time of imprisonment expires he is given permission to restore himself. Is it ever done? Do they ever say to a man in the penitentiary, "I will release you to the colors; you may reenlist"?

Lieut Col. RIGBY. They do sometimes transfer men in the penitentiary to the disciplinary barracks if they think they are worthy of it for any reason, and then give them the opportunity to get back from the disciplinary barracks.

Senator CHAMBERLAIN. Does that wipe out the sentence of dishonorable discharge?

Lieut. Col. RIGBY. Where there has been an executed sentence of dishonorable discharge, where it was not suspended in the first place; no, it does not, as I understand it; but the man is given an opportunity to reenlist. The sentence that is absolutely wiped out is the suspended sentence, and almost all of the men who are sent to the disciplinary barracks are sent under a suspended sentence of dishonorable discharge. So that if they are restored, the sentence of dishonorable discharge never takes effect. As I remember, last year, the latter part of the year, it was running something like 65 per cent of all the dishonorable discharges were suspended, including in the total the penitentiary cases. Of course, in the case of a man who is sent to the penitentiary for a civil crime, like a crime against nature, or burglary, or something of that sort, the ordinary criminal that is sent to the penitentiary, that sentence is not very often suspended. Those men are not desirable for the Army; and the plan is, after they have served their sentence, to let them go.

Senator CHAMBERLAIN. Could you put in the record, without too much trouble, the number of men who are now serving in prison and where?

Lieut. Col. RIGBY. Yes; I could do that, and I could, if desired, elaborate that and show the number in at the beginning of the war, and the number received, and the number discharged, and the number now in prison, if that is desired.

Senator CHAMBERLAIN. With the terms of sentence?

Lieut. Col. RIGBY. I think with the terms of sentence—well, to put in all the terms of sentence would make an enormously big set of figures.

Senator CHAMBERLAIN. I would like to know the main facts.

Lieut. Col. RIGBY. Of course we could give the average term of sentence and divide that up among different offenses and not make too long a table.

Senator WARREN. Well, I should say elaborate as much as you can without making it so long that we shall not even read it.

Lieut. Col. RIGBY. I will be glad to do that. I will consult with Col. Dinsmore and get the authority of Gen. Kreger to put it all in. The number in confinement at the beginning of the war, or rather, to be exact, on April 1, 1917, in the various institutions, disciplinary barracks, and penitentiaries, and the number so in confinement on August 30, 1919, are shown in this table:

	Disciplinary barracks.					Penitentiaries.			
	Fort Leavenworth.	Fort Jay.	Alcatraz.	Fort Douglas.	Total.	Leavenworth.	Atlanta.	McNeil Island.	Total.
In confinement on Apr. 1, 1917	1,368	280	452	.....	2,100	212	.....	.....	212
In confinement on Aug. 30, 1919	1,862	1,087	660	119	3,728	676	128	51	855

The British restored from their detention barracks during the war 54,000 men, roughly.

Senator CHAMBERLAIN. Many of them died in battle?

Lieut. Col. RIGBY. Undoubtedly many of them died in battle. They found their system working very successfully. They are really very proud of it.

Now as to the punishment, just a word as to the plan adopted in Senate bill 64. The theory of the whole scheme of punishment in the bill seems to be to put definite maximum sentences in terms of confinement for offenses, which is a radical change from the present plan, which leaves the quantum of the sentence to the judgment of the court-martial, with few exceptions.

That is different also from the British plan; and it comes from the theory that, as I understand it, the punishment should be adjudged, having in view simply the individual man, and his individual sentence, and not with reference, or much reference, to the circumstances of the Army, the purposes of discipline; and is part of a theory that as I understand it is expressed sometimes that the courts ought not in any sense to be agencies of discipline. I think possibly it is easy to get confused somewhat in the use of the word "discipline," and the term "agencies of discipline." It seems to me that there are two aspects of the judgment of the court-martial, and really of every court. In the first place, the determination whether or not a man is guilty is purely judicial. One ought never to be willing to sacrifice the question of guilt or innocence to any question of expediency or the needs of discipline in the Army, and I do not understand that anyone desires to do so. *But when a man has been found guilty, then a guilty man has no vested interest in the quantum of punishment that shall be adjudged to him;* and the quantum of punishment is the thing in which the commander of

the Army is directly and vitally interested for disciplinary purposes. And that is really not so different in substance from the administration of justice in the civil courts; because I know, in Iowa, in the time of my grandfather's first settlement there, back in the thirties, they used to hang a man who would steal a horse.

Now, it does seem to me that that is a rather vital consideration in fixing the punishment. The man who stole a horse, a horse thief, in Iowa, in 1836, or in Wyoming and other places later than that, was not, perhaps morally—looking at the act simply by itself—any more guilty than the man who steals a horse in Iowa to-day. But a man who stole a horse in Iowa to-day would not be hanged for the act. In other words, the object of punishment in civilian life, as well as in the Army, is primarily to deter others; rather than as vengeance for the act that is done, and the court necessarily, and the Army commanders in the Army, in determining the quantum of the punishment, can not look inside a man's mind and absolutely find out just how guilty he was or just what his motives were, but must fix the punishment in relation to the surrounding circumstances. Now, the act, for instance, of going absent without leave, looked at solely from the standpoint of the man, is no more serious in one division of the Army than another; maybe no more wrong near the front than in a place 3,000 or 4,000 miles away from the front. But its effect upon the discipline of the Army, which is just another way of saying its effect upon the citizenship of the Nation, is very different; depending on the circumstances, or the morale of the other men in that division, and on other things which no one else can judge nearly as well as the commander who is charged with the responsibility of maintaining the discipline in the division and of making that division an effective fighting machine. He knows better than any one else possibly can know—and the military men and officers under him know, as no outsider can know—the men who have the responsibility on them—how serious that act is, judged under the circumstances at the time. And for that reason, there being in the man who has once been found guilty, no vested right, it seems to me, in a particular punishment, it is right, as well as necessary for the purposes of the Army, to leave the determination of the quantum of the punishment in the hands of the officer responsible for making a success of the organization; and we ought not, as it seems to me—at any rate it would be an experiment which has never been tried so far as I know in any other Army—to take that determination of the weight and severity of the punishment out of the hands of the military commanders responsible for the success of the outfit, and put it in the hands of civilian lawyers, or a man like the proposed judge advocate, who is really a civilian, although temporarily clothed with a uniform.

Senator WARREN. Right on that point, are those the maximum that are named in the proposed measure—what is their weight? Are they very extreme, providing that in all trials under them the accused should be given the limit, or are they too moderate for some cases that might arise?

Lieut. Col. RIGBY. Senator, it seems to me that they vary.

Senator WARREN. What is the general trend of them?

Lieut. Col. RIGBY. The general trend of them, it seems to me, would be to unduly reduce the possible sentence that might be ad-

judged under extreme circumstances. On the other hand, it might tend to cause an undue severity of sentence under ordinary circumstances; because, for instance, where you provide a maximum punishment, fix, I think it is, six months for striking an officer, as provided in one article here, manifestly, it seems to me under many circumstances that is unduly lenient to say the least. On the other hand, circumstances might arise off duty, away from the front——

Senator WARREN. A man might get a drink or two in him?

Lieut. Col. RIGBY. Precisely, where the court ought not to have held up to it the suggestion of six months in the statute—the idea that the six months ought to be given. I fear that if you put down those limits in the statutes it would tend to a kind of rigidity, and that the court in every case would tend to give that sentence.

Senator WARREN. We are to understand, then, from that, that you fear that in many cases it would be too severe, I assume with officers not experienced, and so forth, while in other cases you fear it would not be severe enough. What would be the proportion? About even? Or would the less extreme predominate?

Lieut. Col. RIGBY. That would be hard to estimate, depending on whether we were at war or whether it was in time of peace.

Senator WARREN. In view of what has happened?

Lieut. Col. RIGBY. It would seem as though this act had been in force during the past two years, it would have tended in many cases, where the troops were in training, to too severe sentences. On the other hand, with the troops actually on the battle front, it might be a handicap to the giving of a sentence that would really deter a man from committing an offense for the mere purpose of getting out of danger.

Senator WARREN. Perhaps I have misread the testimony, but the testimony of those who have been at the front has seemed to indicate fully as much leniency, perhaps more, except in those special cases, than what the testimony shows as to the trials here. In fact, I think that the trials here, as I have read the testimony, taking into consideration the distance and the fact that one was at the front and the other in training, have been more severe at this end of the line.

Lieut. Col. RIGBY. I think that is true. But it is at the front, Senator, that the need must always be to apply in cases of necessity the severe deterrent, and it would be at the front, I would fear, that a comparatively low maximum would operate most injuriously by handicapping and preventing the deterrent effect of the few heavy sentences being given.

Senator CHAMBERLAIN. Colonel, could the British system be woven into our Articles of War, with their suspended sentence system, without much dislocation of our Articles of War?

Lieut. Col. RIGBY. I see no reason why it could not be, Senator.

Senator CHAMBERLAIN. You know, the British system that you have talked of, as it is described in your testimony, appeals largely to me.

Senator WARREN. It does to me; even this cat and mouse business.

Senator CHAMBERLAIN. Yes. Would it be much trouble for you to formulate the British system, of the judge advocate general and the judge advocates under the British system, giving their suspended sentence system, and present it to the committee?

Lieut. Col. RIGBY. I would be very glad to do that, Senator.

Senator CHAMBERLAIN. The judge advocate there is a civilian?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. While he has not the jurisdiction to review appeals and to reverse or to modify them under the system there, his opinions are pretty generally followed, and it does not interfere with the discipline in the army. The commanding officer in the British army still has the power of command. Why could not that system of appointing judge advocates be adopted in this country, and their functions over there as the adviser of the court be made part of our law here?

Lieut. Col. RIGBY. The only real difference, as I understand it, between their system and ours is the fact that their judge advocate general is a civilian. The court-martial officers, as they call them, could be introduced here just as they were there, merely by general order. You see they introduced it simply by a war-office order, which corresponds to a general order, in 1916. There is no reason why we could not do the same thing.

Senator CHAMBERLAIN. The great trouble about leaving it to an order is the fact that incoming judge advocates, where the office is not a permanent one, show a disposition to change it all the time, so that while one judge advocate general might approve of a certain order, another comes in and changes it. But where it is crystallized into a statute, that is not possible.

Lieut. Col. RIGBY. It is true that in order to increase the personnel of the Judge Advocate General's department, that must be by statute.

Senator CHAMBERLAIN. You know there is a general feeling among enlisted men with whom I have come in contact that justice has not been squarely administered; that there is too much of the military in it. If that impression could be removed by introducing into the system something of the civilian kind, you would better the morale of the Army by making them feel that there is not that strict military method of enforcing the law.

Lieut. Col. RIGBY. I do think that something—for instance, the British, instead of using a hard-and-fast plan of punishment fixed by statute, had a standing order, one of the Rules of Procedure, which was simply a cautionary order cautioning the commanding generals that, while the court-martial has power to award a sentence within its discretion, yet ordinarily, and unless there is some special reason seeming to require a heavier sentence, that the sentence ought not to exceed so and so; and then follow provisions like we have in our Executive order for use in time of peace. That stands always with them.

Senator WARREN. I was going to ask if they changed it from time to time?

Lieut. Col. RIGBY. They do from time to time, but it is always in effect, and it is always cautionary; so that if an emergency arises the commanding general does have the power to approve a heavier sentence under special circumstances; and I have thought, I see no reason why, if our forty-fifth article of war was simply amended by omitting the words "in time of peace," the President could not, by an Executive order, which he might change from time to time, provide, not necessarily the same uniform maximum punishments to be

inflicted everywhere always—for instance, there could have been during the past year, so far as I can see, a standing order effective within the United States, and another standing order effective with the Expeditionary Forces in France, and if necessary or advisable, still a different order for the Expeditionary Forces in Siberia, and those could be molded so as to fit the circumstances in each army, and as they changed from time to time; so as to prevent unduly severe sentences, while at the same time allowing the necessary latitude in emergent circumstances.

Senator CHAMBERLAIN. I would like, Colonel, to have you prepare a bill, embodying our old articles of war in it, and as a part of it a system like the British system so far as the Judge Advocate General is concerned and the judge advocates in the Army, making the Judge Advocate General a civilian and the judge advocates with the field corps, and having practically the same powers as the British officers. Secondly, I would like to have a bill prepared embodying our articles of war with such amendments as you have in mind all along the line, but providing for an appellate tribunal here, with one or more civilians on it, the court to consist of three or five, and if of five, then with two civilians on it, so that that appellate tribunal would have the power to revise and to reverse or to modify or to set aside the sentence of the court-martial. With those two measures before us, I think that our committee will be aided very much in thrashing out a modification of the articles to some extent.

Lieut. Col. RIGBY. I will be very glad to prepare them for you, Senator.

Continuing what I was saying as to the fixed punishment, just as an illustration, I want to call the committee's attention to a provision of article 67 of Senate bill 64, providing that as to quarrels, affrays, and disorders—giving the power which is substantially the same as that given by the corresponding article of the present Articles of War—68 is the present article—the power to any officer to part and quell quarrels, frays, and disorders, and providing punishment for anyone who "refuses to obey such officer or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him."

The present article of war provides that such a person shall be punished as a court-martial may direct. The proposed article 67 provides that such person shall be punished by confinement for not more than one year. To take an extreme case of what might happen under that, a soldier at the front might draw a weapon on Gen. Pershing, or might do violence to Gen. Pershing, and could only be punished by confinement for not more than one year. That does, to my mind, illustrate what I mean, as to the danger of fixed punishments in all cases of these military offenses.

I have this suggestion that I want to bring to the attention of the committee. Of course, the matter of punishment and the length of confinement, where confinement is used, and as to the character of the punishment to be given in war, in emergencies, is a problem in other armies as well as in our own. The great danger, the great trouble, is that there are men in time of stress, and, particularly, if for any reason the morale of the organization has weakened, there are quite a good many men who will inflict wounds on themselves

for the purpose of getting confined in prison and getting away from danger at the front; who will go absent without leave; who will commit other offenses, for the purposes of getting safety. We, during this war, were compelled to meet those cases by long terms of imprisonment. The long term of imprisonment gets to the point where it rather loses effect sometimes. There is a point beyond which you really do not add any deterrent effect by piling on further years to the nominal term of imprisonment. For practical purposes, I do not believe a 40-year term means any more than a 10-year term.

Senator WARREN. It is simply absurd.

Lieut. Col. RIGBY. It is simply absurd. If anybody stops to think of it, he knows that it will not be carried out. The British have met that problem to some extent by their plan of what they call field punishment No. 1, which they substituted in 1881 for the old plan of flogging; which is to tie a man up an hour a day to a fixed object, and in a public place more or less, where it is not only mighty unpleasant, but exposes him to contempt of his fellow soldiers. Of course our people would not, we all know, stand for that kind of punishment being introduced. But it is interesting in a way, because the question as to that being an inhuman punishment, and the need of it, has been raised in the British Army, and you will find attached to the statement of Gen. Childs, which I put in evidence, copies of letters from Field Marshal Haig, and from Gen. Allenby, and from all of the other commanders in chief of the British Army throughout the world, on that subject, in answer to a circular letter which went out from the war office on the 18th of last April as the result of an inquiry in Parliament.

Senator WARREN. I was going to ask whether that was considered desirable or not, but I presume you will get at it there?

Lieut. Col. RIGBY. It is all very fully discussed.

I desire particularly to call attention to the suggestion of Gen. Shaw, the commander in chief in Ireland, who in one paragraph of his letter—the whole letter is interesting—says this, speaking of the punishment No. 1:

> It is not clear that any substitute is really necessary and it is very difficult to suggest one for what is after all only a portion of field punishment No. 1.
>
> The main consideration is that any form of field punishment should be equal in its incidence, and that the delinquent should not escape the risks suffered by his comrades by reason of his bad behavior. In a large Army, such as the British Army in France, it was found in practice very difficult to secure these conditions.
>
> The only method of doing so was to send men behind the line and therefore out of immediate danger. Consequently many men preferred to do severe field punishment well behind the line, than to run the risks attendant on the so-called period of "rest" in close support of the trench line, where long and arduous night working parties under fire, caused the soldier to prefer his tour of duties in the trenches to that of his short tour of "rest."
>
> I think a solution might be found in the formation of penal companies or battalions, to which all men with sentences of 14 days field punishment or upward would be sent.
>
> These penal units could be used for working parties in the dangerous zone, and moreover, could be given a special diet without luxuries of any description. As long as a man remains with his uit, a special diet is impracticable.
>
> I consider that if a penal company formed part of each division, it would be possible to adopt the system for any form of warfare.

Senator WARREN. It would make a lot of trouble, handled that way.

Lieut. Col. RIGBY. It would, and the question would be whether it could be worked.

Senator CHAMBERLAIN. Why could it not be worked by accepting the advantages mentioned?

Lieut. Col. RIGBY. Of course, it is an old, old plan simply to order the men to the front without trial, and our commanders used that this last year. I believe Gen. O'Ryan testified to his use of it and its effectiveness. The difficulty with it in so many cases seems to be that—well, the Germans tried it, for instance, last fall; and the spirit of their army, the morale of the army, was injured by mixing up those men with good soldiers right in the regular organizations. One of the things stated, for instance, is that the sailors from Kiel sent to the front infected many of their organizations with Bolshevism. And then it is a nuisance to have along with your organization those men who ought to be punished.

In Belgium, there has been the suggestion—and you will find it in Maj. Wells's report elaborately worked out by Maj. Van Ackere, Auditeur Militaire, and with the approval of the Belgian authorities—of a plan rather elaborately to form separate penal battalions. So that if the men are sentenced to those battalions, or if sentenced to confinement, the commanding general would have the right to take the men from confinement and to put them in that penal battalion, which would be given the most disagreeable and dangerous work; and then with the opportunity, if a man made good in the penal battalion, to have his sentence entirely wiped out. They planned three ways for him to make good in the penal battalion: He could distinguish himself by exceptional gallantry, which would ordinarily give him the croix de guerre, and that would of itself wipe out the record of a sentence. They had a plan of writing across it in red ink "redeemed by gallantry."

Senator CHAMBERLAIN. Many of those men who commit these petty crimes are the bravest men in the Army.

Lieut. Col. RIGBY. Precisely. Then they would also allow him to serve for a time, I think for four months, in the penal battalion, and if he did his duty regularly and bravely, they would restore him to his place in the regular outfit, and wipe out the effect of his sentence. Or if he was killed in the penal battalion in the course of his duty, that would wipe out the sentence so that there would be no dishonorable record against him for his family. On the other hand, if in the penal battalion a man committed an offense, then it was a very short shrift for him, usually a sentence of death. That same plan was to some extent in force in the French Army by a provision providing for penal battalions which was introduced into the French system, but I was not able to get very much information as to how it worked. But the same problem, you see, has been meeting all of the armies, to find something that would be effective, would not take man-power away from the army, and that would not give a man an opportunity by committing an offense to go to prison and thereby to safety.

Senator CHAMBERLAIN. Did we not amend the articles last year so as to reach that? Did we not provide in some way, did we not place a power in the commanding general over there, to utilize these men?

Lieut Col. RIGBY. By the amendment of the 50th Article of War you provided a broader power to commute sentences, and by amendments to the fifty-second and fifty-third articles of war extended the power to suspend sentences.

Senator CHAMBERLAIN. That was the purpose of it, really, to enable him to handle those men and not lose them from the firing line.

Lieut. Col. RIGBY. The vital difference between that and the suggestion made here is that this would keep the men under sentence and in separate battalions where they would be recognized as men undergoing a sentence, where they could not, in case of a hard situation, infect other men by their grievances. I only call your attention to it as a matter that has come up and has been discussed in those other armies.

I think that is all that I have to offer to the committee.

Senator CHAMBERLAIN. Colonel, we have been very much edified by your testimony, and I shall be glad indeed if you will formulate those bills and let me look them over.

(Thereupon, at 3.40 o'clock p. m. the subcommittee adjourned until to-morrow, Saturday, September 27, 1919, at 2.30 o'clock p. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, SEPTEMBER 27, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 2.30 o'clock p. m., in the room of the Committee on Appropriations, Capitol, Senator Francis E. Warren presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

Senator WARREN. General, will you please state your rank and service to the stenographer?

STATEMENT OF BRIG. GEN. EDWARD A. KREGER, JUDGE ADVOCATE GENERAL'S DEPARTMENT.

Gen. KREGER. Lieutenant colonel, Judge Advocate, in the permanent establishment; brigadier general, Judge Advocate General's Department, in the emergency establishment.

Senator WARREN. Will you please state your service, General?

General KREGER. Captain, Company M, Fifty-second Iowa Volunteer Infantry, during the Spanish War; captain, Thirty-ninth Infantry, United States Volunteers, during the Philippine insurrection; appointed first lieutenant of Infantry, permanent establishment, in 1901, since which date my service has been continuous.

Senator WARREN. You were in the Volunteer service up to that time, and then went into the permanent establishment?

Gen. KREGER. Yes. In 1907 I was detailed as acting judge advocate. In 1911, coincident with my promotion to the grade of captain in the Infantry, I was appointed a major in the Judge Advocate's Corps, and since then have served in that corps.

Senator WARREN. I think you said you were not graduated from West Point.

Gen. KREGER. No. However, from August, 1914, until April, 1917, I served as professor of law at the United States Military Academy.

Senator WARREN. You did line service, as you have indicated?

Gen. KREGER. My service was in the line from 1898 until my appointment in the Judge Advocate's Corps in 1911, except that for a time I served as an acting judge advocate by detail.

Senator WARREN. This subcommittee, General, is seeking information regarding the present Articles of War as compared with the bill which is before us, S. 64, called the Chamberlain bill, and our research has widened somewhat into a comparison of our system of courts-martial with the systems of other countries, and we have endeavored to ascertain as to the application abroad as well as here at home, whether sentences have been oversevere or less severe, or how the workings have been under our law.

As we understand, you have served during the war one year on the other side, as your stripes would seem to indicate, and the balance of the time here, but all of the time in the Judge Advocate General's Department, and we should like to have you give us your ideas of the present law as compared with the proposed law, or some other one that might be proposed, or some system that you might think better than either one. Do I state the case fairly, Senator Chamberlain?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. From the time the United States entered the war until shortly before my departure for Europe in March, 1918, I served in the Provost Marshal General's office, and therefore was not connected during that period with the administration of the Judge Advocate General's Department.

I think I ought to say at this point that the work coming to my desk has kept me so busy that I have had substantially no opportunity to examine the pending bill. The notice of this call to appear before this committee reached me late yesterday afternoon, and there has been no opportunity since then to make special preparation.

Senator WARREN. You have seen this pamphlet, have you, this print in parallel columns of the proposed bill with the present law?

Gen. KREGER. I have seen a copy. My statement was intended as a suggestion that perhaps the committee had better question me specifically, rather than expect a statement from me.

Senator WARREN. I am inclined to think that there would be quite a good many interrogatories propounded even if you laid out the work pretty well beforehand, giving us what is in your mind as to the issue. Senator Chamberlain, would you like to draw him out by questions?

Senator CHAMBERLAIN. I think Senator Lenroot might like to ask him some questions.

Senator LENROOT. Were you a lawyer when you went into the Spanish-American War?

Gen. KREGER. Yes.

Senator WARREN. You were not at West Point as a student?

Gen. KREGER. No.

Senator WARREN. You have been there as one of the teachers since, have you?

Gen. KREGER. From August, 1914, to April, 1917, I served as professor of law at the Point.

Senator CHAMBERLAIN. What were your duties in the Judge Advocate's office up to the time you were detached from that and placed in the Provost Marshal General's office?

Gen. KREGER. During the period prior to my assignment at West Point?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. From March, 1911, until August of 1914, I was on duty in the Judge Advocate General's office.

Senator CHAMBERLAIN. Here in Washington?

Gen. KREGER. In Washington.

Senator CHAMBERLAIN. What were your particular functions?

Gen. KREGER. During a considerable portion of the time I had charge of what was termed the legislative desk.

Senator CHAMBERLAIN. Preparing measures that affected the Judge Advocate General's Department and looking over measures which had been proposed as affecting that?

Gen. KREGER. The study of legislation affecting the Army and the War Department, and making reports on such propositions when either a committee of Congress or a branch of the War Department asked for a report.

Senator CHAMBERLAIN. Then after you left West Point as an instructor of law there—that was in 1914?

Gen. KREGER. I left West Point in 1917.

Senator CHAMBERLAIN. Then you came back here and took another tour of duty in the Judge Advocate General's office proper?

Gen. KREGER. I served in the Provost Marshal General's office; was connected with the draft administration.

Senator CHAMBERLAIN. You remained there how long?

Gen. KREGER. From May 1—that is the approximate date——

Senator CHAMBERLAIN. That is, 1914?

Gen. KREGER. 1917.

Senator CHAMBERLAIN. 1917?

Gen. KREGER. Until about February 9, 1918.

Senator CHAMBERLAIN. And when were you detached from the service in the Provost Marshal General's office?

Gen. KREGER. About February 9, 1918.

Senator CHAMBERLAIN. Then you went to France?

Gen. KREGER. I was attached to the Judge Advocate General's office until my departure for France. I left Washington about the 9th of March, 1918, having been attached to the Judge Advocate General's office about a month immediately preceding my departure for France.

Senator CHAMBERLAIN. Did you go over there to act in the capacity of a judge advocate?

Gen. KREGER. I did.

Senator CHAMBERLAIN. And while you were there you were designated as the representative in France of the Judge Advocate General?

Gen. KREGER. I was.

Senator CHAMBERLAIN. Assuming the functions there that he would have assumed if he had been there?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. As distinct and separate from the staff judge advocate of Gen. Pershing?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That avoided the necessity of sending papers that would ordinarily have come from the staff judge advocate to the Judge Advocate General here? You disposed of them there for the Judge Advocate General?

Gen. KREGER. In respect of cases involving death, dismissal, or dishonorable discharge, in which either the original appointing authority or the commanding general of the American forces in Europe had the power to enter a final order.

Senator CHAMBERLAIN. Now, how much experience did you have while you were in the office of the Judge Advocate General here and before you were detailed for duty in France, with respect to the administration of the criminal law—military law?

Gen. KREGER. During the entire period of my service in the Judge Advocate General's office, prior to my assignment at West Point, I had work connected with the administration of military justice. From time to time I was called upon to write reviews and prepare opinions in respect to what may be termed the more important cases: those that had to go to the President.

Senator CHAMBERLAIN. Could you state approximately how many records you examined from court-martial sentences, generally?

Gen. KREGER. Any statement I might make on that point would be a guess rather than an estimate, Senator, because the number of cases that came to me from time to time depended partly upon the inflow of that kind of work and partly upon whether or not my desk was otherwise in a condition to permit me to study the cases promptly.

Senator CHAMBERLAIN. In other words, as a matter of fact you did not have as much to do with the review of these appeals as others in the Judge Advocate General's office?

Gen. KREGER. During my connection with the office I had as much to do with them as any other officer had. The duty was not assigned especially and particularly to any one officer. There was a small force in the office at that time. I came here to the office from duty as judge advocate, or acting judge advocate, of the Department of the Colorado. I was detailed as acting judge advocate of the Department of the Colorado in December of 1907, and was relieved there in March of 1911 to come to Washington. In the meantime, however, I had served detached from the Denver office for duty as instructor in law at the Army Service Schools at Fort Leavenworth, and also in connection with the provisional government in Cuba; so that during the three years and a half that I was connected with the Department of the Colorado I was not present for duty there all the time.

Senator CHAMBERLAIN. What I was trying to get at was your experience in handling these sentences of courts-martial that came for review to the Judge Advocate General's office.

Gen. KREGER. I had had the experience of a department judge advocate, and the experience of an assistant in the Judge Advocate General's office.

Senator CHAMBERLAIN. You can not say approximately how many cases you reviewed after you came here to the Judge Advocate General's office?

Gen. KREGER. No.

Senator CHAMBERLAIN. What were your functions when you reviewed a sentence of a court-martial after you came here to the Judge Advocate General's Office? What did you do?

Gen. KREGER. That is, you mean in 1911, when I came here as an assistant?

Senator CHAMBERLAIN. Yes; all the time you were in the Judge Advocate General's Office? What were your functions in reviewing cases? What did you do?

Gen. KREGER. I studied the entire record to determine, first and foremost, whether the record was legally sufficient to support the sentence, and in the second place, if it were a Presidential case—that is, one that was not closed—to determine whether there was ground for the exercise of clemency.

Senator CHAMBERLAIN. And, third, whether or not the court had jurisdiction?

Gen. KREGER. That is naturally a part of the question of whether or not the record is legally sufficient to support the sentence.

Senator LENROOT. What was the test of legal sufficiency?

Gen. KREGER. There had to be a showing that the court was appointed by some one having authority to appoint the court; that the warrant of appointment appeared of record; that the man brought before the court was a man subject to military law; and then, of course, there are various and sundry additional points to be considered; for example, the court must be sworn, and the right of challenge accorded.

Senator LENROOT. Perhaps I can put it in this way: Did it go beyond the determination of whether or not the court had jurisdiction?

Gen. KREGER. You mean the examination of the record?

Senator LENROOT. Yes.

Gen. KREGER. Oh, decidedly, Senator. It was a complete and thorough examination——

Senator LENROOT. Oh, I did not mean that; but I mean, in coming to your determination of legal sufficiency——

Gen. KREGER. Oh, yes.

Senator LENROOT. For instance, if there were prejudicial error such as would cause a reversal in a civil case, how was that treated?

Gen. KREGER. Prejudicial, say, in the introduction of testimony?

Senator LENROOT. Yes.

Gen. KREGER. The theory on which we proceeded with the examination of cases covered by General Order 7 of 1918, was this, that if there were error in the introduction of testimony, the case could not stand unless the competent evidence was sufficiently strong practically to compel a reasonable man to find as the court had found, after disregarding all incompetent testimony.

Senator LENROOT. Did the court exclude evidence?

Gen. KREGER. The court, on motion of either the prosecutor or counsel for the defense, often excludes evidence.

Senator LENROOT. Then you say you tried the case upon the strength of the evidence produced, and in case you found error, where evidence had been improperly excluded?

Gen. KREGER. That might be prejudicial to the same extent as the actual improper introduction of evidence.

Senator LENROOT. Yes, and you could act on it in the same way, could you, General? I can readily see, if all the evidence was there and some of it had been improperly admitted, nevertheless, on the whole case, justice had been done; but that you could not determine if there had been improperly excluded evidence?

Gen. KREGER. That would ordinarily appear in the record, because, assuming that the evidence had been offered by counsel for the accused, and objection had been made to it, he would ordinarily indicate the nature of the evidence to such an extent that one could determine whether or not the exclusion, if erroneous, was prejudicial. Do I make myself clear?

Senator LENROOT. Yes. Well, suppose you determined that it was prejudicial; what then?

Gen. KREGER. If it were determined that it was actually prejudicial, I held that the conviction was invalid.

Senator LENROOT. In other words, you applied the same rule that an appellate court of civil jurisdiction would apply?

Gen. KREGER. That has been my theory.

Senator LENROOT. That is what I was getting at.

Senator CHAMBERLAIN. Then what is the practice?

Gen. KREGER. If the conviction is held invalid, wholly or partly, either the sentence is set aside, or there is action by way of clemency.

Senator CHAMBERLAIN. I do not understand that you agree with the general contention there in the Judge Advocate General's Department. I understand that your department acted under section 1199 of the Revised Statutes, did you not?

Gen. KREGER. Section 1199 of the Revised Statutes never became a subject of discussion, so far as I recall, until some time near the end of 1917.

Senator CHAMBERLAIN. Well, take a supposed case before that controversy came up. Would the Judge Advocate General, where you found that a sentence was irregular, set it aside and order the prisoner discharged; or would you simply, from the record you made, advise the court or the commanding officer as to what ought to have been done; or did you order a retrial or a reversal?

Gen. KREGER. The action of the office always was advisory.

Senator CHAMBERLAIN. That is what I am getting at. I understand that the action of the office was simply advisory to the commanding officer?

Gen. KREGER. It was.

Senator CHAMBERLAIN. So that you really did not set aside a sentence?

Gen. KREGER. If I used that terminology I should ask to correct it.

Senator CHAMBERLAIN. I rather understood that you did.

Senator LENROOT. I think you did.

Senator CHAMBERLAIN. Did you not so understand him, Senator?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. My understanding is that no matter what you found in the record, provided the court had jurisdiction and there was some evidence to sustain the judgment, you did not interfere except in an advisory way?

Gen. KREGER. That is correct. However——

Senator CHAMBERLAIN. Yes; that is right.

Gen. KREGER. I might suggest that there must have been more than "some evidence." The "scintilla rule" never was followed in the office. The rule requiring substantial evidential support for every essential allegation in a specification governed.

Senator CHAMBERLAIN. Now then, suppose you found that state of facts, that there was evidence—a scintilla of evidence, if you please; did you then undertake to reverse the sentence?

Gen. KREGER. We undertook to advise the Secretary of War respecting it.

Senator CHAMBERLAIN. That is my understanding of it, General. I do not want any misapprehension between us as to that.

Gen. KREGER. Yes.

Senator CHAMBERLAIN. If the court had had jurisdiction and the trial had been regular, then no matter how small the evidence might have been been, you acted only in an advisory capacity?

Gen. KREGER. In any event we acted in an advisory capacity, because even a declaration of nullity was made by the Secretary of War.

Senator CHAMBERLAIN. So that if you found the court did not have jurisdiction, then what happened?

Gen. KREGER. We advised the Secretary of War and drew a declaration of nullity.

Senator CHAMBERLAIN. So that you did not exercise the power of reversal or modification or amendment prior to the time when this controversy arose?

Gen. KREGER. We exercised it in an advisory way.

Senator CHAMBERLAIN. After the controversy arose you did not change the rule which you had adopted?

Gen. KREGER. There has been no change, except as required by General Order 7 of 1918.

Senator LENROOT. Did you follow cases after your action had been taken?

Gen. KREGER. I naturally did, over in France.

Senator LENROOT. With reference to this—this is what I had in mind, this advisory action. Were there any cases where your action was not confirmed or your advice was not followed?

Gen. KREGER. Yes; in a very few cases, the proportion being so small as to be practically negligible.

Senator LENROOT. Generally speaking, who was it that did not follow the advice? Would it be the court or the commanding officer or the Secretary of War?

Gen. KREGER. I shall have to speak, now, more particularly with reference to the period of the recent war, because the cases preceding that period have faded out of my recollection.

Senator LENROOT. Yes.

Gen. KREGER. During the time that I was acting judge advocate general for the American Expeditionary Forces in Europe I can now recall only two cases in which my advisory recommendation was not in the end followed with reference to the question of whether or not the sentence should be held good. In one of those cases the judge advocate of the appointing power and the appointing power disagreed with me on the law, and they followed their own judgment rather than mine. Speaking from recollection, the case was one in which a man was found guilty of desertion. I held that there was sufficient evidence erroneously introduced on the issue of desertion, as distinguished from absence without leave, to invalidate the finding of guilty of desertion, and recommended that the finding of guilty of desertion be disapproved, or rather that only so much of the find-

ing of guilty of desertion be approved as involved a finding of guilty of absence without leave, the lesser included offense. My advice was not followed.

Senator CHAMBERLAIN. Was that a death sentence?

Gen. KREGER. No. My recollection now is that it was not a question of releasing the man from confinement, even had my advice been followed, but it was a question of reducing or mitigating the adjudged punishment, and, of course, a question of clearing the man's record of the charge of desertion.

The other case was a case in which the judge advocate of the appointing authority, the appointing authority, the judge advocate of the confirming authority, the confirming authority, and also the Secretary of War disagreed with me. There was an appeal from my opinion.

Senator CHAMBERLAIN. To whom?

Gen. KREGER. Primarily to the Judge Advocate General. Unfortunately that case arrived in Washington after I had become Acting Judge Advocate General. Naturally, having judged the case below, I did not participate in judging it up here. I sent the case to the Military Justice Division, presided over by Col. Read. That division passed on it; passed it up to the Secretary of War.

Senator CHAMBERLAIN. Agreeing with you?

Gen. KREGER. That is my understanding. I did not look into it, but recently I was advised that the office here, the Military Justice Division, had agreed with me, but that the Secretary of War had agreed with the other judge advocates.

I do not mean to state definitely that those are the only two cases, out of some 2,500 that I passed on over on the other side, in which there was disagreement. My recollection is now that those were the only ones in which, in the end, the advice of my office respecting the validity of a conviction was not followed.

Senator CHAMBERLAIN. In the 2,500 cases that you speak of over there, in what proportion of them did you advise a modification and reversal of the sentence?

Gen. KREGER. I should have to make a guess as to that. Modification or reversal probably ran somewhere between 5 and 10 per cent.

Senator CHAMBERLAIN. Of your recommendations?

Gen. KREGER. I should judge so. Now, I shall want to check that up, however.

Senator CHAMBERLAIN. Yes; you can correct that.

(NOTE BY GEN. KREGER.—The chief of the statistical section, Judge Advocate General's Office, states that in approximately 6 per cent of the cases examined by the branch office in France while I was in charge of that office reversal or modification of findings or sentences was recommended.)

Senator LENROOT. Did it not frequently happen that a court-martial would receive evidence of other offenses or conduct of the defendant, other than that charged?

Gen. KREGER. Occasionally. That was, I think, part of my quarrel on the first case I discussed here.

Senator LENROOT. That is what I was going to ask you about. But you took the position that it might have so prejudiced the minds of the court that a correct conclusion was not arrived at?

Gen. KREGER. Yes, sir.

Senator LENROOT. I see.

Gen. KREGER. When a man is brought before a military court, the theory is that all charges against him that are properly cognizable by a court shall be cleared up at that time.

Senator CHAMBERLAIN. So that he may be tried on three or four charges; but not unless they are specified?

Gen. KREGER. Not unless they are specified. The rule is that a man may not have his other offendings exploited before a court, except that after the court has arrived at a finding of guilty, and before adjudging a sentence, the court may hear evidence of previous convictions within one year. It may not go further back than that, and may consider only previous convictions of which there is record evidence; and only previous convictions before military courts, not before civil courts.

Senator CHAMBERLAIN. You went over all of the cases that were tried before courts-martial where sentences were rendered to go up to the Judge Advocate General for revision?

Gen. KREGER. Over those within my jurisdiction, as heretofore indicated.

Senator CHAMBERLAIN. Were they all carefully revised—all carefully examined into and reviewed?

Gen. KREGER. Every case had a careful review. I speak only of the review or revision respecting cases that my office reviewed or revised.

Senator CHAMBERLAIN. Is it not true that there were sentences of courts-martial rendered and executed before the record reached your office and you went over them?

Gen. KREGER. Of what period are you spjeaking?

Senator CHAMBERLAIN. I am speaking of the time before the issuance of that general order which required all cases where a death sentence had been adjudged, to be sent to the Judge Advocate General's Office.

Gen. KREGER. No sentence of death or dismissal adjudged in time of peace may be executed before the President has passed upon it.

Senator CHAMBERLAIN. But when was that regulation adopted?

Gen. KREGER. That has stood in the statutes of the United States since the Government was founded.

Senator LENROOT. It is the original law.

Senator CHAMBERLAIN. But here are those Texas cases where those negroes were hung—were executed—before the records got to the Judge Advocate General's Office.

Gen. KREGER. That was in time of war, Senator.

Senator CHAMBERLAIN. That possibility was removed by a regulation later, was it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. When?

Gen. KREGER. General Order No. 7, War Department, January 17, 1918.

Senator CHAMBERLAIN. That was after the war started?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That general order was really the basis of your having been sent to France, was it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. So that the Judge Advocate General could review the cases in pursuance of this regulation?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Without having the records sent here?

Gen. KREGER. Without having the records sent here.

Senator CHAMBERLAIN. There was a case, notwithstanding the law you speak of—take the Texas case—even in time of war, where the sentence was executed without your office having opportunity to review or suggest or revise; is not that true?

Gen. KREGER. Yes; but those cases were tried before General Order 7, 1918, was promulgated. Under the law, in time of war, in the absence of a regulation, the department commander's action on the sentence was final.

Senator CHAMBERLAIN. Take the Texas cases where those negroes were executed. Did you review the record after the men were executed?

Gen. KREGER. I did not. I have had nothing to do with those cases except in passing on applications for clemency.

Senator CHAMBERLAIN. It would not have helped the men very much for you to have examined the record and found that it was irregular, or even that the court had not jurisdiction, would it?

Gen. KREGER. No. Of course, in time of peace, no sentence of death or dismissal can be executed without the confirmation of the President; and that, of course, brings the record up here for formal revision.

Senator CHAMBERLAIN. In time of war, however, that was done until the adoption of General Order No. 7?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Those sentences were carried into execution without the reviewing authority or the President having a chance to pass on them?

Gen. KREGER. Yes; as even now certain sentences are carried into effect before the record gets up to the office here for review.

Senator CHAMBERLAIN. What kind of cases are they?

Gen. KREGER. Those are sentences that do not involve any permanent change in the status of a man.

Senator CHAMBERLAIN. That is, dishonorable discharge or the death sentence?

Gen. KREGER. Yes. No sentence involving death, dismissal, or dishonorable discharge can be executed until this review is had. If it is a question of confinement or forfeiture only, then the general order publishing the final action of the reviewing authority is published and the execution of the term begins. Of course, if, when the record reaches us here, we find it bad, we advise the Secretary to that effect, and he either publishes, himself, or directs the reviewing authority to publish, a modifying order.

Senator WARREN. May I ask you about that Order No. 7; has that been changed, or rescinded, or altered?

Gen. KREGER. General Order No. 7 is in force to-day.

Senator WARREN. The status of your office according to the opinion in your office is that we are still in war times, is it not?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Was not General Order No. 7 modified by General Order No. 84?

Gen. KREGER. Yes; there was a modification of the jurisdiction of the office on the other side.

Senator CHAMBERLAIN. The modification or the amendment of it practically brought you back to the United States?

Gen. KREGER. No; the first modification which was made in September—September 11, 1918—extended my jurisdiction over there to include not only the cases involving death, dismissal, or dishonorable discharge, but all other cases.

Senator CHAMBERLAIN. When was that modification, about?

Gen. KREGER. Speaking from recollection, September 11, 1918; that is, General Order No. 84.

Senator CHAMBERLAIN. Yes; 84. Was there a still further modification of it?

Gen. KREGER. The order which brought me back here placed the functions of the French office in abeyance, temporarily, and when the office began to function again, there was a modification in the terminology of the order.

Senator CHAMBERLAIN. What was that number?

Gen. KREGER. Forty-five or 49, or something like that, of 1919—about March 22, 1919.

Senator CHAMBERLAIN. Will you put those three general orders, Order No. 7, and each of the modifications thereof, in this hearing?

Gen. KREGER. I shall be glad to .

Senator CHAMBERLAIN. Put them in together, so that we will have them.

Senator WARREN. Because of those you were sent over to the other side, for service over there?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. And then you were brought back?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. And then you were sent over and brought back again?

Gen. KREGER. No; I went over there once only, in the early part of March, 1918, returning about the middle of March, 1919. During that time my sole duty on the other side was to review general court-martial records. I had no other jurisdiction.

Senator WARREN. No one took that up, to follow it up afterwards?

Gen. KREGER. Yes. When the period of temporarily suspended animation was over with, Col. Herbert A. White, of the Judge Advocate General's corps, was placed in charge of the office, and the office has been functioning from that time on until the present.

Senator CHAMBERLAIN. The result being somewhat the same as if you had been brought back here and then sent over again?

Gen. KREGER. Exactly.

(The General Orders above referred to are here printed in full, as follows:)

General Orders, No. 7.

WAR DEPARTMENT,
Washington, January 17, 1918.

I. Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record

of trial has been reviewed in the Office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199 Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said

branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

By order of the Secretary of War:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

General Orders, No. 84.

WAR DEPARTMENT,
Washington, September 11, 1918.

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IV. The last subparagraph of section II, General Orders, No. 7, War Department, 1918, is amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

[250.47, A. G. O.]

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
Acting The Adjutant General.

General Orders, No. 41.

WAR DEPARTMENT,
Washington, March 25, 1919.

I. Review of records of general courts-martial. The last subparagraph of section II, General Orders, No. 7, War Department, 1918, as amended by section IV, General Orders, No. 84, War Department, 1918, is further amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part, to the end that any such sentence or any part thereof so found to be illegal or void shall not be carried into effect. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. The said Acting Judge Advocate General will forward all records in which action is complete, together

with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

[250.4, A. G. O.]

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By order of the Secretary of War:

FRANK MCINTYRE,
Major General, Acting Chief of Staff.

Official:
J. T. KERR,
Adjutant General.

Senator CHAMBERLAIN. When were you made acting Judge Advocate General?

Gen. KREGER. The order is dated March 10 of this year. I was furnished a copy of the order on landing in the United States on March 13.

Senator CHAMBERLAIN. As a matter of fact, General, taking your testimony as a basis for the question, and the testimony of other witnesses, there is really no appellate tribunal in the military establishment? There is a reviewing tribunal with an advisory power; that is about all, is it not?

Gen. KREGER. That is one way of putting it.

Senator CHAMBERLAIN. If there is any other way, let us have it, because we want to know what the fact is.

Gen. KREGER. In practice every case does undergo a careful review.

Senator CHAMBERLAIN. Yes; a review, but not an exercise of appellate jurisdiction to modify, reverse, or change, and it is not modified?

Gen. KREGER. The office does not assume to exercise the power to decree a reversal. A recommendation is made to the reviewing authority or to the Secretary of War on the subject.

Senator CHAMBERLAIN. So that if a man has been prejudicially convicted, or convicted where some substantial right has been invaded, the only thing for him is clemency, is it not?

Gen. KREGER. Oh, no.

Senator CHAMBERLAIN. I want to know where there is any appellate tribunal that can grant relief except the Commander in Chief of the Army and Navy.

Gen. KREGER. Take the case of a man tried for desertion, who is found guilty and sentenced by the court, and whose sentence as adjudged by the court is approved by the reviewing authority. The record goes up to the Judge Advocate General's Office, because execution of the judgment is stayed by the operation of General Order No. 7, 1918. It is reviewed in the Judge Advocate General's Office. That office finds the record legally insufficient to support the sentence, and advises the commanding general to that effect. The commanding general enters his disapproval on the record in lieu of his original approval. The case is ended; and the man is released from confinement and restored to duty. That is on the assumption that the commanding general will respond to the legal advice given by the Judge Advocate General.

Senator CHAMBERLAIN. Suppose he does not?

Gen. KREGER. If he does not, he runs counter to what is intended to be brought about by General Order No. 7; namely, that no sen-

tence shall be carried into effect if the Judge Advocate General finds the record legally insufficient to support it.

Senator CHAMBERLAIN. General Order No. 7 is not a law, but is simply a regulation of recent origin and adoption?

Gen. KREGER. Yes. It is an effective one, however. I can now recall only one case arising during the six months I served as Acting Judge Advocate General in which the reviewing authority disagreed with us on the question of disapproving a sentence.

Senator CHAMBERLAIN. In violation of General Order No. 7?

Gen. KREGER. The reviewing authority appealed to the Secretary of War.

Senator CHAMBERLAIN. Yes.

Gen. KREGER. In other words, I do not now recall that, during the six months of my service as Acting Judge Advocate General, a single sentence was caried into effect by a commanding general after our office had advised him that the record was legally insufficient to support the sentence.

Senator CHAMBERLAIN. What was done with the commanding officer who disobeyed General Order No. 7?

Gen. KREGER. Meaning——

Senator CHAMBERLAIN. In those two cases you spoke of?

Gen. KREGER. That I spoke of—cases that arose on the other side?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. In one of those cases my advice was simply disregarded. I do not know that anything happened to the commanding officer. I never investigated that. That was a matter for the Secretary of War.

Senator CHAMBERLAIN. Suppose the commanding officer, even after the adoption of General Order No. 7, had seen fit to disobey the advice of the Judge Advocate General's office, and to disregard General Order No. 7; what would you have done?

Gen. KREGER. The question you are raising, Senator, is as to the legality of the action of the reviewing authority in acting against the advice of the Judge Advocate General?

Senator CHAMBERLAIN. Of the Judge Advocate General, yes.

Gen. KREGER. I suspect that under the statute, as it stands, the action of the reviewing authority would have legal foundation.

Senator CHAMBERLAIN. Yes; that is what I say: General Order No. 7 has for its purpose the restraint of the commanding officer by compelling him to obey the advice of the Judge Advocate General's Office, and then if he disobeys that advice, he is perfectly sustained by the law, although he may disobey a regulation.

Gen. KREGER. However, he is subject to discipline by higher authority.

Senator CHAMBERLAIN. Yes; did they do it in either of those cases you mentioned?

Gen. KREGER. The final authority in one of these cases was the Secretary of War; and in the other case, a major general, who stood on the advice of his own judge advocate. It was a case of two lawyers disagreeing.

Senator CHAMBERLAIN. Do you think that there ought to be some appellate jurisdiction that has power not only to act but to compel obedience to its judgments?

Gen. KREGER. I do.

Senator CHAMBERLAIN. There has not been any disagreement on that proposition, so far as I have heard the testimony here. The only question about which there is a difference is as to whether that appellate tribunal should be composed in part or in whole of civilians, and whether or not it should be entirely within the Military Establishment, or partly within the Military Establishment, or a civil tribunal entirely. You think, I presume, that it ought to be entirely within the Military Establishment, composed entirely of military men or men in uniform?

Gen. KREGER. I think the course of appeal should remain within the Military Establishment, and end finally with the President.

Senator CHAMBERLAIN. That is in accordance with the amendment proposed by the Judge Advocate General's Office to the Committee on Military Affairs in January, 1918.

Gen. KREGER. I have not examined that recently. That is my recollection, however, of the theory of that amendment. I did not participate in its preparation.

Senator CHAMBERLAIN. And confirmed by the Kernan report?

Gen. KREGER. That is as it may be. I do not remember about that.

Senator CHAMBERLAIN. And recommended by the majority of the American Bar Association, I suppose. And you do not think there ought to be any civilians on that appellate tribunal?

Gen. KREGER. I do not.

Senator WARREN. I just want to ask a question outside the lawyers' domain. What proportion of the officers of the Judge Advocate General's Department came from civil life and what proportion from West Point graduates?

Gen. KREGER. You are speaking of the Permanent Establishment?

Senator WARREN. Yes; and further than that, in the selection of these various judge advocates, whether there is any difference in the selection between those that come from civil life and those that happen to come from West Point and were in the line before they were sent into the Judge Advocate General's Department?

Gen. KREGER. Have you an Army Register, Senator? I can answer definitely by reference to an Army Register. Otherwise I can only give an impression.

Senator WARREN. Give your impression, and then you can correct it afterwards.

Gen. KREGER. I think about half from West Point and the other half from other sources; though if there is any difference, it is in favor of the other sources.

(NOTE BY GEN. KREGER.—The present commissioned personnel of the Judge Advocate General's Department, Permanent Establishment, consists of 10 officers who are graduates of the United States Military Academy, and 18 who are not graduates of that institution.)

Senator WARREN. Those that come from West Point have not been prepared of course to take up the duties of law officers, have they?

Gen. KREGER. They get an elementary course in law there.

Senator WARREN. But do they not have to go to some other educational institution or be in some school of the Army?

Gen. KREGER. Practically all of the men coming from the Point who have been appointed judge advocates are men who have em-

braced an opportunity to take a course in law. Of course they never practiced as lawyers in civil life, because they went to the Point as young men.

Senator WARREN. There is a difference between the two paths, isn't there, Gen. Kreger?

Gen. KREGER. Yes.

Senator WARREN. Now, we all understand that when a man gets a uniform on he is in the Army, whether for a month or for life. I wanted to get at, if I could, what the line of—I will not say prejudice, because none of us are supposed to be prejudiced—but whether it really made any difference in the selection for that place whether a man has been in the line of the Army or whether he has been practicing law in civil life, and the qualities of the men were known.

Gen. KREGER. It is essentially a question of the earning character and capacity of the man, rather than where he comes from.

Senator WARREN. Do you think he is better fitted if he has had a good service in civil life in various lines of crimes and misdemeanors than if he has had no experience whatever?

Gen. KREGER. Successful experience as a practicing attorney is exceedingly valuable. It is from that class that the Judge Advocate's corps was recruited during the war.

Senator WARREN. Now the laws in civil life and the laws in the Army are quite different, and the punishments and mode of procedure are exceedingly different, especially in war. Do those who come in from civil life adapt themselves to the exigencies of the Army life and Army law and Army punishments as readily as those that are from the Army in the first instance?

Gen. KREGER. There are compensating advantages and disadvantages. The lawyer from civil life who comes to the law work of the Army, with no military experience, is hampered somewhat by his lack of knowledge of conditions. He finds it difficult to orient himself. To begin with he is somewhat in the dark with respect to facts and circumstances that the man who has served in the Military Establishment knows and feels.

Senator WARREN. Now that is one side of the proposition. Now let us look at the other. The man who has had no Army life, but is well grounded in law, outside—in other words, I want to get at whether it does not make a better court to use them together than to use either one exclusively.

Gen. KREGER. Undoubtedly. The man who has served long in the Military Establishment has missed some lines of legal experience that the civilian practitioner gets. That is his disadvantage. When the two classes of officers are employed together, using one as the complement of the other, we have the ideal arrangement.

Senator CHAMBERLAIN. I do not think it is a disadvantage from the civilian's viewpoint. I do not think it is a disadvantage. He has been accustomed to seeing the criminal laws of his country administered along well-settled and well-adjusted rules of evidence, with every safeguard thrown around a man who is charged with a crime, while I sometimes doubt very much if a military man sees anything else than the strict military rule in the investigation of a crime.

Gen. KREGER. The civilian lawyer coming into the legal work of the Army, particularly the disciplinary side of it, without previous military experience, seems to be impressed with an erroneous theory

that the law of criminal procedure and the substantive criminal law on the military side differ so much from law and procedure on the civil side that he is quite likely to say, "This might be bad in a civil proceeding, but certainly we can not permit technicalities to stand in the way of substantial justice in a military court," with the result that at times the civilian lawyer when first coming into military law work will pass as valid a proceeding that the experienced military judge advocate would not pass. After a time that works itself out.

Senator CHAMBERLAIN. General, the function of a judge advocate in the smaller as well as in the larger unit is that of the prosecutor. is it not?

Gen. KREGER. Not at all. You are speaking of the member of the judge advocate's corps, the staff judge advocate?

Senator CHAMBERLAIN. Well, I am speaking now of the man who appears in the court, after a court is appointed to try a man?

Gen. KREGER. The trial judge advocate?

Senator CHAMBERLAIN. Yes; the trial judge advocate. His function is that of a prosecutor?

Gen. KREGER. That is one of his functions, and if there is counsel for the accused, that is his main function; but if there is no counsel for the accused, a rare occurrence, the trial judge advocate is charged with the protection of the rights of the accused. Of course that gives him a difficult duty to perform.

Senator CHAMBERLAIN. That gives him an impossible duty to perform if he is to do it impartially.

Gen. KREGER. It is certainly next door to impossible.

Senator CHAMBERLAIN. Why should your corps oppose something like the British system where the judge advocate is there as the legal officer of the court, protecting the court, the Government, and the defendant as well, protecting the court from the commission of error. and protecting the defendants against the admission of incompetent or improper testimony?

Gen. KREGER. You are speaking of a judge advocate who is detailed by the judge advocate general of England to sit with a general court-martial?

Senator CHAMBERLAIN. Not as a part of the court, but as an adviser?

Gen. KREGER. That is, in the comparatively few specially important cases that go to general courts-martial?

Senator CHAMBERLAIN. It might be few, or it might be all.

Gen. KREGER. I think it runs only 25 or 30 cases per annum in time of peace. The district court-martial in the British Army, in time of peace, performs to a very large extent the functions that are performed by our general court-martial.

Senator CHAMBERLAIN. Why should not the judge advocate here appear only as an adviser?

Gen. KREGER. The trial judge advocate?

Senator CHAMBERLAIN. Yes.

Gen. KREGER. Now, the trial judge advocate is the representative of the Government in presenting the case.

Senator CHAMBERLAIN. Now?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Why should not he be there rather as adviser of the court?

Gen. KREGER. Who would present the case for the Government?

Senator CHAMBERLAIN. The court could appoint a special prosecutor if it wants, just as now it appoints a man to defend the accused. As it is now, the commanding officer appoints the court, the judge advocate appoints the man who afterwards rules on the admissibility of evidence, who disapproves or approves the evidence. As a matter of fact it is a Government of men mostly, not a government of law.

Gen. KREGER. I think, Senator, I should have to take issue with you there.

Senator CHAMBERLAIN. I would like to have you enlarge on that, because that is what I get from the hearings.

Gen. KREGER. It is true that the commanding officer appoints the court. It is true that he refers the charges. It is true that he designates the judge advocate. Under present regulations, he must also designate, with each court, a competent officer to represent the accused if the accused does not select someone else. And he passes upon the validity of the findings. He passes on all of these under the sanction of his oath as an officer, requiring him to conform to the law. As a matter of fact, the commanding general, in legal matters, rests upon the advice of his staff judge advocate. Again it is advisory. However, referring to the period when I was judge advocate of a department, I do not recall a single case in which the commanding general applied a different view of the law than the one I advised him was the correct one.

Senator CHAMBERLAIN. That might have been so in your case, but it is not so in every case, if the records here are to be relied upon. But now wherein do we disagree? Wherein is the issue between us? You have practically repeated what I said a while ago as to the power of the commanding officer.

Gen. KREGER. Someone must do these things.

Senator CHAMBERLAIN. Well, I know; but you took issue with me on what I said a while ago.

Gen. KREGER. I took issue with you upon the statement, Senator, that the judgment of a military court is merely the judgment of a man, not a judgment according to law.

Senator CHAMBERLAIN. That is merely a difference in the inference that we draw from a set of facts that exists.

Senator LENROOT. General, on this appellate procedure, perhaps you do not want to say that you agree with the Kernan report. Who, in your opinion, should have the appellate power and how should it be constituted?

Gen. KREGER. It should be lodged finally in the President.

Senator LENROOT. And intermediate between the commanding officer and the President, would there be any?

Gen. KREGER. So far as the details are concerned, the Judge Advocate General's Department should be sufficiently strong in the number and the capacity of its personnel to study and report upon every case promptly and with sufficient cogency to dispose of it according to law.

Senator LENROOT. Still in an advisory capacity?

Gen. KREGER. Still in an advisory capacity.

Senator LENROOT. What difference, then, would there be between that and the present law? Is not that practically the power of the President?

Gen. KREGER. About the only change that seems to me to be necessary would be to make it perfectly clear that until a case is finally disposed of by the supreme appellate power it remains open for reversal or modification of the judgment below, so that no man would have to rest under any finding or sentence that is finally regarded as unwarranted by the record.

Senator LENROOT. Well, I speak now only of prejudicial error of law. Why should the President be the final power in that? Surely he is not presumed to have any special knowledge upon that subject.

Gen. KREGER. I think that is where the power should finally be lodged, because it is essential to the efficiency of any military organization that the final authority rest in one man.

Senator LENROOT. Why—confining ourselves now to prejudicial errors of law?

Gen. KREGER. The moment another is empowered to speak the final word with respect to anything connected with a military organization we establish a second line of command.

Senator LENROOT. Let us see about that, General. Bear in mind that I am now confining myself to prejudicial errors of law. Is it your idea that in a given case, although a competent authority should judge that prejudicial error has been committed, nevertheless there should be power vested in somebody with authority to disregard that error and confirm a sentence that was actually illegal?

Gen. KREGER. No; I do not think that will be done.

Senator LENROOT. I am not speaking of what would be done. I am asking if that would not be so. Why should not there be a competent authority to settle that question of prejudicial errors of law when it would be deemed that the President himself would not necessarily be that competent authority?

Gen. KREGER. If a way were pointed out to effectuate that without establishing a second line of command, I should be ready to consider it.

Senator LENROOT. Is not this the difficulty, General, that in these different plans that have been suggested of an appellate tribunal there is always conveyed with the power of that tribunal not alone to pass upon prejudicial errors of law but really to pass upon the record as a whole and substitute its judgment for that of the court, and is not that where you get your objection?

Gen. KREGER. There is no authority and there never has been an authority that could impose a sentence more harsh than the one adjudged by the court, or enter any finding more harsh than the one arrived at by the court.

Senator LENROOT. I understand that, but there is now an authority that, although it might be admitted by every lawyer and by any competent court that prejudicial error had been committed, nevertheless, may confirm that sentence.

Gen. KREGER. If the commanding general sees fit——

Senator LENROOT. I am speaking now of the power.

Gen. KREGER. If the commanding general sees fit to disregard the advice of his judge advocate; yes.

Senator LENROOT. Yes. Now then, my question is, why should there not be a competent authority to pass upon those questions, not to substitute its judgment, but revise the action of the court-martial with reference to its judgment upon the facts? If there is error committed prejudicial to the defendant, why should not there be some competent authority to settle that, and then go to the President or to the court-martial, or to the commanding officer, it may be, for further decision in the case?

Gen. KREGER. The law at the present time lodges that power and duty in the commanding general.

Senator LENROOT. But the commanding general is not competent upon that. He takes the advice, and it is only advice, from those who are competent to pass upon it?

Gen. KREGER. The moment we lodge that final power in some one other than the commander, however, we make that other the more powerful in the organization.

Senator LENROOT. How can that be so if the jurisdiction of this other authority is limited only to ascertaining whether prejudicial error of law is committed?

Gen. KREGER. Reducing the inquiry to one single feature?

Senator LENROOT. I have stated several times, General, that that was how I was limiting it.

Gen. KREGER. On the face of the question, it would seem not to be specially important. But if the judge advocate may pass upon that finally, it makes him to that extent the superior of the major general commanding the divison.

Senator LENROOT. Does it not amount to just this: that the law is superior to the commanding officer? The commanding officer, or whoever affirms the sentence, is supposed to follow the law, and the suggestion that I have made would be purely an authoritative interpretation of the law as applied to a given case. It has nothing to do with the command.

Gen. KREGER. And yet that interpretation rendered by a major would overrule a major general?

Senator LENROOT. That might be so, of course. Let me put the question then, would you think a major general, absolutely ignorant of law, should have a higher power upon the rights of an accused, knowing nothing of those rights as a matter of law, in the matter, than a subordinate officer who is fully competent to pass upon the interpretation of law?

Gen. KREGER. I see no reason for departing from the statement that I have made that the commanding general, with the advice of a competent judge advocate, and acting under the sanction of his oath, should have this final authority.

Senator LENROOT. Even though he is incompetent to exercise it?

Gen. KREGER. I can not assume that he is incompetent to exercise it.

Senator LENROOT. Well, let me give you a case. Assume then that he has no knowledge of the law.

Gen. KREGER. That is why he has a law officer to advise him.

Senator LENROOT. That comes right back to the beginning.

Senator CHAMBERLAIN. That is reasoning in circles. Put it this way: If I may use your own illustration a little further, we will say Senator Warren here and Senator Lenroot and Chief Justice

White constitute the Department of the Judge Advocate General. Every record of conviction of these higher crimes, we will say, approved by the commanding general comes up to them for review. It has been approved by the commanding general, and yet these gentlemen, with Mr. Lenroot, who is a distinguished lawyer, and Justice White, who is a distinguished judge, take that record up by the four corners and they find that there has been prejudicial error, that the defendant was not properly represented, that evidence was excluded that ought to have been admitted, hearsay evidence was admitted that ought not to have been admitted, and that there was gross error in the trial of the case; in other words, that the man did not have a fair trial. They make their finding to that effect. It may not be that they can enforce the judgment of the lower court, but they can at least advise the court of the errors, whether these men had the rank of major or no rank at all.

Gen. KREGER. If the law officers properly advise the commanding general, he will never, in anything like a clear case, give effect to a different view of the law of the case.

Senator LENROOT. That is exactly what we want an appellate tribunal for.

Gen. KREGER. It is not necessary to depart from the theory of military command in order to get the result. It is not necessary to assume to deprive the President of the power to command the Army in order to get the result. It is not necessary to put the division commander in the position of commanding the division, minus the Judge Advocate, in order to get the result. In practice, the advice of the law officers is followed, except in the rare cases as to which two law officers may or do disagree.

Senator LENROOT. So far as the interpretation of the law is concerned, is there any more reason why the President should not be bound by the interpretation of the law of some other body in the military side of the Government than he is bound, as he is bound now, by the very men that he appoints, the Supreme Bench of the United States?

Gen. KREGER. That is a coordinate branch of the Government. But the President is not bound by the opinion of the Attorney General; neither is the Secretary of War bound by the opinion of the Judge Advocate General, nor the Secretary of the Navy by the opinion of the Solicitor.

Senator LENROOT. No; but Congress is given the power to make laws for the government of the Army. I do not see why it is not just as competent for Congress to create a body for the authoritative interpretation of the law as applied to a given case as it is in the civil branch of the Government. I want to be thoroughly understood. I appreciate fully the objections that have been made to mingling the power or jurisdiction of the appellate court, the substitution of its judgment for that of the court-martial, to take a sentence and do with it whatever in its judgment it thinks ought to be done. I can see how that would interfere with discipline. I am unable to see why a competent authority, however constituted, that merely interprets the law as to a given case, could possibly interfere with the military command.

Gen. KREGER. Are we able, Senator, entirely to disassociate law and fact in the trial of a case?

Senator LENROOT. Exactly; the same way that the appellate tribunals are able to do in civil law. They do not disturb the judgments of the lower courts except for errors of law. They do not attempt to substitute their judgment of the facts.

Gen. KREGER. Neither is that the rule in the administration of military justice.

Senator CHAMBERLAIN. There have been absolutely some of the grossest errors committed in cases where men have been convicted that I have ever seen anywhere. And there is no use in shutting our eyes to that fact, and yet the commander is absolutely supreme in those cases?

Gen. KREGER. Error has been committed occasionally and sentences have been imposed that I should not regard as necessary; but the corrections authorized by law have also been applied.

Senator CHAMBERLAIN. Well, now, do you see any objection to making those errors as few as possible?

Gen. KREGER. Not only do I not see any objection to such a course, but I believe thoroughly in making them as few as possible.

Senator CHAMBERLAIN. It seems to me that that proposition which you now advocate, and which was recommended to the Military Affairs Committee in January, 1918, is simply an appeal to Philip drunk and Philip sober. In other words, instead of limiting the power of the Judge Advocate General, it broadens it and gives greater power for errors than existed before.

Gen. KREGER. The power of the Judge Advocate General?

Senator CHAMBERLAIN. Yes; and the military régime, I do not care what you call it. In the last analysis, the President would be governed in 99.9 cases by the advice of the Judge Advocate General or the Chief of Staff, or both. It is still the military machine that is functioning under the plan that you propose.

Gen. KREGER. It is the legal side of the military machine that is functioning. Does a man necessarily cease to be a lawyer because he puts on a uniform?

Senator CHAMBERLAIN. No; but there is the military viewpoint that you spoke of a while ago that you find cropping out all the time, of making a superior officer obey the command of a junior officer.

Gen. KREGER. That situation, of course, can not exist in a military establishment that is to function effectively.

Senator CHAMBERLAIN. It does exist. I will tell you what I mean by that. Here is the commanding officer, who may be the colonel of a regiment, or he may be a higher authority. He appoints a court inferior to him. He appoints the judge advocate who prosecutes the case. He appoints the man who defends the accused. All these men are in the Military Establishment and subordinate to him. The wishes of the commanding officer may be known by these subordinate officers. Is it humanly possible that those men are not influenced at all by what they know the wishes to be of the commanding officer in the case that comes before them?

Gen. KREGER. I do not think that that would influence, in an unlawful way, the judgment of a sworn member of the court.

Senator CHAMBERLAIN. You know there have been cases where the commanding officer has disapproved the findings and had the court reconvened and the accused tried over?

Gen. KREGER. I have never heard of a case, once legally tried, being tried over.

Senator CHAMBERLAIN. To reconsider the case?

Gen. KREGER. To consider the evidence received before the original verdict was arrived at? If a commanding general sent down an order to the court to find otherwise than it had found, if he did more than point out cogently wherein he believed the court had erred, we should have no hesitation in holding the proceeding invalid.

Senator CHAMBERLAIN. That is advisory?

Gen. KREGER. That is ancient history now, because no commanding general is now permitted to send a case back with a view to substituting a finding of guilty for one of not guilty, or to revise a sentence upward.

Senator CHAMBERLAIN. Well, I wish you would examine the case of a young man down in Natchez, Miss., named Winchester. I think you will find in his case that in France he was charged with embezzlement and absence without leave. He was found not guilty of embezzlement, and guilty of absence without leave, and dismissed from the Army, but the commanding officer reconvened the court—that is possible, as you say—and ordered the reconsideration of it by the court, with the result that he was convicted of embezzlement and absence without leave, dishonorably dismissed from the Army, and sentenced to the penitentiary, on the suggestion merely of the commanding officer that a man who was charged with embezzlement ought to be convicted on general principles. If I have misstated the case, I should like to have you give the record of it.

(NOTE BY GEN. KREGER.—A statement respecting this case, prepared from records on file in the Judge Advocate General's office, follows:)

1. First Lieut. Eugene K. Winchester, 155th Infantry, was tried in France on October 23 and 24, 1918, before a general court-martial convened by order of Maj. Gen. Hodges, commanding the 39th Division, American Expeditionary Forces, upon the following charges and specifications, viz:

Charge I: Violation of the 93rd article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, A. P. O. 904, on or about the 10th day of October, 1918, fraudulently convert to his own use and benefit and knowingly embezzle company funds to the value of about $1,225.00, the property of Company A, 155th Infantry, intrusted to him as company commander of said Company A, 155th Infantry.

Charge II: Violation of the 61st article of war.

Specification 1: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, without proper leave, absent himself from his command from about nine o'clock a. m. October 5th, 1918, to about seven o'clock p. m., October 5th, 1918, by going to the city of Bourges, France.

Specification 2: In that First Lieut. Eugene K. Winchester, 155th Infantry, did, at Masseurve, France, without proper leave, absent himself from his command from about seven o'clock a. m., October 10th, 1918, until about seven o'clock p. m., October 10th, 1918, by going to the city of Bourges, France.

Charge III: Violation of the 96th article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, having been intrusted with the care and custody of the company council book of Company A, 155th Infantry, as commanding officer of said Company A, 155th Infantry, did, in France, at some time between the 3rd day of September, 1918, and the 10th day of October, 1918, while he was charged with the care and custody of said council book, negligently lose or thru design destroy the said council book, together with all vouchers connected therewith.

Charge IV: Violation of the 69th article of war.

Specification: In that First Lieut. Eugene K. Winchester, 155th Infantry, having been placed in arrest by his commanding officer on account of being charged with a crime, did, at Masseurve, France, on or about the 17th day of October, 1918, break his arrest before he was set at liberty by proper authority.

2. Lieutenant Winchester, who was represented at the trial by First Lieutenant Maurice L. Geisenberger, 155th Infantry, as counsel, pleaded not guilty to all of the charges and specifications.

3. The court found Lieutenant Winchester guilty of Charges I, II, and IV, and the specifications thereunder, not guilty of Charge III and the specification thereunder, and sentenced him "to be dismissed the service."

4. In a written review, dated October 27, 1918, Major W. W. Thompson, division judge advocate, expressed the opinion that the record was legally sufficient to support each of the findings of guilty. With reference to the charge of embezzlement, after reviewing at some length the evidence of record, Major Thompson said:

"There can be no question in my mind about the guilt of the accused on this charge."

Major Thompson concluded his review as follows:

"On the question of punishment I am of the opinion that the court has not given proper consideration to the seriousness of the offenses of which it has convicted the accused. To my mind it is still immaterial that the accused did, on the day of the trial, refund what he claims to be the amount he is due the company fund. He occupied the responsible position of company commander and was charged with the obligation of caring for the company fund of that company. Not only did he fail to do that but in some manner he lost the fund, and from what he stated to Colonel Hoskins, we may surmise in what manner he lost it, for he said he had gotten drunk and lost the funds. Could it be argued that if an enlisted man stole a thousand dollars that he would be given a dishonorable discharge and told to go home. Is it any more reasonable in morals or law that this accused should be permitted to escape the consequences of his criminal act. I am of the opinion that this record should be returned to the court and that the reviewing authority should call the court's attention to the fact that the punishment awarded is absolutely and ridiculously inadequate for the offenses of which it convicted the accused."

5. Pursuant to the foregoing recommendation of the division judge advocate, the reviewing authority, Major General Hodges, on October 27, 1918, returned the record to the court by means of an indorsement reading as follows, viz:

"The reviewing authority is of the opinion that the sentence awarded in this case is absolutely and entirely inadequate for the offenses of which the court has properly convicted the accused. The evidence is convincing beyond any question of a doubt that the accused embezzled his company funds. It is likewise clear that he absented himself without leave on two occasions and that when placed in arrest for embezzlement he had so little regard for the restriction that he broke that arrest. In the opinion of the reviewing authority, embezzlement is one of the most reprehensible and detestable offenses which any man may commit.

"The accused was entrusted with this company fund. He was occupying the honorable position of an officer in the United States Army. He violated that trust and dishonored that position by embezzling that company fund. Could it be argued that if an enlisted man had embezzled one thousand dollars or more or property or funds entrusted to him by the Government that a simple dishonorable discharge would be sufficient for the offense? Can it be argued with any more a degree of reason that simple dismissal is sufficient for this offense of embezzlement? The object of all punishment is its deterring effect on others. The reviewing authority is of the opinion that this sentence is not sufficient to impress upon the mind of the accused or upon the minds of others the grave seriousness of the crime which this accused committed by embezzling the fund.

"Having the foregoing views of this case, the reviewing authority is returning the record to the court for a reconsideration of the sentence in the light of the foregoing remarks."

The court having reconvened on October 30, 1918, revoked its former sentence and sentenced the accused "to be dismissed the service of the United States and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five years."

The reviewing authority approved this sentence, and forwarded the record of trial to the commander in chief of the American Expeditionary Forces for action under the 48th article of war.

Gen. KREGER. Did the commanding general order a finding of guilty against the accused?

Senator CHAMBERLAIN. No; he does not have to make an order. Fortunately those cases do not happen often, but they do happen, and it ought to be made impossible for them to happen at all.

Gen. KREGER. It has been.

Senator CHAMBERLAIN. I do not think so. I do not agree with you, General. I would like to have you state how it has been made impossible. You mean by this recent order of the President after the war was over?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. That is locking the door after the horse has been stolen, and the very discussion of this subject, I have no doubt, caused the adoption of that order. What is the number?

Gen. KREGER. General Order No. 88, War Department, 1919, paragraph 1.

Senator CHAMBERLAIN. I should like to have that put in the record.

(The order referred to is here printed in the record as follows:)

GENERAL ORDERS, No. 88. } WAR DEPARTMENT, *Washington, July 14, 1919.*

I. Procedure respecting the return of proceedings to courts-martial for revision. The following rule of procedure prescribed by the President modifying the existing procedure respecting the return of proceedings to courts-martial for revision is published for the information and guidance of all concerned:

1. No authority will return a record of trial to any military tribunal for reconsideration of—

(*a*) An acquittal; or

(*b*) A finding of not guilty of any specification; or

(*c*) A finding of not guilty of any charge, unless the record shows a finding of guilty on a specification laid under that charge which sufficiently alleges a violation of some article of war; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited.

3. This order will be effective from and after August 10, 1919.

* * * * * * *

By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

Senator CHAMBERLAIN. That is a mere regulation, which, in my opinion, was adopted because of criticisms of the administration of military justice. Now, the next President who comes in may be a splendid man, honest in every purpose, and yet he may be a strict military man, and may have that order revoked. It ought not to be possible that that should lie in the power of any one man to administer justice.

Gen. KREGER. I have not the slightest objection to this regulation being embodied in a statute, because it is something that I have stood for since coming into the Army, possibly due to my training as a lawyer.

Senator LENROOT. General, if it were not for the fact, as you state, of an apparently incongruous situation of a subordinate officer controlling the action of a superior officer, would you be in favor of the action of the Judge Advocate General's office upon the review of cases for errors of law being made final?

Gen. KREGER. If it were entirely possible to divorce the whole procedure from any effect upon the necessary all-inclusiveness of the power of command, then perhaps it would make no difference, but that is practically impossible.

Senator LENROOT. I can not see, General, how the matter of prejudicial error of law can affect command, except—I do not think that affects it—the idea of the subordinate officer controlling the action of the superior officer. In that sense it might perhaps affect command, but so far as the command itself is concerned, how can securing the rights of an accused affect command?

Gen. KREGER. If the commanding general can not be trusted in respect of one thing he can not be trusted in respect of another. The moment we begin to take from him the power to decide in respect of everything, of course always under the law, in respect of everything that has to do with his command, we weaken his control over his organization. The commanding officer must be responsible for everything in connection with his organization. It is only where he is in fact the commanding officer that he can get the best out of his command.

Senator LENROOT. So in theory he must be an absolute autocrat?

Gen. KREGER. No; because we do nothing autocratically.

Senator LENROOT. In theory—I am not speaking of what you do—he must be an absolute autocrat.

Gen. KREGER. Not in theory even; because he acts always under the sanction of the law.

Senator LENROOT. Acts under the law when it is admitted that he himself may be absolutely independent to interpret the law?

Gen. KREGER. That is proceeding upon the assumption that he not only knows no law himself, but will not consider any legal advice. The commanding officer acts upon the advice of his staff officers in a very large proportion of the decisions that he makes, the things that he orders. If we are to permit the judge advocate to be final in respect of certain things said to be within his jurisdiction, why not make the quartermaster final in respect of his, and the ordnance officer in respect of his?

Senator LENROOT. Do you make no distinction, General, between protecting the rights of a citizen accused of crime and carrying out an ordinary policy, attempting to make a comparison between the conduct of the Quartermaster's Department and the court-martial trial?

Gen. KREGER. They are two different functions, each of which ought to be performed in the best possible manner. The difference seems to be that I take the view that the commanding general will perform his duties according to law, and that there is a theory on the part of others that he will not, that he will be autocratic, and arbitrary, and will disregard the law. In my 20-odd years of service in the Army, I have served under no commanding officer that would arbitrarily override considered legal advice.

Senator CHAMBERLAIN. Do you think that the British discipline is impaired by the fact that the judge advocate general of Great Britain holds his position for life, with a large salary, and the cases are reviewed by him and he determines whether or not there was error, and wherein the error consists, and his finding goes through the assistant adjutant general to the minister of war, and the opinion of the attorney general may then be askd by him, but not in all of the cases, the judge advocate general is followed, his opinion is followed? Do you think the British discipline is impaired by the fact that he is a civilian and that his opinions are followed in the administration of military justice?

Gen. KREGER. He is a subordinate of the prime minister, responsible to him, indirectly it is true.

Senator CHAMBERLAIN. Well, the appellate tribunal that Senator Lenroot is suggesting here has only the power to find whether or not there has been error. It does not propose——

Gen. KREGER. But that is establishing a separate, independent tribunal; whereas the judge advocate general of England simply reports to the Secretary of State for War through the deputy adjutant general—through a military channel—to the supreme executive authority.

Senator CHAMBERLAIN. Senator Lenroot was not here when that system was gone into, but the rights of the accused are further protected in the British system in this way, that if the court goes ahead and imposes a sentence in violation of the advice of the judge advocate who attends the trial, the court subjects itself to liability for damages.

Gen. KREGER. I suspect that if a court were to proceed without jurisdiction with us the same result would occur.

Senator CHAMBERLAIN. Then it would "break" some of the officers of the Army if it were pursued relentlessly.

Gen. KREGER. Following the Milligan case were there not a number of civil actions against the members of the commission?

Senator LENROOT. I think there were. I do not know what became of them.

Gen. KREGER. The Supreme Court held that the military commission that tried Milligan was without jurisdiction to do so; and I think that later there were civil proceedings for damages against the members of the commission with judgment for Milligan.

Senator CHAMBERLAIN. That is a provision of law and regulation in Great Britain.

Senator WARREN. Have you anything to offer that has occurred to you bearing on this general subject, as to the other angles of it?

Gen. KREGER. Nothing occurs to me at the present time.

Senator LENROOT. General, you are familiar with how this bill proposes to constitute the court, allowing enlisted men to sit on the court. What would you say about that?

Gen. KREGER. I think that would not be a satisfactory means of securing both justice and discipline.

Senator LENROOT. Would you think that the sentences or that the attitude of those enlisted men would be more or less severe toward the accused as a rule?

Gen. KREGER. I am inclined to think that their attitude would not be as consistent as those of the officers. They would be more likely

to be swayed by what might be termed a local view of the offense, the offender, or the occasion; because naturally the view of the enlisted man is somewhat more circumscribed than that of the officer.

Senator LENROOT. On courts-martial generally, is it your experience that officers of a court are more sympathetic to officers that are accused than to enlisted men, or otherwise?

Gen. KREGER. Taking it by and large, I do not see that there is any material difference. In some instances it has seemed to me to be manifest that the court was swayed by sympathy for an officer; in others it was quite manifest that the court was swayed by sympathy for an enlisted man, especially his family.

Senator LENROOT. It would depend on the facts in the particular case?

Gen. KREGER. Yes; it would depend on the facts in the particular case. The proceedings in the cases of officers are ordinarily more extended than in the cases of enlisted men. The issues in the cases of officers are usually the more complex, affording more opportunity for the activities of counsel and for a harder fight.

Senator LENROOT. But you do not think that the mere classes, the fact that one is an officer being tried and the other an enlisted man, without reference to the personality of either, makes any difference?

Gen. KREGER. I do not think that that appears as a consistent thread running through the administration of military justice. It is possible that when an officer is dismissed, and also sentenced to confinement, or in a case where confinement might be authorized in addition to dismissal, the period of confinement may sometimes be tempered on the theory that dismissal is, by itself, a substantial punishment. However, that is not a theory that has appealed to me. To my mind, the dishonorable discharge adjudged in the case of an enlisted man stands on a par with and amounts to as much punishment for the enlisted man as dismissal does to an officer. The two are identical, except that the words descriptive of the judgment are different.

Senator LENROOT. In addition to that, in case of two identical crimes, one by an officer and the other by an enlisted man, as a rule would it not be said that the officer should be held to a higher standard?

Gen. KREGER. That is my theory. If an officer and an enlisted man were concerned in the same offense, I should be inclined to try the officer and let the enlisted man go with an admonition.

Senator WARREN. There has been some difference of opinion and some discussion as to whether the list of specific crimes and misdemeanors and the punishments named should be enlarged, or whether the trials and the sentences and the punishment should rest upon the circumstances under which the offense occurred, the situation and surroundings when the offense was committed. What would you say about that?

Gen. KREGER. It might be practicable to enlarge somewhat the specific description of offenses, though the revision of 1916 goes considerably further than the prior form of the Articles of War did. But to lay down a specific punishment for each particular offense I think is, in the long run, impracticable, because the circumstances under which an offense may be committed vary so widely as to make it necessary to leave a very wide discretion in the court.

Senator WARREN. Now, on the whole, would the sentence be liable to be more or less severe, taken by and large, if such transgression were enumerated in the law, or if it were left to the court to provide a maximum?

Gen. KREGER. My own theory is that the statute itself should describe the various offenses and indicate maximum limits of punishment somewhat generally, and that the executive should have the power to define the limits of punishments, not only in peace time, but also in war time.

Senator WARREN. Do you mean to have some standard maximum or not?

Gen. KREGER. Yes.

Senator WARREN. If you have that standard there are times, of course, when you want to reach above that standard and times when it seems desirable to go below it. What I was getting at was, what would be the probable effect, especially with the newer officers in time of war and the surrounding excitement—whether they would be less liable or more liable to go to that maximum, or to consider the line from zero to the maximum entirely within their decision.

Gen. KREGER. I am inclined to think, from observing what occurred at the beginning of this war, that if there were a list of maximum limits in the statute, sufficiently high for all possible conditions, the courts would crowd the limit pretty closely. The necessarily high statutory limit would serve as a suggestion, whereas, without that, perhaps the effect of peace-time limits, defined by the executive, would not be entirely lost even though the army were extended. Does that in anywise answer your question, Senator?

Senator WARREN. Yes: that answers it. Now, if you care to, I think you, perhaps, would have more knowledge of the comparison between the severity of sentences over on the other side, in the trials by courts-martial, with those here, in the preliminaries, when these men were being trained, than perhaps would any other officer or any other one who has come before the committee. You have had those cases come to you both from the United States and from the other side, have you not?

Gen. KREGER. Yes.

Senator WARREN. Well, now, taking it as a class, and especially in the minor offenses, has there been a difference, and if there has been a difference which has been the more severe, taken as a lot, those abroad or those at home?

Gen. KREGER. I should have to give my impression. It is something that I asked the statistical section, some little time ago, to investigate with a view to getting something definite to back up my impression. The section has not yet found the time to make the necessary examination. My impression, however, is that the sentences adjudged in Europe did not include so large a proportion of what may be regarded as severe sentences as was the case over here.

Senator LENROOT. It ought to have been the other way.

Senator WARREN. You took the words out of my mouth. That is the reason why I am making this inquiry, and of course we should like to get the testimony back as soon as we can, but we should like to have you give some information on that and as specifically as possible, because I have had the impression, from listening to this

testimony, and also from what I have seen from time to time in the press, but more especially from the statements made here, that at the front, right up under the guns, those sentences have been far less in the whole aggregate of years or months of imprisonment than they have been over here. I should like to be set right about it.

Gen. KREGER. I will try to have such a statement prepared.

Senator WARREN. It is not entirely a matter of curiosity, but while these younger men who are assiociated with me on this committee will see more wars, I do not expect to see more than a dozen more, and I think this legislation ought to be founded not only on our experience of what we have had, but on the practices that might be adopted in another war, judging from this last one. For instance, if we are going to bring in another large army, we shall have to do it as we did this time, from the body of the people, those that do not volunteer but who are willing to do their duty; and matters will be left largely in the hands of officers that will be taken from such a body of men, some from the Regular Army and some from the new army, and I want to see what the tendency was this time in order to guard against it in the next, if necessary.

Gen. KREGER. Discipline and justice must go hand in hand. No organization that is without discipline can dispense justice, and no organization that does not dispense justice can have discipline. The question or the difference of opinion is how may we best secure the desired result.

Senator WARREN. Now, from reports we get, it would seem that out of the thousands of cases—and there must be thousands—there must be some erroneous judgments, and there have been some sentences that seem to me have not only verged on the absurd and ridiculous, but have exceeded ordinary absurdity. Of course, if that is only occasionally, here and there, that is one thing. But on the other hand, if the general current is in that direction, I think we ought to seek a way to check it. Discipline must accompany justice and there must be in the face of the enemy a way of reaching it and reaching it quickly.

Gen. KREGER. I have some statistics that touch indirectly on that subject. During the period from April 6, 1917, to August 31, 1919, 30,916 men were tried by general courts-martial.

Senator CHAMBERLAIN. General courts?

Gen. KREGER. General courts-martial. These trials resulted in 24,668 approved convictions. The approved convictions included 5,991 cases in which dishonorable discharge or dismissal was executed; 6,674 cases in which dishonorable discharge was adjudged but the execution thereof suspended; and 12,003 cases in which the judgment did not include death, dismissal, or dishonorable discharge, what may be termed minor sentences, involving ordinarily terms of confinement not in excess of six months, and in approximately 3,000 cases no confinement whatever.

Senator WARREN. It must be less than six months in certain courts, must it?

Gen. KREGER. Yes. Of course the general court-martial can adjudge anything from reprimand on upwards. Speaking of general court-martial cases, of the approved convictions, approximately half carried neither dishonorable separation from the service nor confine-

ment for terms in excess of six months. Of the 30,916 trials, 6,248 resulted in acquittals or disapproved convictions. This does not include the cases in which the records were found legally insufficient to support the sentences when they came on up to the Judge Advocate General's office.

Senator WARREN. That 31,000 covered what—the entire force on the other side; 2,000,000 men?

Gen. KREGER. That covered the entire United States Army, all over the world.

Senator WARREN. For how long a time?

Gen. KREGER. For the period from April 6, 1917, to August 31, 1919, barring a few cases that are still in the office here in the course of examination, and which therefore have not been included.

Senator WARREN. Well, then, that comprehended 4,000,000 men that were being demobilized during that time?

Gen. KREGER. Yes.

Senator CHAMBERLAIN. Did those cover life sentences?

Gen. KREGER. Yes. Cases of life sentence would come in with the dishonorable discharges or the dismissals.

Senator CHAMBERLAIN. Have you the aggregate of the number of years of sentence passed on those 31,000 men?

Gen. KREGER. I can give it to you in an indirect form, I think. This is a table prepared a day or two ago covering 21,111 convictions involving confinement, and therefore not covering the total number of convictions. It runs from April 6, 1917, to September 20, 1919, and is divided up into three periods. During the period from April 6, 1917, to June 30, 1918, 8,840 convictions carried an average of 2.66 years as the term of confinement.

Senator CHAMBERLAIN. That is the original sentence?

Gen. KREGER. That is the original sentence.

Senator WARREN. Those were to disciplinary barracks as well as to the penitentiaries?

Gen. KREGER. Yes. This is a statement prepared by Lieut. Col. Dinsmore, the chief of the statistical section of the office, showing the average sentence to confinement adjudged by general courts-martial and approved by reviewing authorities from the beginning of the war up to and including September 20, 1919.

Senator WARREN. Now, that is the sentence that was given?

Gen. KREGER. Yes.

Senator WARREN. Of course, I presume you can not tell exactly the actual service under those sentences, and I suppose a great many of them were changed.

Gen. KREGER. I have some figures here; but possibly you would like the figures for the other two periods.

Senator WARREN. Yes.

Gen. KREGER. From July 1, 1918, to June 30, 1919, the average term of confinement adjudged in 11,016 cases was 3.95 years. During the period from July 1, 1919, to September 20, 1919, it was 1.92 years.

Senator CHAMBERLAIN. That is the average?

Gen. KREGER. Yes; by periods.

Senator CHAMBERLAIN. What is an average, how many years?

Gen. KREGER. The average sentence for the 21,111 cases is 3.29 years.

Senator WARREN. Now, what we want to get at is the actual service. I suppose a good many are still serving.

Gen. KREGER. I think I can put a statement in the record, after reference to the records in the office, touching that.

Senator WARREN. Do that.

Gen. KREGER. I have a showing here as to the average length of time served by 1,107 men who were honorably restored to duty through the disciplinary barracks at Fort Leavenworth. The average sentence originally adjudged upon those men was 7.4 years. The average period actually served in confinement before their honorable restoration to duty was .43 of one year.

Senator WARREN. A little less than 6 months.

Gen. KREGER. Yes; a little less than 6 months.

Senator WARREN. That is for Leavenworth. What about the other two?

Gen. KREGER. I do not happen to have the figures for the other two.

Senator WARREN. You can insert them, can you?

Gen. KREGER. Yes; if the transcript does not have to come back too soon, I can get the information.

Senator WARREN. I suggest that you wire for it.

Gen. KREGER. I would have to telegraph to Jay and Alcatraz for the figures.

Senator CHAMBERLAIN. Are there only three prisons?

Gen. KREGER. Only three disciplinary barracks; yes. Here is a statement showing the number of men restored to the colors from the disciplinary barracks.

Senator WARREN. The ones that served out their sentences and received dishonorable discharge? What proportion should you say of the whole was passed out at the end, dishonorably discharged; that is, dishonorably discharged from the Army? Of course the figures are all staggering, because of the size of the Army.

Gen. KREGER. Those figures I do not happen to have at hand; but I do have some that are indicative of the speed with which convicted men have flowed through the disciplinary and penal institutions. On April 1, 1917, there were 2,101 general prisoners in the disciplinary barracks, and 212 in penitentiaries.

Senator WARREN. That was about the commencement of the war?

Gen. KREGER. Yes; April 1, 1917. During the period from April 1, 1917, to July 31, 1919, there were received from all sources at the disciplinary barracks 11,492 men, and in the penitentiaries 1,352 men.

Senator WARREN. That is, inclusive of the first?

Gen. KREGER. No; those are the new receipts. The total to be accounted for for the period is: In the disciplinary barracks, 13,593 men, and in the penitentiaries, 1,564 men.

Senator LENROOT. Does that include those in France?

Gen. KREGER. Yes; with comparatively few exceptions. This report was made as of July 31, and on August 16 there were only 34 general prisoners in France.

Senator LENROOT. It does not amount to much.

Senator WARREN. They are supposed to bring the prisoners home as fast as possible?

Gen. KREGER. The homeward movement of the general prisoners in France began in May and was practically carried to a conclusion by the end of July. The whole number of men in confinement in disciplinary barracks on August 30, 1919, was 3,728.

Senator WARREN. Four weeks ago?

Gen KREGER. Yes.

Senator WARREN. How many in the penitentiaries?

Gen. KREGER. Eight hundred and fifty-five in the penitentiaries.

Senator WARREN. That would be over a thousand more than there were at the commencement of the war in both.

Gen. KREGER. The total at the commencement of the war was 2,313 in both classes of institutions; and in both classes of institutions on August 30, 1919, there were 4,583 men. In other words, the increase through the 4,000,000 citizen army was about 2,200. That is the increase up to August 30, 1919.

Col. Rigby told me that there had been some inquiry about the restorations to duty. We have sufficient figures upon which to base a statement by quarters: During the quarter, April to June, 1917, 172 men were restored to duty; July to September, 1917, 136; October to December, 1917, 237; January to March, 1918, 153; April to June, 1918, 160; July to September, 1918, 270; October to December, 1918, 267; January to March, 1919, 427; April to June, 1919, 453; July and August, 1919, 200.

Those figures give the most definite information our office had last night on restorations to duty at the three disciplinary barracks.

I gave you, a short time ago, the average length of time that men had served at Fort Leavenworth prior to restoration.

Senator WARREN. Well, General, I can not figure how you should have so very many to go through the penitentiaries and disciplinary barracks in the short time of this war and come out with so few left if they have served the time that you have given us, on the average.

Gen. KREGER. I am giving the average sentences adjudged.

Senator WARREN. I thought you were giving us the length of service as you went along.

Gen. KREGER. No.

Senator WARREN. I am very glad to see the way it is. I am not finding fault.

Senator LENROOT. The majority were short sentences?

Gen. KREGER. Yes; as indicated a bit ago, out of the twenty-four thousand and some hundreds of approved convictions there were 12,000 sentences that were minor sentences, six months or less.

Senator WARREN. That would bring it down, all right.

Gen. KREGER. And then, of course, the clemency agencies have been operating on these sentences.

Senator LENROOT. Has the clemency board acted upon practically all of the cases? Of course, they act upon them over and over again, more than once. Have all of the cases been gone through, practically?

Gen. KREGER. Very nearly so. A few cases from abroad have not yet been acted upon, because some of these prisoners reached home as late as the latter part of July. A small portion of the cases from France has not yet been disposed of. At the present time we are engaged to a considerable extent with the reexamination of cases that have heretofore been passed upon. We had in the office this morning 489 clemency papers.

Senator LENROOT. Does that cover definite periods, General?

Gen. KREGER. An automatic report was called for by special order of the Secretary of War in January. Some time ago I suggested that it be made the rule that, as soon as a prisoner reaches a penal institution, a report be made of his case. Such reports on recent cases are coming in now—cases that have been passed on by our board of review, and the legality of the sentences determined, within the last few weeks.

Senator WARREN. Are there any of those details that you wish to insert? Of course, you have got the meaty part of them, but would it enhance the value of the testimony to include any of those?

Gen. KREGER. I may be able to attach some additional statements.

Senator WARREN. Make it as plain as you can for us to review. Of course, a tabulated statement is always preferable to figures given in a conversational way.

(Tabulated statements touching various matters hereinbefore referred to follow:)

Analysis of results of trials by general courts-martial.

Number of men tried by general courts-martial from Apr. 6, 1917, to Aug. 31, 1919	30,916
Approved convictions	24,668
Dishonorable discharges and dismissals executed	[1] 5,991
Dishonorable discharges suspended	6,674
Other sentences	[2] 12,003
Total	24,668
Acquittals, disapproved convictions, sentences set aside, etc.	6,248

Table showing the average length of sentences to confinement imposed from the beginning of the war to Sept. 20, 1919, for the whole Army.

	Total number of convictions involving confinement.	Average term of confinement adjudged, in years.
Apr. 6, 1917, to June 30, 1918	8,840	2.66
July 1, 1918, to June 30, 1919	11,016	3.95
July 1, 1919, to Sept. 20, 1919	1,255	1.92
Total	21,111	3.29

NOTE.—These figures do not include unreduced life sentences.

[1] Does not include a few cases involving sentences to dismissal, which are now pending.

[2] Includes a few cases involving sentences to dismissal, which are now pending.

Table showing average length of sentences to confinement imposed from the beginning of the war to Sept. 20, 1919, in the United States and in the American Expeditionary Forces in Europe, respectively.

	Total number of convictions involving confinement.	Average length of confinement imposed in years.
Apr. 6, 1917, to Feb. 1, 1919:		
United States	13,837	3.77
American Expeditionary Forces	1,221	3.40
Total	15,058	3.74
Feb. 1, 1919, to Sept. 20, 1919:		
United States	3,302	1.49
American Expeditionary Forces	2,751	2.96
Total	6,053	2.16
Apr. 6, 1917, to Sept. 20, 1919:		
United States	17,139	3.33
American Expeditionary Forces	3,972	3.10
Total	21,111	3.29

NOTE.—These figures do not include unreduced life sentences.

Statement showing average sentence served by men who left a disciplinary barracks or a penitentiary otherwise than by escape from Apr. 1, 1917, to July 31, 1919, and average sentence remaining to be served by men in confinement on July 31, 1919, less allowance for good conduct time not forfeited.

	Disciplinary barracks.	Penitentiary.
	Years.	*Years.*
Average sentence served by men who left a disciplinary barracks or a penitentiary otherwise than by escape	1.06	2.94
Average sentance remaining to be served on July 31, 1919, less allowance for good conduct time not forfeited (not including life sentences)	1.59	3.96

Men confined in disciplinary barracks and penitentiaries Apr. 1, 1917, to Aug. 30, 1919.

	Disciplinary barracks.	Penitentiaries.	Total.
In confinement Apr. 1, 1917	2,101	212	2,313
Received from all sources, Apr. 1, 1917, to July 31, 1919	11,492	1,352	12,844
Total	13,593	1,564	15,157
In confinement Aug. 30, 1919	3,728	855	4,583

Statement showing, by quarters, the number of men restored to the colors at disciplinary barracks, Apr. 1, 1917, to Aug. 31, 1919.

	1917	1918	1919
First quarter	.....	153	427
Second quarter	172	160	453
Third quarter	136	270	[1] 200
Fourth quarter	237	267	.....
Total	545	850	1,080

[1] July and August only.

Grand total of men restored to the colors, Apr. 1, 1917, to Aug. 31, 1919, 2,475.

Statement showing number of men restored to the colors at each of the three disciplinary barracks, between Apr. 6, 1917, and Aug. 31, 1919.

	United States disciplinary barracks, Fort Leavenworth, Kans.	Atlantic branch United States disciplinary barracks, Fort Jay, N. Y.	Pacific branch United States disciplinary barracks, Alcatraz, Calif.	Total.
Number	1,410	470	568	2,448
Average sentence in years originally adjudged against men so restored	8.8	2.98	2.17	5.73
Average sentence in years actually served by men so restored	.43	.59	.57	.49

NOTE.—This statement does not include 156 men who, during the period stated, were restored to the colors and at once honorably discharged, or who, during the same period, were restored to the colors and granted ordinary discharges, by order of the Secretary of War, under paragraphs 139 and 150, Army Regulations, for the reason that the necessary information concerning these men is not available.

Senator LENROOT. General, from a disciplinary standpoint alone, is there any material difference, in your judgment, between a sentence of 5 years and a sentence of 20 years; I mean upon the morale of the Army?

Gen. KREGER. In my judgment; no.

Senator WARREN. What about 40 years or 60 years?

Gen. KREGER. My judgment would favor the 5-year sentence, as against the 40 or 60 years, as a disciplinary measure. Justice along with discipline are dependent upon each other. If a command were to form the impression that the two are not traveling hand in hand, both will suffer.

Senator WARREN. I should consider the whole idea that the dispensation of justice is a matter of discipline; in other words, prepare the man in a way to be a better man or to retrieve him entirely unless it be a very few who, like mad dogs, ought to be penned up in the penitentiary.

Gen. KREGER. The military punishment can be combined in a very large proportion of the cases with salvage.

Senator LENROOT. What has been your observation on that and your experience in the Army?

Gen. KREGER. On the salvage proposition?

Senator LENROOT. Yes.

Gen. KREGER. The more experienced officers, I think, as a rule, are the ones that make the greater effort to save a man. Youth is likely to be somewhat intolerant of the errors or weaknesses of others.

Senator WARREN. Of other youths?

Gen. KREGER. Yes. There is a wide difference, Senator, in the extent to which the court-martial system is invoked by different officers. A number of years ago, while serving as judge advocate of the department, I found the number of summary court trials in one organization running very high. A letter was written to the company commander, inviting attention to his high summary court record. He insisted it was due to local circumstances, the character of the men, the origin of the men. However, at the same station, under identical conditions, with men from the same source, there was another company commander who was getting along with less

than one-half as many summary court trials. Therefore it was proper to point out to the first captain that his explanation of his high summary court rate was not convincing. He began to study the problem more fully, with the result that there was a very decided reduction in the number of summary court proceedings in his command.

Two district attorneys will probably lay different budgets before their grand juries; so two company commanders will proceed differently in the matter of the trial of their men. I confess that I am somewhat inclined to gauge the efficiency of a command by the rate of trials by courts-martial. Other things being equal, the lower court-martial rate ordinarily is found in the more efficient organizations.

Senator CHAMBERLAIN. On the 26th of February last, when the subject of trials by court-martial was under consideration, Senator McKellar went into the proposition of the stigma of conviction and the question of punishment, and Gen. Crowder in answer to a question asked by Senator McKellar, on page 281 of the hearings, said:

Gen. CROWDER. Now, addressing myself to the two elements of that briefly. I want to say that before 30 days I shall have 60 per cent, or maybe 70 per cent, of these sentences remitted in their excessive portions; and within 60 days I hope to have the whole field cleared up, so that you need not consider the question of the punishment. That is the order. They will be worked out very expeditiously. So there remains to be considered only this question of removing the stigma of conviction.

Has the whole thing been cleared up within 60 days from February 26, 1919?

Gen. KREGER. With comparatively few exceptions the examination of the approximately 5,000 cases of men then confined in disciplinary barracks and penitentiaries in the United States—the cases to which, I believe, Gen. Crowder referred—was completed about June 1. About that time we began to give special attention to cases from the other side. Nearly all of the cases from the other side have now been examined. Of course, the task of the clemency agencies is not entirely completed. They are working continuously—considering the cases of men convicted since March 1 of this year, and upon application considering, for a second and even for a third time, the cases of men who had been convicted at an earlier period. From February 25 to September 12, 1919, the clemency agencies examined and reported upon the cases of 6,598 men.

(NOTE BY GEN. KREGER.—A brief statement on the subject follows:)

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington.

Statement showing activities of clemency agencies in the office of the Judge Advocate General of the Army, during the period from Feb. 25 to Sept. 12, 1919, inclusive, in respect of cases of men sentenced to dishonorable discharge and confinement in a disciplinary barracks or a penitentiary.

I.

Number of cases considered	6,598
Less number of life-sentence cases	106
Balance noted under subdivisions II and III	6,492

II.

Average sentence to confinement originally adjudged in cases considered ..... years	6.93
Average sentence to confinement, in cases considered, remaining after remissions ..... years	1.86
Per cent of reduction	73.04

III.

Number of cases in which the entire unexecuted portion of the sentence to confinement was remitted	1,960
Number of men recommended for or authorized to apply for ordinary discharge (A. R., sec. 139, par. 1; sec. 150, par. 3) by order of the Secretary of War, with remission of the dishonorable discharge adjudged	547
Number of men recommended or authorized to apply for restoration to duty	429

IV.

Number of life sentence cases in which clemency was recommended	20
Average term sentence left in effect in the 20 life-sentence cases—years	13.05

V.

Number of cases in which clemency was recommended	5,462
Per cent of cases in which clemency was recommended	82.78

JOHN P. DINSMORE,
Lieutenant Colonel, Judge Advocate,
Chief, Statistical Section.

It would seem to be appropriate for me to add here, with the permission of the committee, a brief statement concerning certain matters mentioned in the record at earlier stages of the hearings.

On pages 162 and 163 of the record it is stated in substance that Col. William S. Weeks, judge advocate, was relieved from duty in the Judge Advocate General's office in an unusual manner, without notice, and "ordered to Charleston, an insignificant place, which, of course, will carry immediate reduction." The assignment of Col. Weeks to duty at Charleston was ordered upon my recommendation, made while I was serving as Acting Judge Advocate General. In March, Col. Weeks orally expressed to me a desire to be transferred from Washington to West Point as professor of law at the United States Military Academy. Subsequently he expressed the same desire in writing. No request for his detail was received from the superintendent of the academy. Early in June Col. Weeks was offered an assignment as department judge advocate at Charleston, which he declined. He was then advised that it was my intention to request an order assigning him to duty at Charleston. In July he was again advised to the same effect. On August 21 I filed a request for the order, which was issued on the following day. The transfer did not involve a reduction in rank. He still holds an emergency commission as colonel.

On pages 192 and 193 of the record appears a statement to the effect that the commandants of the disciplinary barracks, who were very potential factors in the granting of clemency, were brought on to Washington and that they and the Acting Judge Advocate General conferred with the special clemency board and the clemency examiners, and agreed upon some principles governing the award

of clemency, but that Col. Ansell, president of the board, though present in his office, was not notified of, and was not present at, the meeting. I was Acting Judge Advocate General when the conference referred to took place, but did not arrange it; neither was I present.

On pages of 193–196 and 203–207 of the record it is suggested that Col. Ansell was denied the necessary freedom and authority in the performance of his functions as president of the special clemency board; that his views with reference to the personnel of the special clemency board and the agencies connected therewith did not receive due attention; and that I, as Acting Judge Advocate General, obstructed the exercise of clemency in appropriate measure and delayed unnecessarily the examination of the cases of general prisoners from abroad.

The facts are otherwise.

Following receipt and examination of the memoranda dated March 21 and March 24, 1919 (Ansell Exhibit S and Ansell Exhibit T, record, pp. 193 and 195), I informed Col. Ansell that by virtue of his assignment as president of the special clemency board he was vested with authority to communicate his views and instructions respecting the exercise of clemency to all of the personnel serving under him—the personnel of the special clemency agencies. No orders or instructions to the contrary were issued, at any time, by me or by my direction. On April 7, at my suggestion, and in my presence, Col. Ansell redated the memorandum of March 21 (Ansell Exhibit S, record, p. 193), modified the address by striking out my name and substituting therefor "The special clemency board, the special clemency examiners, and the special board of review," and adding, after his own name at the end of the memorandum, the title "Lieutenant Colonel, Judge Advocate, President Special Clemency Board."

By my direction the memorandum, thus dated, addressed, and authenticated, was mimeographed and distributed to the personnel of the clemency agencies of the Judge Advocate General's Office. A copy of the memorandum, as published, appears as an inclosure to my first indorsement, dated June 19, upon a subsequent memorandum from Col. Ansell, dated May 17, and therefore is not copied here but is copied later in connection with a copy of that indorsement. Throughout his service under my direction as Acting Judge Advocate General, Col. Ansell was left free to exercise all the authority that his assignment to duty as president of the Special Clemency Board implied.

In his memorandum of March 24 (Ansell Exhibit T; Record, p. 195) Col. Ansell requested that Col. Easby-Smith be relieved from duty with the special clemency board. Col. Easby-Smith was an industrious member of that board, conscientiously devoted to his task, who acted throughout with due regard for the rights and the interests of the individual as well as for the rights and interests of the Government. After careful observation and consideration I could discover no reason, other than Col. Ansell's request, for relieving Col. Easby-Smith, and therefore declined to do so, advising Col. Ansell accordingly. So far as I now recall, this is the only specific request touching the personnel of the special clemency board and cooperating agencies that was preferred by Col. Ansell and

denied by me. He was uniformly consulted with reference to the assignment of officers to duty in connection with the special clemency board or their relief therefrom, and no such assignment or relief was ordered by me against his expressed wishes.

With reference to the suggestion that due to my action or inaction examination of the cases of general prisoners from abroad was unnecessarily delayed, the records of this office show that the special clemency board, in outlining a plan for carrying on the work of the board, said:

It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examination of the cases of those serving sentences of confinement within the United States, since, it is thought, the obtaining of the necessary information and the relationship of the offense to the theatre of war are considerations which would concur in such postponement.

Col. Ansell's concurrence in this plan is indicated by the fact that his signature is appended to the report (filed February 21, 1919) without any indication of dissent. On May 15, two days before Col. Ansell's memorandum of May 17 (Ansell Exhibit U; Record, p. 204) was written, I took steps toward bringing home the general prisoners from abroad, in order that their return might coincide substantially with the completion of the examination of the cases of general prisoners confined in the United States at the time the special clemency board was organized. The homeward movement of general prisoners from abroad began during the latter part of May and was practically completed by the end of July. The task of examining into their cases was taken up coincident with the completion of the first branch of the task of the special clemency agencies. At no time since the middle of March have the clemency agencies of the Judge Advocate General's Office been without all the work they could dispose of, and at no time during that period has the personnel of those agencies been reduced so as to be unable to meet the demands of the situation.

In this connection it may be added that the cases of nearly all of the general prisoners sent home from abroad have been examined and reported upon by the clemency agencies of the Judge Advocate General's office.

The measure of the clemency granted and the extent of the field covered during the period of my service as Acting Judge Advocate General is disclosed by the "statement showing activities of clemency agencies in the office of the Judge Advocate General of the Army during the period from February 25 to September 12, 1919, inclusive," inserted in connection with some of my earlier remarks on the subject. The nature of the activities of the clemency agencies is disclosed somewhat in detail by the official correspondence which followed the filing of Col. Ansell's memorandum of May 17, 1919 (Ansell Exhibit U; record, p. 204). A copy of that correspondence is appended.

MAY 17, 1919.

Memorandum for the Secretary of War
(Through the Acting Judge Advocate General):

I recommend:

1. That the special clemency work which is now limited in its considerations to prisoners confined in the United States be extended to prisoners in our Army serving sentences in Europe.

2. That a more thorough review now be made of all doubtful cases here of prisoners still having more than three months to serve; this in recognition

of the fact that the work of special clemency examination has been done so hastily as to preclude assurance of satisfactory results.

3. That a thorough review now be made of all cases here and abroad in which the record of the proceedings would indicate the advisability of extending a full pardon.

4. That if I should be entrusted with this work as president of the special clemency board I be permitted to select, as far as possible, the personnel of the board in order that it may be in general sympathy with my views as to clemency.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate,
President of Special Clemency Board.

[1st Ind.]

WAR DEPARTMENT, J. A. G. O., *June 19, 1919.*

To The Adjutant General of the Army.

1. Attention is invited to the foregoing memorandum for the Secretary of War, submitted by Lieutenant Colonel S. T. Ansell, judge advocate, president of the special clemency board functioning in this office, which reads as follows:

"I recommend:

"1. That the special clemency work which is now limited in its considerations to prisoners confined in the United States be extended to prisoners in our Army serving sentence in Europe.

"2. That a more thorough review now be made of all doubtful cases here of prisoners still having more than three months to serve; this in recognition of the fact that the work of special clemency examination has been done so hastily as to preclude assurance of satisfactory results.

"3. That a thorough review now be made of all cases here and abroad in which the record of the proceedings would indicate the advisability of extending a full pardon.

"4. That if I should be intrusted with this work as president of the special clemency board, I be permitted to select, as far as possible, the personnel of the board, in order that it may be in general sympathy with my views as to clemency."

2. On January 22, 1919, the following instructions, the promulgation of which has been recommended by the Judge Advocate General of the Army on January 18, 1919, were telegraphed by The Adjutant General of the Army to officers exercising general court-martial jurisdiction, viz:

"In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December fifteen, nineteen sixteen, is obvious. Where in exceptional cases a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record period. Trial by general court-martial within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the one hundred fourth article of war would be under all the circumstances of the case clearly inadequate."

Since January 22, 1919, courts and reviewing authorities have, of course, functioned with the instructions of that date in view.

3. With the approval of the Secretary of War, an office order was issued on January 28, 1919, establishing a special clemency board in this office, under the presidency of Brigadier General S. T. Ansell. That board began to pass upon cases on or about February 25, 1919, and has been engaged continuously upon the task since that time. The effect of the instructions touching the jurisdiction and functions of the special clemency board, as I understand those instructions, is to require the board to examine with a view to the extension of clemency and the adjustment of penalties to the requirements of justice and discipline, but in view of the restoration of conditions approximating those of peace, the cases of all general prisoners confined in penitentiaries or in disciplinary barracks in the United States for offenses committed on or after April 6, 1917, and tried by general court-martial on or before January 22, 1919, the

ate upon which the instructions mentioned in paragraph 2, supra, were pro-
ulgated.

4. At the beginning of the work it was estimated that the execution of the
lan would require consideration of approximately 5,000 cases, there being at
hat time 5,027 men in confinement in penitentiaries and disciplinary barracks
n the United States under sentences adjudged by general courts-martial. Up
o the present time the special clemency board has examined and reported upon
220 cases and the clemency section of the Military Justice Division, which has
een engaged in like examinations under instructions identical with those
ddressed to the special clemency board, has examined and passed upon 1,170
ases. The total number of cases thus examined and reported upon is, there-
ore, 5,390. Approximately 100 cases are still pending in this office. The con-
ideration of these cases will be completed and reports made with the least
ossible delay.

5. That the total number of cases reported upon and still to be reported upon
xceeds the 5,027 mentioned in the preceding paragraph is due to the fact that
ince February 25 additional men convicted during the war period have been
ent to penitentiaries and disciplinary barracks in the United States. Some of
hose men have come from posts and camps in the United States, and others have
een returned from Europe and Asia. As soon as the examination of the cases
oming within the existing instructions addressed to the special clemency board
as been completed, a more detailed report of the activities of that board will
e submitted.

6. With reference to the second paragraph of Lieutenant Colonel Ansell's
nemorandum, attention is invited to the following outline of the plan pur-
ued by the special clemency agencies in this office. An officer of the de-
artment examined a record, made a brief abstract thereof, and indicated the
ction that in his opinion should be taken. The record and the examiner's
nemorandum then went to one of the sections of the special clemency board,
ach such section consisting of two officers. These two officers, after a study
f the examiner's memorandum and such examination of the record as ap-
eared to them to be necessary or advisable, entered their recommendation.
Thereafter the record went either to Lieutenant Colonel Ansell as president
f the Special Clemency Board or to Lieutenant Colonel E. M. Morgan as vice
hairman of that board, after which it came to the head or acting head of the
ffice for consideration. In any case in which the legal sufficiency of the record
r the fairness of the proceedings had been questioned by the examiner or
y the section of the Special Clemency Board the record went to a Special
Board of Review, consisting of: Lieutenant Colonel James S. Sanner, formerly
justice of the Supreme Court of Montana; Major Andrew J. Copp, jr., of
California, who has practiced law for 14 years; and Major Henry Buck, of
South Carolina, who has practiced law for 16 years. In case the report of
his board suggested action more favorable to the prisoner than had been
ecommended theretofore the record was returned to the Special Clemency
Board for further consideration in the light of such report. It follows that the
eneral result of the intervention of the special board of review was not to
educe the measure of clemency theretofore recommended by the Special Clem-
ncy Board, but to bring about, in certain cases, an increase in the measure of
lemency so recommended. Upon completion the memorandum respecting each
ase considered by this office went to the office of the Secretary of War for
nal action.

7. A copy of a report dated June 15, 1919, made by Lieutenant Colonel
anner as chairman of the special board of review, is inclosed herewith. In
his connection it should be noted that, in harmony with the plan outlined
bove, the intention has been to recommend such appropriate corrective action
s lay within the power of the Secretary of War in those cases in which the
pecial board of review found the record legally insufficient to support the
entence either in whole or in part, and also to recommend similar corrective
ction in those cases in which that board found the record unsatisfactory, or of
oubtful sufficiency, considered from a legal point of view. The files are now
eing examined with a view to making certain that there shall be no failure
o recommend appropriate corrective action in all such cases. There is also
nclosed herewith a copy of a memorandum addressed to the Special Clemency
Board, the special clemency examiners, and the special board of review, under
ate of April 7, 1919, by Lieutenant Colonel Ansell as president of the Special
lemency Board. Consideration of the instructions under which the clemency
gencies of this office have operated, in connection with my observation of the

attitude of the officers engaged in the work, has led me to the conclusion that the work has been done with care and with a desire to do justice, and in case of doubt to lean to the side of mercy.

8. Recently the four officers who, at the present time, are functioning as members of the two existing sections of the Special Clemency Board, were called upon for an expression of their views as to the manner in which the clemency work has been performed, and as to the necessity, from the standpoint of fairness and justice, of reexamining the records heretofore examined under instructions addressed to the Special Clemency Board. A like expression of opinion was requested of the Chief of the Military Justice Division and the Chief of the Clemency Section of that Division. Copies of the memoranda submitted by the six officers referred to are enclosed herewith. The opinion of those officers, as disclosed by the memoranda they filed, is to the effect that the work in question has been performed with care and solicitude and that a reexamination of the records in the mass is not necessary. This would seem to be the correct view. The Special Clemency Board is now engaged in the study of the records in nearly 200 cases in which the Secretary of War after passing upon the original clemency memoranda submitted by this office deemed reconsideration advisable. Further applications for clemency will no doubt be filed in most cases—certainly in those cases in which for any reason the accused believes that full and complete justice has not been accorded him. Action upon such application will, it is believed, bring to light any deprivation of substantial legal rights or any undue severity in sentences that may have escaped attention and corrective action in the course of the examination thus far made. It is probable that in some, at least, of the cases in which the record was found legally insufficient to support the sentence, the corrective action heretofore taken should be supplemented by further action looking to the granting of full pardons, so as to remove any disabilities that may have resulted from the convictions. Steps to that end should be taken as soon as that may be done without interfering with the performance of other tasks, that may perhaps be regarded, for the present, as more pressing. Probably also in a number of other cases substantial justice, and a regard for the future usefulness of the individuals concerned as members of civil society, will require, or at least warrant, the granting of full pardons. However, it is believed that cases of this kind are more likely to be disclosed effectively by applications for pardon on the part of the individuals concerned, generally after they shall have been restored to their civil relations, than by a reexamination of the entire file of thousands of general court-martial records. Upon receipt of such application each can be given the careful and painstaking consideration to which it is entitled. The task of first importance to be performed in the immediate future by the clemency agencies of this office would seem to be the examination of the records of trial of general prisoners not thus far examined in this office with a view to the extension of clemency; i. e., the records of trial of general prisoners now being returned, or soon to be returned, from foreign parts.

9. In a memorandum entitled "Plan for carrying out work of clemency board appointed under office order of January 28, 1919," signed by the members of that board and approved by the Judge Advocate General, it is said, paragraph 5:

"It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examination of the cases of others serving sentences of confinement within the United States, since it is thought that the obtaining of the necessary information and the relationship of the offense to the theater of war are considerations which would concur in such postponement."

Under date of May 15, this office, in a memorandum addressed to The Adjutant General, requested information as to the number of general prisoners in confinement in Europe, classified with reference to the place and term of confinement under the following heads:

1. General prisoners under sentence to be confined in penitentiaries.
2. General prisoners under sentence to be confined in the United States Disciplinary Barracks or a branch thereof.
3. General prisoners under sentence to be confined in a place under military control, other than the United States Disciplinary Barracks or a branch thereof, under—

(*a*) Sentences involving confinement for six (6) months or more,
(*b*) Sentences involving confinement for less than six (6) months.

The information thus requested was furnishd this office on June 4, in the form of a cablegram dated June 1, from Gen. Pershing, reading as follows:

"Number of general prisoners in Europe: First, penitentiary, 88; second, disciplinary barracks or branches thereof, 64; third, other places under military control—first, having six months or over still to serve, 751; second, having less than six months still to serve, 195.

10. Before my departure from France on March 4, 1919, information reached me unofficially that a clemency section had been established in the office of the Judge Advocate General Headquarters, American Expeditionary Forces. Information reaching me since that date indicates that the section has continued to function. It is known that clemency has been extended in a number of cases, and no doubt clemency has been extended in other cases in which the action taken has not come to the attention of this office. Nevertheless the cases of general prisoners in confinement in Europe should receive timely attention.

11. This office has been informally advised that contingents of general prisoners are en route to the United States. In the execution of the plan of demobilization all the general prisoners now in Europe no doubt will be returned to the United States in the near future. The cases of these men should receive attention as soon as possible after their arrival in the United States, and their cases should be dealt with in conformity with the principles that have guided this office in passing upon the 5,390 cases referred to in paragraph 4, supra.

12. Recently, as the inflow of applications for clemency and of clemency memoranda from the various places of confinement in the United States has decreased, a considerable portion of the personnel originally assigned to duty with the special clemency board has been assigned to other duty in order to meet the pressing demands made upon the department for officers of legal training and experience for service in connection with the solution of problems incident to the cessation of hostilities and the consequent demobilization. When the cases of general prisoners being returned or about to be returned from foreign parts are taken up for consideration it will be necessary again to augment the personnel of the clemency agencies of this office. This may perhaps be done in part by the assignment of officers now on other duty but whose services may become available for this purpose in the near future. Any remaining deficiencies of personnel will have to be met by means of new appointments of officers qualified for the duty in question.

13. The following recommendations are submitted for consideration, viz.:

(*a*) That general prisoners now being held in confinement in foreign parts be returned to the United States as soon as practicable.

(*b*) That as to all general prisoners returning from foreign parts steps be taken to assure that a clemency memorandum be forwarded to this office by the commandant of the place of confinement with the least possible delay after the arrival of the prisoner.

(*c*) That the records of all general prisoners returned from foreign parts be examined as expeditiously as practicable by the special clemency board and cooperating clemency agencies in this office, in conformity with instructions heretofore addressed to said board and cooperating agencies, the work to be prosecuted as has been done in connection with the records of general prisoners in the United States since the establishment of the special clemency board in this office.

(*d*) That so far as practicable general prisoners having only short terms left to serve be held near ports of debarkation until their cases can be examined and reported upon.

(*e*) That whenever a recently convicted general prisoner files his first application for clemency the commandant of the place of confinement shall forward the application without delay, with the proper notations and his recommendation thereon.

(*f*) That in any case in which the commandant of the place of confinement regards the sentence as unduly severe, or in which in his opinion there is any reason making for clemency, if none has been granted, or for additional clemency if any has been granted, he shall forward a clemency memorandum with his recommendation thereon, even though no application for clemency or for additional clemency has been filed by or in behalf of the prisoner.

(*g*) That applications for full pardons filed by persons convicted by general courts-martial be given prompt attention; and that in cases in which the record has been found or shall be found legally insufficient to support the sentences

adjudged and in which the corrective action taken or to be taken under existing instructions should be supplemented by further action looking to the granting of full pardons so as to remove any disabilities resulting from convictions not well founded in law, such further action be taken as soon as that may be done without delaying the examination of the records of trial of general prisoners returned from foreign parts.

E. A. KREGER,
Acting Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, June 15, 1919.

Memorandum for General Kreger:

The special board of review (cases in clemency) has examined to date 1,117 records, of which 107 were "repeaters," leaving for statistical purposes 1,010. Of these, 925 were found legally sufficient; 42 were found unquestionably bad; 12 were found very doubtful; 30 (presenting convictions for desertion) good to the extent of A. W. O. L. only. Of the 925 legally sufficient cases, 31 were found unsatisfactory (because not convincing or for some objectionable features); 71 presented one or more unsupported findings (not affecting the validity or justice of the final result).

Of the whole number (1,010), 218 presented formal irregularities of no vital consequence (these were, chiefly, failures to properly explain pleas or rights of accused as witness where it was obvious that no harm was or could have resulted from the failures); 342 were fairly characterized as "poorly" tried (included in the above "bad," "doubtful," or "unsatisfactory" classes whenever the misprisions rose to the dignity of prejudicial error).

The 1,010 records thus considered were selected as deficient out of the 4,268 cases examined by the boards and examiners. Taking the latter as the whole number, the percentages thus revealed are a trifle under one per cent bad; a trifle under two per cent bad, doubtful, or unsatisfactory; a trifle under five per cent show formal irregularities; a trifle over eight per cent were poorly tried.

Of the 342 "poorly tried" cases, the characterization was justified: In 206 cases, by the admission of improper evidence (chiefly hearsay); in 136 cases, by the inertness or inadequacy of counsel for the accused; in 69 cases, by poor preparation on the part of the prosecution; in 42 cases, by errors of the court in rulings at the trial; in 32 cases, by the fact that no evidence was presented *aliunde* the pleas of guilty; in 33 cases, by improper examination of witnesses or of the accused; in 23 cases, by the fact that the accused convicted himself; in 22 cases, by general debility or ineptitude; in 7 cases, by improper argument on the part of the trial judge advocate.

J. S. SANNER,
Lieutenant Colonel, Judge Advocate.

APRIL 7, 1919.

Memorandum for the special clemency board, the special clemency examiners, and the special board of review:

Here are my views, briefly and roughly stated, respecting the considerations which I think should govern the clemency examiners and the clemency board itself:

1. Clemency is not a matter to be governed by technical rules of law. It is a matter of conscience rather than strict professional judgment. It is a matter which requires us to see the human being, his motives, circumstances, and condition, and our vision in this regard must not be limited by what the record, legally considered, strictly shows.

2. Too much legal deference must not be paid to any record for purposes of clemency, and this is especially true of courts-martial records. They frequently show what is only too frequently true, that however closely the forms of trial may have been adhered to, the trial itself was not a fair, full, and impartial presentation of the case. Speaking more specifically, I think we must ask ourselves, among many others, the following questions:

(*a*) Were the facts, as revealed on the record and as they may be fairly inferred, such as to indicate a state of mind that is really criminal, or immoral, or chronically perverted, or intolerably reckless of the military obligation?

Or, especially in purely military offenses, was not the delinquency due to thoughtlessness, or ignorance, or a lack of understanding of the military environment, or was it not provoked, as is frequently the case, by an unsympathetic, if not an oppressive attitude upon the part of those in authority? Frequently the two serious charges, desertion and disobedience of orders, can be so resolved, in the light of the human facts, as to indicate that there was no intention to commit the offense at all. While every charge of disobedience of orders sounds bad upon paper, very frequently the order itself was one given in a light or improper manner, or was not a necessary one, or involved some inconsequential thing not sounding in those necessitous circumstances where disobedience of orders becomes a most serious, even a capital offense.

(*b*) Accused may have counsel, but too frequently counsel is so limited by reason of his lack of legal qualification or a lack of that rank which gives him standing before the court, or a general lack of those inclinations and appreciations which zealous and competent counsel must have in order to make a good defense, that it can be said, as a matter of fact, if not as a matter of law, that the accused did not have the substantial assistance of counsel which every accused should have. And frequently the court will permit a man to go to trial without counsel, when any man of legal appreciations knows such a course to be unwise. What is true of counsel is frequently true of other incidents of the trial.

(*c*) There is nothing that courts-martial are more inclined to do than follow a natural inquisitiveness to admit masses of hearsay testimony, and at the same time so limit the counsel as to prevent proper cross-examination where, as is none too frequently the case, the counsel is inclined to indulge in one. Military counsel frequently hesitate to examine superior officers, and courts-martial as a rule seem to think that it is improper to test a witness, especially if he is a superior officer, for bias, prejudice, or credibility.

(*d*) Special attention must be paid to improvident pleas of guilty. Frequently the entire case is given away by such a plea made by an accused without counsel, or advised by incompetent counsel; and very frequently, after such a plea, the accused makes statements in his own defense inconsistent with the plea, which courts frequently disregard. Pleas of guilty of serious offenses should be most carefully scrutinized. Courts-martial duty is uncongenial, and a plea of guilty is acceptable as a brief method of ending the trial.

(*e*) Of course, as a technical matter, every presumption should be made in favor of the action of the court, but frequently the action of the court, however it may appear in mere form, is not fair and its conclusion is prejudiced thereby.

(*f*) We should be on our guard against confessions or statements of any kind against interest, when made by a soldier to a military superior. The military relation is such as to induce confessions in such a way as to render them incompetent.

(*g*) I do not regard that the 37th article of war changes the rule with respect of the effect of prejudicial error, but simply redeclares it. Substantial error, in my judgment, must be presumed to affect the finding and sentence. As between evidence of the same degree of credibility, it may be that the effect of evidence erroneously admitted may be overcome by an overwhelming volume of evidence of such a nature as to compel the mind. But, for instance, take a confession which when worthy of belief is the most convincing of all evidence, if it should be improperly admitted, I should conclusively presume error.

(*h*) I observe that it is frequently said in the clemency memoranda that the evidence is sufficient to sustain the conviction. Evidence may be sufficient to sustain the conviction when tested by an appellate court for its purposes, and yet be so weak and unsatisfactory as to justify clemency. The tests and purposes of the tests of the evidence in the two cases are entirely different.

3. I believe that the great principles fundamentally established in our civil jurisprudence, designed for the purpose of securing a fair trial, are equally applicable, except where clearly withheld, to trials before courts-martial. A military accused is entitled to the same full, fair and impartial trial; to be informed of the nature and cause of the accusation; to have witnesses in his favor; to be confronted with witnesses against him, except in those cases where the rules of evidence reasonably prescribe otherwise; and, above all, he is entitled to the assistance of counsel for his defense, counsel that should represent him and his cause, and not simply to appear in the trial to satisfy a form of law. And a military accused is fully entitled to protection against self-incrimination, as much so as an accused in a civil court.

4. The articles of war and the military statutes are not the sole source to be sought in determining whether or not a man has had a full, fair and impartial trial. The fundamental principles of law which are a part of the common law and now a part of our Constitution must be resorted to and applied, except where by their very nature they are inapplicable to military processing.

5. I think our tendency should be, wherever we can justify it, to get rid of that kind of punishment which is continuing and damns a man forever, such as a dishonorable discharge. Such a punishment as that should be given only in extreme cases. It has been given altogether too frequently and we should lean towards finding a way to reduce that kind of punishment. In the ordinary case, we should try to restore a man to the colors or return him to civil life without marking him so he can never rehabilitate himself.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate,
President, Special Clemency Board.

JUNE 16, 1919.

Memorandum for Gen. Kreger:

Subject: Operations of Second Division, special clemency board.

The special clemency board of the office of the Judge Advocate General was subdivided, practically at the inception of its actual operations in general court-martial cases, into three coordinate divisions of two members each, and so functioned from and after March 5, 1919, under the presidency of General Ansell, who was also an ex officio member of each division. The second division was composed of the undersigned judge advocates, who since said date have continuously served in such capacity, and have functioned on approximately one-third of the entire number of cases which to date have automatically come before the said special clemency board for review and recommendation under the office order of January 28, 1919. We have endeavored to devote to the work done by the second division the best thought and consideration whereof we were capable, unrestricted by the action of those who may have preceded us in the consideration of cases from the making of the findings of the trial court to and including the action of the revisory agencies of this office, which, pursuant to established procedure, may have functioned in the case before receipt of the record by the second division for review and recommendation for clemency purposes. That is to say, we have apprehended our responsibilities and duties in the premises to be clearly quasi-judicial in nature, and hence have not viewed as conclusive or binding on us the action of whomsoever may have previously functioned in a case at any stage of the proceedings, although at all times we have been disposed to give respectful consideration to such prior action. Accordingly, whenever considerations of justice or clemency prompted us so to do, we would proceed to reopen a case as to all matters of law and issues of fact therein, and would act on each case according to our view thereof, adjusted to established War Department policy, and embody our decision in the clemency recommendation of record in the case, which would have regard to the extraneous facts and circumstances appearing in the clemency memorandum and accompanying papers prepared and submitted for our consideration in acting thereon. Contemplating in retrospect the work done by the second division, we are constrained to appraise the value of our operations and the results same have accomplished by the above-stated latitude of judgment wherewith the work was executed by us. In functioning, as aforesaid, on cases coming before the second division, we are convinced that the work was performed with reasonable thoroughness and due regard to the nature and importance of the same; that were we to reconsider such cases in the mass, we would, on the whole, but duplicate our action of record therein; and, consequently, we regard as unnecessary future reexamination, in the mass, of cases disposed of according to our recommendations.

The foregoing statement, which you desire us to make of record, we would respectfully submit for your consideration.

WM. M. CONNOR, JR.,
Lieutenant Colonel, Judge Advocate.
WM. C. ROGERS,
Major, Judge Advocate.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, June 17, 1919.

From: Colonel James S. Easby-Smith, J. A., and Captain Charles T. Tittmann, J. A. constituting division No. 1, of the clemency board.
To: The Acting Judge Advocate General.
Subject: Report concerning work which has been performed by the clemency board.

1. The following report is submitted in compliance with oral instructions that the undersigned, after reading Senate joint resolution No. 18, introduced May 20, 1919, "Providing for a review of the findings of courts-martial" etc., submit a brief report of the character of the review of court-martial cases which has been made by the clemency board.

2. Practically at the outset, from and after March 5, 1919, there were three divisions of the clemency board, each composed of two officers. The board has recently been reduced to two divisions, Nos. 1 and 2, composed of two members each. The undersigned, James S. Easby-Smith was originally a member of division No. 1; and the undersigned, Charles T. Tittmann was originally a member of division No. 3. One member each of divisions Nos. 1 and 3 have recently been relieved, division No. 3 has been abolished, and the undersigned now compose division No. 1 and make this joint report as representing division No. 1 and former division No. 3.

3. Under the procedure which has been in effect since the creation of the clemency board, the entire record of a case (not only the transcript of the evidence but all formal orders, reviews and other accompanying papers) are submitted to the board, prefaced with a memorandum sheet, entitled "Clemency memorandum for the Secretary of War" which shows briefly the essential facts in the case, including a summary under the title "Circumstances attending offense." This summary is prepared by an examining officer who is not a member of the clemency board and is accompanied with his recommendation as to clemency. It was intended that the clemency memorandum should be so complete as to make it unnecessary for members of the clemency board to examine the record at length; but at the very outset of the work the members of the clemency board felt that the data contained in the memorandum was not sufficiently informative, and it has been the practice from the beginning for the members of the board to read the entire record and accompanying papers either exhaustively or to such an extent as to extract all the material information in the record.

4. In approaching the work of reviewing these cases with a view to clemency the board has constantly borne in mind the following statements, contained in a memorandum from the Secretary of War to the Judge Advocate General, dated January 13, 1919, commenting upon a memorandum, written to the Secretary of War on January 11, 1919, by Gen. Ansell, formerly acting Judge Advocate General:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him (General Ansell) which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last twenty months will disclose—(1st) very unequal degrees of punishment, and (2nd) perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

"I am not able to gather from General Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view."

5. The board has also borne in mind the following statement contained in an order recommended by Judge Advocate General Crowder, on January 18, 1919, and issued by The Adjutant General on January 22, 1919: "In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the pro-

4. The articles of war and the military statutes are not the sole source to be sought in determining whether or not a man has had a full, fair and impartial trial. The fundamental principles of law which are a part of the common law and now a part of our Constitution must be resorted to and applied, except where by their very nature they are inapplicable to military proceeding.

5. I think our tendency should be, wherever we can justify it, to get rid of that kind of punishment which is continuing and damns a man forever, such as a dishonorable discharge. Such a punishment as that should be given only in extreme cases. It has been given altogether too frequently and we should lean towards finding a way to reduce that kind of punishment. In the ordinary case, we should try to restore a man to the colors or return him to civil life without marking him so he can never rehabilitate himself.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate,
President, Special Clemency Board.

JUNE 16, 1919.

Memorandum for Gen. Kreger:

Subject: Operations of Second Division, special clemency board.

The special clemency board of the office of the Judge Advocate General was subdivided, practically at the inception of its actual operations in general court-martial cases, into three coordinate divisions of two members each, and so functioned from and after March 5, 1919, under the presidency of General Ansell, who was also an ex officio member of each division. The second division was composed of the undersigned judge advocates, who since said date have continuously served in such capacity, and have functioned on approximately one-third of the entire number of cases which to date have automatically come before the said special clemency board for review and recommendation under the office order of January 28, 1919. We have endeavored to devote to the work done by the second division the best thought and consideration whereof we were capable, unrestricted by the action of those who may have preceded us in the consideration of cases from the making of the findings of the trial court to and including the action of the revisory agencies of this office, which, pursuant to established procedure, may have functioned in the case before receipt of the record by the second division for review and recommendation for clemency purposes. That is to say, we have apprehended our responsibilities and duties in the premises to be clearly quasi-judicial in nature, and hence have not viewed as conclusive or binding on us the action of whomsoever may have previously functioned in a case at any stage of the proceedings, although at all times we have been disposed to give respectful consideration to such prior action. Accordingly, whenever considerations of justice or clemency prompted us so to do, we would proceed to reopen a case as to all matters of law and issues of fact therein, and would act on each case according to our view thereof, adjusted to established War Department policy, and embody our decision in the clemency recommendation of record in the case, which would have regard to the extraneous facts and circumstances appearing in the clemency memorandum and accompanying papers prepared and submitted for our consideration in acting thereon. Contemplating in retrospect the work done by the second division, we are constrained to appraise the value of our operations and the results same have accomplished by the above-stated latitude of judgment wherewith the work was executed by us. In functioning, as aforesaid, on cases coming before the second division, we are convinced that the work was performed with reasonable thoroughness and due regard to the nature and importance of the same; that were we to reconsider such cases in the mass, we would, on the whole, but duplicate our action of record therein; and, consequently, we regard as unnecessary future reexamination, in the mass, of cases disposed of according to our recommendations.

The foregoing statement, which you desire us to make of record, we would respectfully submit for your consideration.

WM. M. CONNOR, Jr.,
Lieutenant Colonel, Judge Advocate.
WM. C. ROGERS,
Major, Judge Advocate.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, June 17, 1919.

From: Colonel James S. Easby-Smith, J. A., and Captain Charles T. Tittmann, J. A. constituting division No. 1, of the clemency board.

To: The Acting Judge Advocate General.

Subject: Report concerning work which has been performed by the clemency board.

1. The following report is submitted in compliance with oral instructions that the undersigned, after reading Senate joint resolution No. 18, introduced May 20, 1919, "Providing for a review of the findings of courts-martial" etc., submit a brief report of the character of the review of court-martial cases which has been made by the clemency board.

2. Practically at the outset, from and after March 5, 1919, there were three divisions of the clemency board, each composed of two officers. The board has recently been reduced to two divisions, Nos. 1 and 2, composed of two members each. The undersigned, James S. Easby-Smith was originally a member of division No. 1; and the undersigned, Charles T. Tittmann was originally a member of division No. 3. One member each of divisions Nos. 1 and 3 have recently been relieved, division No. 3 has been abolished, and the undersigned now compose division No. 1 and make this joint report as representing division No. 1 and former division No. 3.

3. Under the procedure which has been in effect since the creation of the clemency board, the entire record of a case (not only the transcript of the evidence but all formal orders, reviews and other accompanying papers) are submitted to the board, prefaced with a memorandum sheet, entitled "Clemency memorandum for the Secretary of War" which shows briefly the essential facts in the case, including a summary under the title "Circumstances attending offense." This summary is prepared by an examining officer who is not a member of the clemency board and is accompanied with his recommendation as to clemency. It was intended that the clemency memorandum should be so complete as to make it unnecessary for members of the clemency board to examine the record at length; but at the very outset of the work the members of the clemency board felt that the data contained in the memorandum was not sufficiently informative, and it has been the practice from the beginning for the members of the board to read the entire record and accompanying papers either exhaustively or to such an extent as to extract all the material information in the record.

4. In approaching the work of reviewing these cases with a view to clemency the board has constantly borne in mind the following statements, contained in a memorandum from the Secretary of War to the Judge Advocate General, dated January 13, 1919, commenting upon a memorandum, written to the Secretary of War on January 11, 1919, by Gen. Ansell, formerly acting Judge Advocate General:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him (General Ansell) which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last twenty months will disclose—(1st) very unequal degrees of punishment, and (2nd) perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

"I am not able to gather from General Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view."

5. The board has also borne in mind the following statement contained in an order recommended by Judge Advocate General Crowder, on January 18, 1919, and issued by The Adjutant General on January 22, 1919: "In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the pro-

priety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December 16, 1916, is obvious."

6. The board has also borne in mind the following statement contained in an order of the Judge Advocate General, dated January 23, 1919, organizing the clemency board, to the effect that the purpose of the creation of the board was, "In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only of equalizing punishment but to adjust that punishment to present disciplinary requirements."

7. The board, having approached the consideration of cases with the above enunciated principles in view, has also carefully considered not only the record, strictly so called, but all extrajudicial and extralegal facts and circumstances which appear and which, in the opinion of the board, ought to be considered in rectifying and equalizing sentences by the exercise of clemency—such as illhealth, mental deficiency or irresponsibility, youth, dependents, alienage, education, civil life record, etc.

8. As to the attitude of the clemency board toward the work in hand and its apprehension of its duties and responsibilities in the premises, the undersigned adopt, as expressing their views, the memorandum upon this subject submitted by Lieut. Colonel Connor and Major Rogers, judge advocates, under date of June 16, 1919.

9. It is the opinion of the undersigned that much of the work of the examining officers embodied in the item "Circumstances attending offense" was, of necessity, especially in the early stages of the work, so hurriedly done as to render many of the summaries of little, if any, value; but the information contained in these summaries, which was sometimes inaccurate and frequently incomplete, was supplemented by a full and exhaustive examination of the records by the members of the clemency board as heretofore described.

10. It is the opinion of the undersigned that no necessity exists for another review of the cases which have been examined by the clemency board, except as new and additional extrajudicial facts looking to clemency may be brought to attention from time to time in particular cases.

J. S. EASBY-SMITH,
Colonel, Judge Advocate.
C. T. TITTMAN,
Captain, Judge Advocate.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, June 17, 1919.

Memorandum for General Kreger.

Subject: Proposed legislation for review of all court-martial and retirement cases.

1. The clemency section of the military justice division, Judge Advocate General's Department, now composed of six officers and two law clerks, has considered all applications for clemency on behalf of prisoners sentenced by general courts-martial, and has recommended remission or commutation of sentences, or restoration to duty, as the facts and justice of each case required, having due regard to the public interests.

2. Since February 10, 1919, under office order dated January 28, 1919, consideration has been given to the return of conditions approximating peace and an effort made more nearly to equalize punishments. With these ends in view, punishments have been reduced more nearly in conformity with the peace-time limits set forth in the President's order of December 15, 1916.

3. Since the order of January 28, 1919, became effective, the clemency section has reviewed and recommended action in 1,141 cases. In almost every instance, these recommendations have been approved by the Secretary of War and have been carried into effect or are in process of being executed.

4. In cooperation with the special clemency board of this office, practically all the cases of prisoners convicted by general courts-martial of offenses during the war, and confined in the United States, numbering about five thousand, have been reviewed; and almost without exception the recommendations approximating the reduction in punishments to peace-time limits have been carried out by order of the Secretary of War.

5. Sentences of summary and special courts-martial, whose jurisdiction is limited to confinement not exceeding three and six months, respectively, are not

reviewed in the Judge Advocate General's Department. In our opinion such review is neither necessary nor advisable. Nor are the so-called "retirement cases" subject to such review. But the general court-martial trials, involving the more serious offenses and punishments, have been most carefully reviewed, and, because of the return of peace-time conditions, have been mitigated and commuted in accordance with every humane and just consideration. There are of course many cases of prisoners confined in France whose records of trial have not yet reached this office.

6. As to the general court-martial cases, therefore, we are of opinion that the purpose and object of the proposed legislation have been accomplished.

B. A. READ,
Colonel, Judge Advocate, Chief, Military Justice Division.
S. HECKSCHER,
Lieutenant Colonel, Judge Advocate, Chief, Clemency Section.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, June 26, 1919.

Memorandum for the Judge Advocate General.

Subject: Recommendations of the Acting Judge Advocate General relative to administration of military justice.

1. The Chief of Staff directs that you be advised, for your information and guidance that the Secretary of War has approved the following recommendations contained in paragraph 13 of your 1st indorsement, dated June 19, 1919, to The Adjutant General of the Army on the memorandum of Lieutenant-Colonel S. T. Ansell, president special clemency board, dated May 17, 1919:

"(*a*) That general prisoners now being held in confinement in foreign parts be returned to the United States as soon as practicable.

"(*b*) That as to all general prisoners returning from foreign parts steps be taken to assure that a clemency memorandum be forwarded to this office by the commandant of the place of confinement, with the least possible delay after the arrival of the prisoner.

"(*c*) That the records of all general prisoners returned from foreign parts be examined as expeditiously as practicable, by the special clemency board and cooperating clemency agencies in this office, in conformity with instructions heretofore addressed to said board and cooperating agencies, the work to be prosecuted as has been done in connection with the records of general prisoners in the United States since the establishment of the special clemency board in this office.

"(*d*) That so far as practicable general prisoners having only short terms left to serve be held near ports of debarkation until their cases can be examined and reported upon.

(*e*) That whenever a recently convicted general prisoner files his first application for clemency, the commandant of the place of confinement shall forward the application without delay, with the proper notations and his recommendation thereon.

"(*f*) That in any case in which the commandant of the place of confinement regards the sentence as unduly severe, or in which in his opinion there is any reason making for clemency if none has been granted, or for additional clemency if any has been granted, he shall forward a clemency memorandum with his recommendation thereon, even though no application for clemency or for additional clemency has been filed by or in behalf of the prisoner.

"(*g*) That applications for full pardons filed by persons convicted by general courts-martial be given prompt attention; and that in cases in which the record has been found or shall be found legally insufficient to support the sentences adjudged and in which the corrective action taken or to be taken under existing instructions should be supplemented by further action looking to the granting of full pardons so as to remove any disabilities resulting from convictions not well founded in law, such further action be taken as soon as that may be done without delaying the examination of the records of trial of general prisoners returned from foreign parts."

2. You will be furnished a copy of such instructions as may be issued by the department in order to carry into effect such of the recommendations quoted above as relate to other agencies of the department than the office of the Judge Advocate General.

FULTON Q. C. GARDNER,
Colonel, G. S., Secretary, General Staff.

JUNE 26, 1919.

Memorandum for the Director of Operations:

Subject: Recommendations of the Acting Judge Advocate General relative to administration of military justice.

1. The Chief of Staff directs that the papers herewith be referred to you for the necessary action to carry into effect such of the recommendations as are contained in subparagraphs (*a*), (*b*), (*d*), (*e*), and (*f*) of paragraph 13 of the first indorsement of the Acting Judge Advocate General, dated June 19, 1919, herewith.

2. He further directs that a copy of such instructions as may be issued in this connection be furnished the Acting Judge Advocate General.

3. For your information there is transmitted herewith a copy of memorandum of this date to the Acting Judge Advocate General in this connection.

FULTON Q. C. GARDNER,
Colonel, G. S., Secretary, General Staff.

JUNE 24, 1919.

Memorandum for the Acting Judge Advocate General:

1. On May 17 I addressed to the Secretary of War, through you, a memorandum in which I recommended in effect that (1) clemency consideration be given our prisoners in France, as well as those in this country, which has not heretofore been done; (2) that, in view of the haste with which the first review was necessarily made, a more thorough review be made of doubtful cases, looking to still further clemency; (3) that another and thorough review be made with a view to granting in proper cases full pardon, and (4) that if I should be intrusted with the work, I be permitted to select, as far as possible, a personnel in sympathy with my views as to clemency.

Yesterday you indicated to me that you would approve my recommendation that the prisoners in France be given the same clemency consideration as the prisoners here, but that you were of a mind to disapprove the other recommendations.

2. With the greatest earnestness I urge you to reconsider, in the hope that you may be brought to that state of mind enabling you to view the situation as I do. The work has been hastily done. More than 5,000 records, each with its accompanying papers, have been examined. It is not humanly possible to give to that number of cases, their records and the facts and information de hors the record the consideration which justice to the enlisted man requires. The clemency examiner upon whom so much depends has been at times inexperienced in the work and at all times almost intolerably pressed. I have observed evidence, and have been conscious, of hasty action in all departments of the work, including my own. It has not been done with that accuracy, deliberation, and assurance which should characterize judicial action.

A second examination would not require the most thorough examination of every record, but only those in which there were some outstanding indicia of the necessity of reexamination. To indicate one class of cases, I myself believe that many of those in which clemency has been flatly denied ought now to be more thoroughly reexamined.

3. According to your view, the application for pardon should be initiated by the individuals who deem themselves so aggrieved as to justify that course. In view of all the circumstances surrounding the administration of military justice, this, in my judgment, would be an unjust as well as an unwise course. As long as clemency was permitted to be given consideration only upon the application of the individual, little clemency was had. It is the right of the individual to seek clemency; it is the duty of authority to give it. That duty carries with it, when there has been so much injustice as there has recently been, the duty of taking the initiative and not waiting upon individual application. We took the initiative in the granting of clemency; and why should we not, for the same reason, take the same initiative in granting pardons? Taking such intiative would, in my judgment, be to the great credit of the pardoning power. Pardon ordinarily is a matter of mercy and, as such, should not be strained out just to those who may be advised to seek it, and it never should be deferred for mere convenience' sake. In many of these cases in which we can say with fair assurance that the man ought not to have been

tried or was not lawfully tried, or that the record as it stands can not fairly sustain the conviction, pardon becomes a matter not of mercy but of partial justice. In such a case we should act, not as a matter of grace, but in recognition of a high sense of justice. In such cases our sense of justice and our sense of duty should compel us to act. Furthermore, the military relation is such and the condition of the prisoner is frequently such that he has not the ability, nor the liberty, to make out the case that ought to be made for him.

We ought frankly to acknowledge and act upon the fact that courts-martial ran riot during this war, and now do all we can to correct their unjust results.

4. If you still adhere to your views of yesterday and report upon my previous memorandum accordingly, after you have considered thi memorandum, permit me to request that you forward it with the other papers for the consideration of the Secretary of War.

S. T. ANSELL,
Lieutenant Colonel, Judge Advocate.

[First Ind.]

WAR DEPARTMENT,
(J. A. G. O.),
July 17, 1919.

To The Adjutant General of the Army:

1 This paper was brought to my attention on the afternoon of June 26, 1919. Early the following morning I brought the paper to the attention of the Secretary of War, with the request that action upon my indorsement of June 19 upon Lieut. Col. Ansell's memorandum of May 17 be deferred until this paper could be formally indorsed over for con ideration in connection with the earlier papers on the same subject. The Secretary, after reading the paper, advised me that he had already acted upon the earlier papers and directed that, after official notice of his action had reached me, this paper be forwarded for consideration by him in connection with the earlier papers. In accordance with those instructions and the reque t made by Lieut. Col. Ansell, the paper is forwarded, accompanied by the corresponding office file, including copies of each of the two memoranda, dated June 26, evidencing the action of the Secretary of War on the earlier papers.

2. It is requested that the accompanying office file be returned to this office.

E. A. KREGER,
Acting Judge Advocate General.

WAR DEPARTMENT, *Washington, July 21, 1919.*

Memorandum for the Judge Advocate General:

I return herewith the memorandum of Col. Ansell and your indorsement of July 17th.

Col. Ansell presses two points: First, that all of the records which have been examined by the clemency section of the office of the Judge Advocate General should be reexamined. Second, that this reexamination should be by a group of officers personally selected by Col. Ansell and having "a personnel in sympathy with my [his] views as to clemency." In support of the first recommendation, Col. Ansell expresses the belief that the work of the clemency board has been hastily done. Frankly, this is an incredible statement. The clemency boards were organized with great care. They were composed of men of courage, ability, and zeal, and their work was done in an atmosphere with every predisposition toward a humane and merciful consideration of the facts of the cases presented. I cannot bring myself to reflect upon work so devotedly done by any hasty assumption that it was ill done because either of its volume or speed. It is not to be forgotten that Col. Ansell was himself the head of this work and I know him too well to believe that, in a matter which so fully engaged his feelings, he sat by and saw hasty, slipshod, and therefore unjust work done.

The second suggestion that the next board should be one chosen by him and having his views as to clemency seems to me at variance to all of the suggestions he has hitherto made with regard to the administration of military justice, which he insists should be characterized by its adherence to law rather than its color of personal opinion.

However these two considerations may be viewed, I am persuaded that the remedies instituted by the Judge Advocate General in these cases are adequate and careful, and that the work which has been done and is being done deserves the confidence of the Secretary of War. I am further of the belief that when these reviews shall have been completed, the recommendations which we will inevitably receive from the commandants at the several disciplinary barracks, from the psychiatrists and medical officers, and the applications for clemency from the men themselves, will bring to our attention cases in which further clemency ought to be considered. I therefore adhere to the view I verbally expressed to you of approving the arrangement set out in the earlier papers.

NEWTON D. BAKER, *Secretary of War.*

(Thereupon, at 5.10 o'clock p. m., the committee adjourned subject to the call of the chairman.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

THURSDAY, OCTOBER 23, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 10.30 o'clock a. m., Senator Francis E. Warren, presiding.

Present, Senators Warren (chairman), Lenroot, and Chamberlain.

Senator WARREN. Gen. Chamberlain, Inspector General of the Army, is present this morning, and we will hear his statement.

STATEMENT OF MAJ. GEN. JOHN L. CHAMBERLAIN, INSPECTOR GENERAL, UNITED STATES ARMY.

Senator WARREN. General, this committee has before it the result of some work and some examinations which you have had conducted with relation to courts-martial, so that all that we shall ask you to do is to add whatever you wish to say in addition to that.

Gen. CHAMBERLAIN. I have nothing to add to that report. In his testimony before this committee former Lieut. Col. S. T. Ansell has from time to time taken occasion to comment upon the Inspector General of the Army and the Inspector General's Department. With Gen. Ansell's opinions as to the Inspector General and the Inspector General's Department I am not concerned. However, certain concrete statements made by him appear to call for comment.

Referring to certain testimony given by Maj. Copp, of the Judge Advocate General's Department, before a committee of the American Bar Association, Lieut. Col. Ansell states:

> Maj. Copp, speaking out of what he described as his experience as a judge advocate in a division during this war, said that it was customary for the Inspector General's Department to compel, by virtue of the power of office, a man to incriminate himself.

When the committee asked him time and time again, "Do you know this to be true?" he said, "Yes, because I not only observed it but the representative of the Inspector General's Department at the camp where I was stationed admitted that to be a fact."

Examination of the printed record of Maj. Copp's testimony before that committee fails to discover that upon any occasion he made a statement to the effect that these views were based upon personal knowledge. On the contrary one discovers the following statement, made by Maj. Copp:

> This matter of compulsion probably is receiving more notice than I intended that it should. It never was under my observation, even in those investigations of the Inspector General, except as he related them to me. He said that he had that authority and it was his duty to compel witnesses to appear before him for investigation.

Again, in another place, appears the following:

I simply desire the committee to understand that I merely base my statement there upon what I have been told and not upon anything I personally observed or anything within my personal knowledge.

Lieut. Col. George W. England, on duty as senior camp inspector at Camp Sheridan, from August 30, 1918, to March 25, 1919, was the only officer of the Inspector General's Department who was on duty at that camp during the period that Maj. Copp was there, the other representatives of the Inspector General's Department being acting inspectors. Col. England in a letter to the Inspector General states:

The policy of requiring witnesses to give incriminating evidence against their protest did not exist in the office of the inspector, Camp Sheridan, nor was belief expressed or held that such procedure was proper. All of the testimony taken in the office of the inspector was taken under my immediate supervision, and in no case was this policy followed. * * * In no case before the inspector for investigation was the plea of self-incrimination disregarded or was a witness forced to answer questions which would incriminate him.

There are issued from the office of the Inspector General certain instructions to the officers of that department. One of the instructions I quote as follows:

Prior to interrogating a witness:
(1) Make sure that witness understands his or her constitutional rights * * *

Again referring to the same matter Lieut. Col. Ansell, in his testimony before this committee, stated:

There ought to be some law against permitting the Inspector General's Department of the Army to use these third-degree methods of menace and threats and taking advantage of the innocence or ignorance of the unhappy lot of the enlisted men.

It is a fact well known to officers and enlisted men of the Army that such methods are entirely foreign to the firmly established policy of the Inspector General's Department. It is also a fact that they are not resorted to.

It is also a fact that officers and enlisted men well understand that in the hands of the Inspector General's Department they get a square deal.

Referring to an investigation made by the Inspector General of certain controversies which had arisen in connection with the Judge Advocate General's Department, on page 209 of these hearings, Col. Ansell states:

And then the Inspector General, in my judgment forgetting whatever quasi-judicial character belongs to his position—and there ought to be a great deal to it—said, "You know, I am making a report on this subject by order of the Secretary of War. This thing is in Congress, and my report will go to Congress; and, Ansell, when it goes to Congress it will be very detrimental to you;" and I said, "Well, General, I would rather meet you in Congress than deal with you here."

Further on he states:

It was a menace, a threat that unless I played the department rôle the report was going in against me, would be published broadcast to the world, and would be very detrimental to me.

In regard to these statements I desire to state unconditionally and in language which will admit of no misinterpretation, I made no such statements, nor did I make any statements which admit of such interpretation.

That is all I have to say, gentlemen.

Senator LENROOT. In that connection, General, was there a conversation between you upon that subject?

Gen. CHAMBERLAIN. There was a conversation.

Senator LENROOT. Could you relate the conversation as you recollect it?

Gen. CHAMBERLAIN. I said to Lieut. Col. Ansell that I regretted very much that he had taken this view of the situation, as I was endeavoring to get at the facts of the case, and that I needed his statements in order to give me both sides of the controversy. That is the gist of what I said. Of course I do not recall the words.

I will add, in that connection, that because of the fact that Col. Ansell declined to make any statement, I had Col. Mayes brought home from France. Col. Mayes was Col. Ansell's—I might say—confidential assistant during most of the period involved. Col. Mayes came home, and his statements and testimony appear in my report.

In that connection I might state that Mr. Bennett, a stenographer in my office, who was present during this conversation, is now in the waiting room, if you care to call him in regard to this matter.

Senator LENROOT. What were the relations at that time between you and Col. Ansell?

Gen. CHAMBERLAIN. Perfectly friendly; always have been. They have never been otherwise.

Senator LENROOT. When did the controversy first arise between you?

Gen. CHAMBERLAIN. There never has been a controversy.

Senator LENROOT. There never has been?

Gen. CHAMBERLAIN. My relations with Gen. Ansell, he as acting judge advocate general, and I as inspector general, throughout the period of the war, were most friendly, and so far as I know there was full coöperation. I recall only one difference. That was in connection with an investigation of the conduct of an officer of the Judge Advocate General's Department. My office condemned severely the conduct of this officer and recommended disciplinary action. That action was not approved in Gen. Ansell's office, and the officer was not disciplined, but that was a matter to which I never gave a thought afterwards, and I do not believe that he did. That was purely official. So far as I can recall that is the only case where the two offices did not substantially agree in their recommendations.

Senator LENROOT. I just note in the testimony that you referred to in the record, it appears that whatever controversy there was in this conversation grew out of his refusal to make a statement in the investigation that you were charged with making.

Gen. CHAMBERLAIN. There was no controversy. Our conversation at that time was most friendly.

Senator LENROOT. Yes; but he put it in writing, and I have it here. He did refuse?

Gen. CHAMBERLAIN. Yes, he refused.

Senator LENROOT. And he gave as his reason, apparently, that you were charged with making an investigation upon a subject upon which, prior to that time, you had formed an opinion, and were therefore not an impartial investigator. That was the amount of it. That is stated on page 208.

Gen. CHAMBERLAIN. In that connection, Gen. Ansell must have referred to the fact that back in November, 1917, when the case which is now known as the El Paso——

Senator CHAMBERLAIN. Mutiny cases?

Gen. CHAMBERLAIN. Mutiny cases.

Senator WARREN. Do you care to have that record, General?

Gen. CHAMBERLAIN. No; the matter is perfectly clear in my mind. Upon that occasion, or in connection therewith, Col. Ansell submitted recommendations relative to the interpretation of section 1199 of the Revised Statutes of the United States. The court-martial proceedings in those cases were handed to me by the Assistant Chief of Staff to look over and to prepare a memorandum for him. This was done because of the fact that a short time before, I had been at Fort Bliss in connection with another matter, the Twenty-fourth Infantry trouble. I had made some inquiries as to this artillery case, and had some little knowledge of the conditions. The memorandum which I prepared had no direct reference whatsoever to the interpretation of section 1199, and to the best of my belief—although I could not state that positively, as it was some time ago—I had no knowledge at that time that a memorandum with respect to section 1199 had been submitted by Ansell. In other words, my memorandum regarding those specific cases had no bearing whatsoever upon the general question of section 1199. In my memorandum I stated my disapproval of smashing those proceedings, because I believed them to be legal, and because such action would be detrimental to discipline. But on account of the peculiar conditions I suggested that clemency be exercised, and that those men be restored to duty, and that the young officer who had shown bad judgment be relieved from his command.

Senator LENROOT. That is, your participation was upon the merits of the case and not upon the construction of the statute?

Gen. CHAMBERLAIN. Absolutely so. It had no connection whatsoever with the statute.

Senator LENROOT. You prepared a memorandum upon it?

Gen. CHAMBERLAIN. A short memorandum.

Senator LENROOT. Could that be produced and put in the record? That would help to clear this up, here.

Gen. CHAMBERLAIN. That memorandum is embodied in my report.

Senator LENROOT. It is already in this record?

Gen. CHAMBERLAIN. It is in my report, I think.

Senator WARREN. We have that.

Senator LENROOT. That will be all right, then.

Senator WARREN. I have not brought that report before the committee for examination, Senator, but it is here, when you get ready to look it over.

Senator LENROOT. I can refer to it.

Senator WARREN. When you were out of the room, I believe, Senator Chamberlain, there was something said by Gen. Chamberlain about something that Gen. Ansell said.

Senator CHAMBERLAIN. Yes; I have the record here.

Senator WARREN. Would you like to ask the witness any questions on that?

Senator CHAMBERLAIN. Of course this committee, as I understand it, is not interested in the personal controversy between you and

Gen. Ansell, but it is perfectly proper for you, General, to give your version of this particular statement of Ansell's.

Gen. CHAMBERLAIN. Mr. Senator, my only object in coming here was to correct a positive statement of fact which seriously reflected upon the Inspector General in the performance of his duties.

Senator CHAMBERLAIN. I say it is perfectly proper for you to do it; but the committee itself is not interested so much in the personal question as in the law itself.

Gen. CHAMBERLAIN. Certainly.

Senator CHAMBERLAIN. What were you investigating with reference to Ansell? Were your instructions to make the investigation, in writing?

Gen. CHAMBERLAIN. In writing?

Senator CHAMBERLAIN. Yes.

Gen. CHAMBERLAIN. Yes, sir.

Senator CHAMBERLAIN. From whom did you receive instructions to investigate Ansell?

Gen. CHAMBERLAIN. I never received instructions to investigate Ansell.

Senator CHAMBERLAIN. What was the subject——

Gen. CHAMBERLAIN. My orders are in writing, signed by the Secretary of War, and they are embodied in that report, fully. The Secretary of War told me, as I recall it, that a controversy involving questions of fact had arisen in the Judge Advocate General's Department; that he desired me to examine all the records and to fully investigate those matters. He specifically, in those written instructions, stated that the investigation would be conducted under the assumption, with every officer, that it was his duty—have you that report there?

Senator LENROOT. I have your memorandum here.

Gen. CHAMBERLAIN. I want to get the exact language. [Reading from report:]

> In making the foregoing inquiry you will proceed on the fact that I recognize fully the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by the committees of the Congress, and do not desire any adverse inference to be drawn from the fact of such testimony, where it is frank and straightforward.

This investigation was directed with special reference to the question as to whether or not the controversy pertaining to the office of the Judge Advocate General had affected adversely the efficiency of that office.

Senator CHAMBERLAIN. That is in your order from the Secretary of War?

Gen. CHAMBERLAIN. That is in my order from the Secretary of War.

Senator CHAMBERLAIN. Who prepared that?

Gen. CHAMBERLAIN. The Secretary of War dictated it, in my presence.

Senator CHAMBERLAIN. Was it usual, in a controversy between two officers in the same department, to refer the whole question of fact involved between those officers to the Inspector General's office?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. For investigation and report?

Gen. CHAMBERLAIN. Entirely so. That is one of the functions of the Inspector General's Department.

Senator CHAMBERLAIN. Is that your report?

Gen. CHAMBERLAIN. That is my report.

Senator CHAMBERLAIN. It covers maybe a thousand pages of typewritten matter, does it not?

Gen. CHAMBERLAIN. The report itself covers 60 pages.

Senator CHAMBERLAIN. Sixty pages?

Gen. CHAMBERLAIN. And these are copies of all correspondence [indicating].

Senator WARREN. Did you say 6 pages or 60 pages?

Gen. CHAMBERLAIN. Sixty pages. This report is long because we made a study in the office of 1,500 court-martial cases taken in blocks of 500 each, 500 taken during the period about January and February, 1918, 500 taken a few months later, and 500 again a few months later than that. We took those cases and made a careful analysis and study of them, the result of which study is set forth in this report.

Senator LENROOT. You studied all the cases within a given period?

Gen. CHAMBERLAIN. We took 500 in chronological order. That is, we took a block of 500 here and a block of 500 there, and then another block of 500, so that they included cases from every department; from the Philippine Islands, from Hawaii, from the A. E. F.; so that they were typical cases.

Senator WARREN. You also had some from here in the United States proper, I presume?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Did you take cases as they came, that is in the chronological order, the order in which they were filed in the Judge Advocate General's Office?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Did you receive any aid from the Judge Advocate General's Office or in any way, from Ansell or anybody else, in your selection of the 1,500 cases.

Gen. CHAMBERLAIN. None whatsoever. I called for 500 cases in a block. The Judge Advocate General's Department had nothing whatever to do, directly or indirectly, with the selection of those cases, or in the analysis of them, or in the examination of them.

Senator CHAMBERLAIN. How did you call for them? Did you say "I want 500 cases between January 1, and February 1," we will say, for illustration, or did you ask for 500 cases in the chronological order of filing? How did you get each block of 500? I think it is quite material that you should refresh your memory as to just how these cases were selected, because I can conceive of a situation——

Gen. CHAMBERLAIN. I can tell you upon what basis they were selected. There was a General Order, No. 7, which was published in the spring of 1918, which was the occasion of a great deal of controversy.

Senator CHAMBERLAIN. That was the four cases in France——

Gen. CHAMBERLAIN. No, no.

Senator CHAMBERLAIN. That order originated out of them?

Gen. CHAMBERLAIN. That order——

Senator CHAMBERLAIN. No; it originated out of the Texas cases.

Gen. CHAMBERLAIN. It originated out of the Texas cases.

Senator CHAMBERLAIN. Where the negroes were sentenced to be shot, and were shot?

Gen. CHAMBERLAIN. Yes. Now, my instructions were these: To get 500 cases before General Order No. 7 went into effect, 500 cases after it went into effect, and 500 cases after it had been in force a considerable time.

Senator WARREN. Here is what I want to know, and I think it is the same thing Senator Chamberlain wants to get——

Senator CHAMBERLAIN. Will you please let me continue while I have this in mind?

Senator WARREN. I wish you would put it this way: I want to know whether every court-martial case that occurred, chronologically, within a certain period of time was taken, was selected, or whether a certain number of cases were selected. Is that what you want to know?

Senator CHAMBERLAIN. Have him answer your question, and then I will put my question just as I want it.

Gen. CHAMBERLAIN. The 500 cases were chronological. Each block contained a certain number, taking in every number, as received in the Judge Advocate General's files. That is all brought out in the report.

Senator WARREN. That is all brought out. Excuse the interruption.

Senator CHAMBERLAIN. This may be very material for what I am trying to get at. It may be that there were 500 cases before General Order No. 7 was issued where there was absolutely no irregularity, either on the record or otherwise, but I can conceive that there might have been 500 cases prior to the issuance of General Order No. 7 where there were grave irregularities. I can conceive that the 500 cases that were submitted to you might have been the cases where there were no irregularities. I do not charge it, but I suggest that might have occurred.

Gen. CHAMBERLAIN. There were no cases submitted to me, Mr. Senator. I sent an officer who got the cases. I think if you will read the report your question will be fully answered.

Senator CHAMBERLAIN. Please understand, General, that I am not charging that there was any such course as that pursued.

Gen. CHAMBRLAIN. I understand.

Senator CHAMBERLAIN. But if you depended upon the Judge Advocate General's office, that might have been done?

Gen. CHAMBERLAIN. I did not. The Judge Advocate General's office had no more idea of what cases or blocks of cases we were going to take than you had.

Senator CHAMBERLAIN. I am glad to know that, because you could only get a cross section of the court-martial proceedings by taking them without respect to anybody's selection.

Gen. CHAMBERLAIN. My first idea was, and my first suggestion was, that we take 1,500 cases in a block; and then Col. Patterson, who was assisting me in this work, suggested that we would get more general results, or more satisfactory results, if, instead of taking the whole 1,500 together, we took 500 here and then 500 and then another 500.

Senator CHAMBERLAIN. And you think they were chronological?

Gen. CHAMBERLAIN. I know they were. The records show that. Col. Patterson, from my office, went personally and took the records from the files of the Judge Advocate General's office.

On January 17, 1918, General Order No. 7 was issued, to become effective from and after February 1, 1918. These orders provided that not only the execution of all sentences of death, as provided in General Order 169, 1917, but also all sentences of dismissal and dishonorable discharge be stayed until the records of the trial could be reviewed in the office of the Judge Advocate General and their legality there determined.

Fifteen hundred records of trial by general court-martial were selected from the office of the Judge Advocate General for a twofold purpose: (a) Because it was believed that they would be representative of the 20,000 cases tried during the war, and that they would therefore indicate how military justice was actually being administered, and (b) by selecting the records from different periods an opportunity would be afforded to discover what results were being accomplished by the issuance of General Order No. 7.

Records of trial received in the office of the Judge Advocate General are given consecutive serial numbers; date of receipt is also stamped on each case.

Three periods were chosen as follows:

One beginning January 1, 1918. This was before the issuance of General Order No. 7. Five hundred records were chosen consecutively from that date forward. One beginning March 1, 1918. This was one month after General Order No. 7 became effective. Five hundred records were chosen consecutively from that date forward. One beginning May 1, 1918. By this time the object and purposes of General Order No. 7 were well understood throughout the Army. Five hundred records were chosen consecutively from that date forward.

Senator WARREN. Excuse me for the interruption. That is exactly what I was anxious to find out.

Senator CHAMBERLAIN. If Ansell did decline to appear before you, he was only exercising a right which was usual and in accordance with the rule which you have just announced?

Gen. CHAMBERLAIN. Certainly. I have never criticized Ansell for that. I simply told him at the time that I regretted it, because I wanted everyone to tell me what he knew. It was his privilege to decline to give testimony.

Senator CHAMBERLAIN. Had you, previously to this request upon Ansell, formed any opinion as to section 1199 of the Revised Statutes as to the appellate jurisdiction of the Judge Advocate General's office?

Senator WARREN. As to review and revisory power?

Senator CHAMBERLAIN. Yes.

Gen. CHAMBERLAIN. Do you mean as to the soundness——

Senator CHAMBERLAIN. Of Ansell's interpretation of the law and of the soundness of the Judge Advocate General's interpretation of that statute.

Gen. CHAMBERLAIN. I have never presumed to pass upon that, Mr. Senator. I am not a lawyer. That is purely a matter of law and I have never presumed to pass upon that.

Senator CHAMBERLAIN. You spoke of the case of these Texas mutineers. That controversy was primarily involved in the con-

struction of the law that those two gentlemen had placed upon that statute. Which view of the law had you taken? You had held, I believe you say, that the conviction was proper, and you had only recommended that the young officer be transferred from his command.

Gen. CHAMBERLAIN. As I stated, to the best of my belief a concrete question of the interpretation of that section, 1199, was not at that time brought to my attention, and to the best of my belief I had no knowledge whatsoever that any question of the interpretation of section 1199 was up until the question came up before the committees over a year later.

In my mind there is no connection whatsoever between the interpretation of section 1199 and the memorandum which I prepared on those cases. Of course, as you look back over the records they were connected, but I do not think at the time I knew it, nor do I think I knew it until last spring when these hearings began. As to whether that section gives to the Judge Advocate General the appellate view of jurisdiction which Col. Ansell claims, I do not presume to express an opinion.

The trial of those men appeared to be entirely legal. There is no question, and was no question, that those noncommissioned officers were guilty of the technical charge of mutiny. There is no question that those noncommissioned officers refused repeatedly in the presence of other members of the command to obey the orders of the commanding officer.

The attending circumstances were such, however, as to very materially mitigate the seriousness of the offense.

Senator CHAMBERLAIN. They were standing on their rights, and while they were under arrest on a former charge they could not be ordered to do a military duty.

Gen. CHAMBERLAIN. The first duty of a soldier, as I have always understood it, is to obey the orders of his commanding officer.

Senator CHAMBERLAIN. There is no question about that, General, as an ordinary proposition; but is it not a fact that when a man is under arrest on a charge of some kind for a violation of a military duty he can not then be ordered to perform some military service?

Gen. CHAMBERLAIN. I do not think so.

Senator CHAMBERLAIN. You think that if these men were charged with gambling and were under arrest for violation of that regulation they could nevertheless be ordered to perform a military service; to drill, for instance?

Gen. CHAMBERLAIN. I think it was improper to do so; but I do not think it was an occasion where a man, a noncommissioned officer, or an officer was justified in taking the law into his own hands and presuming to determine whether the commanding officer should order him to do it.

Senator CHAMBERLAIN. That was the controversy. These noncommissioned officers claimed that, under the rules and under the regulations and under the law, they being under arrest, they had no right to be required to perform military service; and, as you say, it was not proper.

Gen. CHAMBERLAIN. I say that it was not up to them to decide whether the orders of the commanding officers were legal or proper. It was up to them to obey those orders, and if the commanding officer had given an illegal order, it was up to his superior officers to disci-

pline him, which would have been done, probably, if it had been reported.

Senator CHAMBERLAIN. What I am getting at, General, is this: There the controversy arose between Ansell and the Judge Advocate General. Ansell held, evidently, as you hold, that it was improper to have ordered these men to do a military duty while they were under arrest.

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. And Ansell claimed that therefore, having been ordered to do a thing which was improper, the trial was irregular and ought to be—the sentence ought to be—set aside. On the other hand, the approving authorities held that that condition was proper.

Gen. CHAMBERLAIN. I think it was entirely proper.

Senator CHAMBERLAIN. There, you see, there is opportunity for a fair misunderstanding between two officers in the Judge Advocate General's Office about the facts.

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. So that you will agree, then, not with Ansell about the view of the law, but with Gen. Crowder's view of the law?

Gen. CHAMBERLAIN. Gen. Crowder up to that time had expressed no view at all. It had not then been put up to him.

Senator CHAMBERLAIN. Whether it had or not, you agreed with the view that he was maintaining?

Gen. CHAMBERLAIN. He had not expressed any view at all up to that time, so far as I know. The case had not at that time come before him.

Senator CHAMBERLAIN. Of these mutineers?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. That had come before him when you were called upon to investigate Ansell, and that was one of the questions you were called upon to investigate, was it not?

Gen. CHAMBERLAIN. I was not directed to investigate Ansell.

Senator CHAMBERLAIN. The differences between Crowder and Ansell?

Gen. CHAMBERLAIN. Not at all. I was called upon to investigate statements of fact, where one had made certain statements of fact. certain charges, and where the other had made certain statements. I was not called upon to, nor did I in my investigation or in my report, touch upon the question of the interpretation of section 1199 or upon the merits of the action upon these or other court-martial cases.

Senator CHAMBERLAIN. I do not see how you could possibly separate the one from the other.

Gen. CHAMBERLAIN. Well, if you will read this report, you will find out. I believe that I have done so. I believe that I confined myself strictly to the spirit and letter of my instructions.

Senator CHAMBERLAIN. I want again to impress upon your mind, General, that I have no feeling upon this matter except to get the justice of the proposition.

Gen. CHAMBERLAIN. I appreciate that perfectly, Senator, and I have no feeling. I should not have taken the time of this committee, except for those concrete statements which were not true.

Senator CHAMBERLAIN. If I had been in Ansell's place, if I had felt that you had already espoused that view of the law, even if you were going to investigate only a question of fact, I would have hesitated to appear before you, because it is human to follow the bent of a man's decision in a former case.

Gen. CHAMBERLAIN. He was within his rights, and I never have criticized him for that; the only thing I take exception to is his statement that I threatened him.

Senator CHAMBERLAIN. In that controversy we have no particular interest. Both sides are interested.

Gen. CHAMBERLAIN. But the committee has accepted and has made of record his statements, which did charge me with having done that.

Senator CHAMBERLAIN. Yes.

Gen. CHAMBERLAIN. Therefore I consider that my statement in regard to the matter ought to be of record also.

Senator CHAMBERLAIN. That is perfectly proper, General.

Senator WARREN. Now, see if I understand you as to your construction of the duties of soldiers and officers. Here is a mutiny, as I get it, from what has been said. Certain noncommissioned officers, and perhaps privates, refused to obey an order of their superior officer because of their knowledge or supposed knowledge of the law, or what might be the end, the ruling, that an officer had no right to give them orders while they were in arrest. I think, from what you say, you must take the view that a soldier must obey the order of his officer and find out afterwards, or call the officer to account afterwards if he has done wrong; that is, when an order is given, *per se*, he must obey it. Is that your idea?

Gen. CHAMBERLAIN. That is the way that I have been brought up. If I receive an order from my superior officer I obey it, and I inquire as to the legality of it afterwards. The only occasion under which I would assume the responsibility of disobeying an order of my superior now, with my present rank and experience, would be if by obedience to that order I would commit an act which would have serious results which could not be remedied after the act had been committed.

Senator CHAMBERLAIN. Here is the question we are interested in—that is, that I am very much interested in, General. Here was an order given to these men, which you admit was wrong under the circumstances, and it led to your recommendation——

Senator WARREN. I did not hear that order read. What was it for them to do?

Senator CHAMBERLAIN. It was for them to perform a military duty while they were already under arrest, and they, acting together, refused and were then charged with being mutineers.

Senator WARREN. It was not an order to do something that could result in wrong to anybody else?

Senator CHAMBERLAIN. Oh, no.

Gen. CHAMBERLAIN. An order to go to drill.

Senator WARREN. An order in the technical application of the law?

Senator CHAMBERLAIN. Yes. Now, let me get that over again. Here is what I am particularly interested in. Here were these noncommissioned officers who were under arrest. They were ordered by the commanding officer to perform a military service. They refused to do that service because they said that, being under arrest, it was

violative of the regulations to order them to perform a military service. You say that order was wrong.

Gen. CHAMBERLAIN. I say that the commanding officer should not have given that order.

Senator CHAMBERLAIN. But he did give the order, and the approving authorities held that it was proper. Now, what I am interested in——

Gen. CHAMBERLAIN. No, they did not hold that it was proper, I think, Mr. Senator.

Senator CHAMBERLAIN. They approved the sentence.

Gen. CHAMBERLAIN. That is a very different thing.

Senator CHAMBERLAIN. The sentence was approved, and those men were dishonorably discharged from the service. If that had not been the case you would not have recommended clemency.

Gen. CHAMBERLAIN. If what had not been the case?

Senator CHAMBERLAIN. If the sentence had not been approved by the approving authority there would have been no clemency to be recommended.

Gen. CHAMBERLAIN. Certainly not.

Senator CHAMBERLAIN. Here is what I am interested in. There was under the ruling of the Judge Advocate General no relief for these men. There was no relief for them, except that if the Judge Advocate General's Office looked over the record and found, as you actually found, that the order was improper, and he then recommended to the approving authority that the sentence be set aside, or whatever recommendation he saw fit to make; but he had not authority to do that himself.

Gen. CHAMBERLAIN. The Judge Advocate General?

Senator CHAMBERLAIN. Yes.

Gen. CHAMBERLAIN. No, sir; certainly not.

Senator CHAMBERLAIN. So that you see there was really no relief for these men.

Gen. CHAMBERLAIN. Yes there was, and the relief actually came. The President exercised clemency.

Senator CHAMBERLAIN. What did he do?

Gen. CHAMBERLAIN. As I recall it, he remitted sentence and restored them to duty and relieved the officer from his command. That is my recollection.

Senator CHAMBERLAIN. But the record of conviction still stood against them.

Gen. CHAMBERLAIN. It stood.

Senator CHAMBERLAIN. It was simply a question of a person having exercised mercy toward men who were charged improperly.

Gen. CHAMBERLAIN. I did not say they were charged improperly. I do not think they were charged improperly. I think they should have been tried.

Senator CHAMBERLAIN. Well, that is where our difference is.

Gen. CHAMBERLAIN. That is where our difference is.

Senator CHAMBERLAIN. Which is perfectly proper.

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Under my view of the law the Judge Advocate General had the power under section 1199 to have rejected and set aside the findings of the court.

Gen. CHAMBERLAIN. I could not pass upon that, as I say, because I am not a lawyer.

Senator WARREN. I can see right where the difference is. It is the difference between the practice in civil life and the regulations in the Army. That is where it comes in.

Senator CHAMBERLAIN. Probably.

Senator WARREN. In the Army the thing to do is to obey an officer. In civil life the proper thing is to stand a man off as long as possible.

Senator CHAMBERLAIN. But the difficulty is that he gets carried before the military authorities and does not get justice, frequently.

Senator WARREN. I understand that this is the fact. See if I am right: Their record was wiped out and they were restored to duty?

Gen. CHAMBERLAIN. The record was not wiped out, but I understand they were restored to duty. Of that, however, I am not certain.

Senator WARREN. In other words, they stood in the position that men would stand in who are apprehended and who undergo, possibly, a temporary imprisonment, and are then found to be innocent, and that is the end of it. Now, is that a fair simile?

Gen. CHAMBERLAIN. I do not think so. I think that the fair simile would be that of a man who had been tried and convicted upon a charge, and there was no question of his being guilty of the charge as placed, but that the circumstances and conditions were such as to justify the pardoning power to at once issue a pardon.

Senator WARREN. You did not get at just what I meant. I was getting at results only, and skipping all the other, if the results were similar.

Gen. CHAMBERLAIN. The results would be similar, yes.

Senator WARREN. I am not expressing my opinion either way, but trying to get the different facts to see where the end is, practically.

Senator CHAMBERLAIN. In practical effect, you state the rule; but the general states the rule more properly.

Senator WARREN. Oh, yes; I admit that.

Senator CHAMBERLAIN. Here is the case. I may be charged with murder and may be convicted of murder, and I may be sentenced to be hung or to be sent to the penitentiary. Now, I may be pardoned by the governor of a State, or by the President of the United States if it is a Federal charge. That is a question of mercy. The other question, that is more important to me, is, was I justly convicted? There ought to be some appellate tribunal to determine whether I was guilty in this instance, and the tribunal may have said that I was not guilty. Now then, I am a free man, without any shadow of guilt upon me. In the other case I am a pardoned man; mercy has been extended to me.

Senator WARREN. You state the case as it is in the books. I was jumping crosswise to get at what the condition of the man was afterwards.

Senator CHAMBERLAIN. Here is a case of a man who has been unjustly convicted, who has had mercy extended to him when he ought to have had justice shown him. That is unjust.

Your report is there in the Ansell case, in the investigation that was referred to you?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Your evidence is all there?

Gen. CHAMBERLAIN. Everything is here.

Senator CHAMBERLAIN. And your findings and conclusions are there?

Gen. CHAMBERLAIN. Many of the papers examined are there, and all the evidence taken.

Senator CHAMBERLAIN. So that that will show all that was done?

Gen. CHAMBERLAIN. Yes, sir.

Senator CHAMBERLAIN. Can you tell in concrete, and in a very few words, just what your conclusion was with reference to the controversy between Ansell and Crowder?

Gen. CHAMBERLAIN. The answer to that question covers many pages of the report. There were a good many different points at issue which were taken up individually.

Senator CHAMBERLAIN. In other words, in your findings do you sustain Ansell in some and Crowder in some?

Gen. CHAMBERLAIN. I do. In some I find that Ansell's claims were correct, and sometimes the other; and sometimes neither.

Senator CHAMBERLAIN. That would be very natural in findings on so many questions?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Is there a general recommendation that Gen. Ansell be brought to trial?

Gen. CHAMBERLAIN. No recommendation whatsoever as to disciplinary action.

Senator CHAMBERLAIN. Is it not usual for the Inspector General's department to recommend that a charge be preferred?

Gen. CHAMBERLAIN. Not necessarily, unless the Inspector General considers that a charge should be preferred or that disciplinary action should be taken.

Senator CHAMBERLAIN. Did you consider that disciplinary action should be taken?

Gen. CHAMBERLAIN. I made no such recommendation. I made no recommendation as to disciplinary action.

Senator CHAMBERLAIN. You just left it to the Secretary of War to do what he thought proper?

Gen. CHAMBERLAIN. I simply stated the facts as I found them, and the conclusions based upon those facts.

Senator CHAMBERLAIN. Was any disciplinary action taken, so far as you know?

Gen. CHAMBERLAIN. None, so far as I know.

Senator CHAMBERLAIN. Was your report filed before Ansell's resignation, or after?

Gen. CHAMBERLAIN. This report was filed—the report is dated May 8, 1919.

Senator CHAMBERLAIN. And he resigned afterwards?

Gen. CHAMBERLAIN. Yes; he resigned several months afterwards.

Senator CHAMBERLAIN. I believe that is all I care to ask the general.

Senator WARREN. I believe that I have nothing more. You understand, Senator Chamberlain, I have not even opened or examined that report at all. I assumed, though, just what he has stated last, that he was not given a duty and did not perform any duty as

to the controversy between the two men, but to get these cases that we have had up.

Senator CHAMBERLAIN. Yes.

Senator WARREN. I am right about that, am I not, General?

Gen. CHAMBERLAIN. Yes.

Senator WARREN. You were not instructed to entertain any charges against any members of the Judge Advocate General's corps?

Gen. CHAMBERLAIN. None at all; no charges were made against anyone.

Senator WARREN. Never have been, in fact?

Gen. CHAMBERLAIN. No charges were made at any time against anybody.

Senator CHAMBERLAIN. May I ask you this question, General: Do you feel, with your vast experience, that no revision of any kind of the Articles of War, or the appellate procedure, is necessary?

Gen. CHAMBERLAIN. I do not feel that; no, sir. I think that there are a number of things in connection with the Articles of War which should be changed.

Senator CHAMBERLAIN. Have you ever made any recommendations upon the subject?

Gen. CHAMBERLAIN. Some time ago I submitted to The Adjutant General a brief memorandum on the subject.

Senator CHAMBERLAIN. Have you them accurately in your mind so that you could, without very much difficulty, suggest those amendments?

Gen. CHAMBERLAIN. I have some of them in my mind; the principal ones?

Senator CHAMBERLAIN. You know, General, this committee is only anxious to get at the truth of this situation, and any suggestions from you would be very helpful. If you have in mind any amendments that ought to be made to the Articles of War or any particular one of them, your recommendations upon the subject might have controlling weight upon this committee.

Senator WARREN. I should like to have anything of that kind submitted so that we might have it in this report of this hearing. You might submit it at a later date in written form.

Gen. CHAMBERLAIN. I would prefer, Mr. Chairman, to have time to think that matter over, because I have never thought of it with a view of presenting my views to this committee. I have very decided views upon certain points.

Senator WARREN. You must have.

Gen. CHAMBERLAIN. And I would like to present them, but I would like to have an opportunity to prepare a memorandum for the committee.

Senator WARREN. What time could you present them; so that they could be printed with this?

Gen. CHAMBERLAIN. Any time you desire.

Senator CHAMBERLAIN. Could you not embody them as an appendix to your testimony?

Gen. CHAMBERLAIN. I could do that, if you desire.

Senator WARREN. He could let them come in at the end of this testimony. You could get them to us early next week?

Gen. CHAMBERLAIN. Yes.

Senator CHAMBERLAIN. Put in anything you can at the end of this testimony.

Senator WARREN. Yes. How would it do to have printed his testimony of this morning and then his recommendations, and then have this report, which is very voluminous, printed as an appendix?

Senator CHAMBERLAIN. Are you going to print that report?

Senator WARREN. I think so, if there is no objection?

Senator CHAMBERLAIN. I do not care.

Gen. CHAMBERLAIN. That report has never been given out, so far as I know.

Senator WARREN. I asked the Secretary of War to send it up here so that the committee might have the liberty of referring to it, and he made no objection and he has sent it.

(See report, printed as an appendix, following Gen. Chamberlain's testimony.)

Senator CHAMBERLAIN. One other question, General: The American Bar Association has held hearings, and has made some recommendations in regard to appellate procedure in regard to courts-martial, and has suggested changes in the present law.

The Kernan Board, appointed by the Secretary of War, have looked into the matter and they have made recommendations suggesting a change in the methods of appellate trials. I think Gen. Crowder himself feels that there ought to be some change in the appellate procedure, and Gen. Ansell recommends something of the same kind. All of these people, boards and committees and individuals, have recommended some change so that the appellate tribunal shall have more power than is now given to the Judge Advocate General, some insisting that this appellate tribunal should be partly civil and partly within the Military Establishment, and some insisting that it should be entirely within the Military Establishment. Have you any views upon that subject?

Gen. CHAMBERLAIN. Yes; I have very decided views.

Senator CHAMBERLAIN. What are your views about it?

Gen. CHAMBERLAIN. There should be an appellate jurisdiction. I think that all parties agree as to the necessity for appellate jurisdiction, the only question being as to where it should rest.

Senator CHAMBERLAIN. Yes.

Gen. CHAMBERLAIN. My own belief is that it should rest with the President and his subordinate military commanders—and that the action of the legal branch should be advisory. It is my belief that the presence of civilians on such a tribunal would in no degree contribute to improvement in the administration of justice.

The Commander in Chief of the Army and his military subordinates are responsible to the country for the Army, they are responsible for discipline, and you can not take away from them the instrumentalities for maintaining discipline and put them into the hands of somebody who has no responsibility whatever for discipline or for results, who knows nothing about command, or who has never exercised command.

Senator CHAMBERLAIN. Take this sort of a case: Here is a man charged with a high crime, and he is tried and evidence is admitted

in the trial which is wholly improper. He is convicted, however, on that testimony. For the purposes of the illustration we may say that all of the testimony is hearsay testimony. He is convicted by the court-martial, and the approving authority, though he may be ever so distinguished a military man, yet entirely ignorant of law, approves the findings. The man appeals to the Judge Advocate General for review. The Judge Advocate General has no power to reverse that for errors of law made on the trial. Do you not think there should be some appellate tribunal that could look at the record from the first inception of the case to its conclusion and say that the error there ought to reverse the case?

Gen. CHAMBERLAIN. I think there is such an agency. Final action should, in my opinion, not rest with the legal tribunal. As a matter of fact, Mr. Senator, as my report will show, in probably 97 cases out of 100 the commanding general, the reviewing authority acts upon the recommendation of his judge advocate, and the President or the Secretary of War acts upon the recommendation of the Judge Advocate General. In cases involving legal questions, I believe that they would so act in 99 out of 100 cases, and similarly the commanding general acts—upon the recommendation of his judge advocate. Questions may arise as to the amount of punishment a man should receive. The commanding general might think that his view as to the amount of punishment for a certain crime was better than that of his judge advocate. But when it comes to the regularity of proceedings and to legal questions involved, the commanding general will always follow his law officer.

Senator CHAMBERLAIN. You do know of cases where a man has been found not guilty of a crime, and the commanding officer ordered a reconvening of the court, and practically instructed the court to render a verdict of guilty against the man?

Gen. CHAMBERLAIN. That is wrong, Mr. Senator, and I think that the Articles of War should be changed in such a way as to prohibit the return of proceedings in case of an acquittal, or the return of proceedings for a revision of the sentence upward.

Senator CHAMBERLAIN. Yes; they have now undertaken to cure that by regulation.

Gen. CHAMBERLAIN. That has been cured by regulation.

Senator CHAMBERLAIN. What was that order, do you remember? Do you know, Col. Hull?

Col. HULL. No; I do not.

Gen. CHAMBERLAIN. I do not remember exactly, but it covers that point.

Senator CHAMBERLAIN. The President, the Commander in Chief, issued that order?

Gen. CHAMBERLAIN. Yes. I do not know whether you care to bother about calling that young man, my stenographer. He is waiting outside. I am entirely satisfied either way.

Senator CHAMBERLAIN. No; I do not think so.

Senator WARREN. We do not care to call him, and unless you have something more to offer, we shall excuse you, General.

Gen. CHAMBERLAIN. I have nothing further to offer. I will prepare the statement on Articles of War.

(The statement referred to was subsequently submitted by Gen. Chamberlain, and is here printed in full, as follows:)

CHANGES IN COURT-MARTIAL PROCEDURE AND THE ADMINISTRATION OF MILITARY JUSTICE.

1. Membership of courts-martial should be restricted to commissioned officers. These officers should be those best qualified for such duty by training and experience. The presence of civilians on the court would, by their lack of knowledge of military matters, hamper the administering of justice, and would seriously interfere with the maintaining of discipline. The presence of enlisted men on the court would serve no good purpose. They would have very little patience with slackers and unpopular men in the organization.

2. No change should be made in the present membership of general courts-martial with respect to the number of officers provided by law to be detailed on said courts.

Should the membership of a general court-martial be in excess of nine members for the trial of persons in capital cases, no conviction of an offense for which the death penalty is made mandatory by law and no sentence of death should stand unless concurred in by at least nine members of the court. Should the membership be nine members or less, no such conviction or sentence should stand unless unanimously concurred in by the members of the court.

3. Summary court officers should be selected from those best qualified by reason of rank, experience, and judicial temperament.

4. There should be detailed for each general and special court-martial a trial judge advocate, and a counsel for the defense. Neither of these officers should be, if same can be avoided, a member of the staff of the reviewing authority. Should it become necessary to select a member of the staff for either duty, the proceedings should be forwarded to a higher military authority for review.

It is not believed necessary to provide, for general and special courts-martial, officers of the Judge Advocate General's Department to rule upon questions of law or to perform other legal duties. With a judge advocate on the staff of the convening authority, and with an appellate review of all court-martial records, no error of law or procedure prejudicial to the accused will be permitted to stand.

Officers of experience should be assigned as counsel for the accused. The latter should be permitted to have civilian counsel at his own expense and, if practicable, of his own choosing. He should also be permitted to have military counsel of his own choosing if same is practicable, the question of practicability being one entirely within the judgment of the convening authority.

5. The jurisdiction and powers of special courts-martial should be materially broadened, so as to reduce the number of cases brought before general courts-martial.

6. Before charges are preferred the case should be thoroughly investigated by a disinterested officer of experience, who should recommend to the proper military authority whether or not the accused should be brought to trial. The staff judge advocate should indorse in writing on all charges whether or not an offense made punishable by the Articles of War is charged with legal sufficiency, and whether or not it has been made to appear to him that there is prima facie proof that the accused is guilty of the offense charged. The officer exercising court-martial jurisdiction should, however, be the sole judge as to whether or not an officer or soldier should be brought to trial.

7. The accused should not be given the right of peremptory challenge.

Care should be taken that each member of the court is free from bias and prejudice and that he has not formed an opinion in the case.

8. Procedure should be prescribed in cases of acquittal to forbid the appointing authority to return a record of acquittal to the court for reconsideration and to direct the immediate release of the accused from custody.

Procedure should also be prescribed in cases of conviction to forbid the convening authority to return record to the court for reconsideration, with a view to increasing a sentence originally imposed, except where a sentence of confinement of one year or more fails to carry a dishonorable discharge, in which event reconsideration should be limited to imposing a suspended dishonorable discharge.

9. Every court-martial record should be automatically and carefully reviewed in the office of the Judge Advocate General. For this purpose boards of review should be created and should be composed exclusively of officers of the Judge Advocate's Department. The presence of civilians on these boards would in no sense contribute to their efficiency, nor would they add in the slightest degree to insuring justice to the accused. These boards of review should determine and recommend in what cases the appellate power should be exercised by the Commander in Chief. Their action

and that of the Judge Advocate General should be advisory only, the Commander in Chief being the sole judge as to whether appellate power should be exercised.

10. There should be provided an appellate power over court-martial sentences. This appellate jurisdiction should be very broad and comprehensive in its scope. It should be lodged in the Commander in Chief of the Army, who should have power to correct, change, reverse, or set aside any sentence of court-martial found by him to have been erroneously adjudged, whether by error of law or of fact. The Judge Advocate General should have no appellate jurisdiction, his duties being confined in this respect to legal adviser to the Commander in Chief.

11. Clemency and restoration boards should be composed of officers of the Judge Advocate Genaral's Department exclusively. They should consider appeals by prisoners, their relatives, or friends, for clemency or restoration to the colors. They should make their recommendations to the Judge Advocate General, who, in turn, should advise the Commander in Chief what cases warrant the exercise of Executive clemency.

12. The President should have power, by Executive order, to prescribe limits of punishment in time of war, as well as in time of peace.

13. An enlargement of the disciplinary powers now lodged in commanding officers under the provisions of the one hundred and fourth article of war would serve no good purpose.

Steps should be taken by Executive order to insure, so far as possible, prompt trial of accused persons. To this end it is believed that the commanding officers should be required on stated occasions to report to the next higher commander the names of all persons who have been in confinement or arrest for a greater period than 14 days, giving full information regarding the status of each. Such report on the 1st and 15th of each month would be effective.

APPENDIX.

REPORT OF INSPECTOR GENERAL TO SECRETARY OF WAR—INVESTIGATION OF CONTROVERSIES PERTAINING TO THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, May 8, 1919.

From: The Inspector General of the Army.
To: The Secretary of War.
Subject: Investigation of controversies pertaining to the Office of the Judge Advocate General.

The basis of this investigation was a memorandum for the Inspector General from the Secretary of War, dated March 7, 1919 (exhibit 1) as follows:

"Certain controversies have arisen with regard to the presentation of facts growing out of the administration of military justice to the Secretary of War, and with regard to the administration of military justice itself in the Office of the Judge Advocate General during the war. It may be roughly said that these controversies began with the presentation of a brief in behalf of a certain construction of section 1199 of the Revised Statutes of the United States by Gen. Ansell, and reply brief thereto by Gen. Crowder. The legal question involved in that difference of opinion was definitely settled by the Secretary of War, and need be given no consideration in the inquiry which you are herein directed to make.

"It is conceded that the curative power of clemency existed in the President, and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's Office for recommendations growing out of their examination of records of court-martial trials. I, therefore, desire to have you conduct a thorough investigation into the following questions:

"(1) What machinery was organized in the Office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?

"(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?

"(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the Office of the Judge Advocate General?

"(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective reorganizations may be made of all the forces of the Judge Advocate General's Office for the performance of its duties.

"In making the foregoing inquiries you will proceed on the fact that I recognize fully the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee of the Congress, and do not desire any adverse inference to be drawn from the fact of such testimony where it is frank and straightforward.

"Please proceed with the inquiry at your earliest convenience, and report the facts in full to me."

Upon receipt of this order, I made know to Maj. Gen. E. H. Crowder, Judge Advocate General, and to Brig. Gen. S. T. Ansell, Judge Advocate General's Department, senior assistant, the fact of the investigation and requested certain information. Gen. Crowder responded to this request and has rendered every possible assistance. In addition to a personal conversation with Gen. Ansell upon this subject, he was handed a memorandum, dated March 8, 1919 (Exhibit

2), setting forth the scope of the investigation and affording him an opportunity to submit such information, written or otherwise, as he might desire to submit, relating to the organization and functioning of the Judge Advocate General's Office during the present emergency. In reply Gen. Ansell submitted the following (Exhibit 3):

MARCH 10, 1919.

Memorandum for the Inspector General of the Army.

Responding to your memorandum of the 8th, I beg to say:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigation has to do with my statement, before the Senate Committee on Military Affairs, that statement for which, of course, I am responsible speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it, are not, when fairly considered, particular incidents to which your special capacity of inquiry can be properly applied; they are extra-departmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides, whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War, whose subordinate you are. Even more; it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation, and excepting, as I do, and for the reasons given, to your jurisdictional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it, voluntarily.

S. T. ANSELL.

Subsequently Gen. Ansell was summoned as a witness. To the first and only question propounded to him he replied as follows (Exhibit 27):

"General, I feel that as a matter of self-protection I have the right to decline, and I ought to decline, and I therefore do decline, to answer this question, or any other questions asked me by the Inspector General in this investigation, inasmuch as I believe the purpose of it is to lay the foundation for disciplinary action against me."

It is to be regretted that the Inspector General has been deprived of the cooperation and assistance which could have been rendered by Gen. Ansell in this investigation. However, Gen. Ansell's testimony before the Senate Military Affairs Committee and his signed statements have become public documents, and it must be assumed that he has made a full presentation of facts to the public, from his viewpoint, in so far as relates to this investigation. Fortunately, the files are so complete with respect to all matters of controversy as to make possible the rendition of a full report.

Before proceeding to a consideration of the case it is not only proper but imperative to here make clear a matter intimately connected with this investigation, although somewhat divorced from the subject matter thereof. In his memorandum above set forth, Gen. Ansell declares the Inspector General to be disqualified to make a "full, fair, and impartial investigation," citing certain reasons therefor. In charging bias against the Inspector General, Gen. Ansell stated: "In my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of

War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed."

Early in November, 1917, certain noncommissioned officers were jointly tried for mutiny at Fort Bliss, Tex., and, when the record of trial reached the Judge Advocate General's Office, Gen. Ansell was of the opinion that the case was particularly flagrant with error and such that any court of appeals anywhere in the land could not have permitted the judgment and sentence to stand. As the result of his review of the proceedings of the case, he took action as expressed in the following language (Exhibit 5, p. 6):

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, and recommend that the necessary orders be issued restoring each of them to duty."

When the court-martial proceedings in the case of these noncommissioned officers were under consideration, the views of the inspector general were called for. On November 15, 1917, he submitted the following memorandum (Exhibit 6):

Memorandum for the Chief of Staff:

1. The court, consisting of seven field officers and five captains, embraced what I believe to be a personnel well above the average of military courts.

The accused were represented by counsel, presumably of their own choice, and, so far as appears, this counsel has made no claim to the reviewing authority that the men did not receive a fair trial.

2. While the conduct of the case is, as stated by the Acting Judge Advocate General, open to grave censure, yet it can not be assumed that the members of this court were influenced thereby in their action.

It is also true that Capt. Harvey, the battery commander, is an officer of very short service and that his actions in this case were illadvised, unjustifiable, and clearly demonstrate his unfitness to command men.

3. Stripped of all technicalities, the evidence is believed to show conclusively that these men, in concert, deliberately refused and failed, and persisted in failing, to obey the orders of their commanding officer, and that they did this in the presence of the entire battery. There is, and can be, no doubt as to the fact that they fully understood that they were disobeying orders.

4. The action proposed by the Acting Judge Advocate General would, in my judgment, have a most demoralizing effect upon discipline. It is believed that these men are guilty of an offense which, under normal peace conditions, would be very serious and which, under war conditions, is even more so, but in view of the actions of the battery commander, and of the whole circumstances surrounding the case, the exercise of clemency by the Secretary of War appears to be demanded.

It is suggested, first, that the unexpired portion of their sentences be remitted and that they be restored to duty as privates if same can be done legally; second, that Capt. Harvey be severely reprimanded and that he be relieved from command of Battery A, 18th Field Artillery, if this has not already been done, and that he be assigned to duty elsewhere.

J. L. CHAMBERLAIN.

This memorandum pertained to the specific cases under consideration and contained no word of reference to the general question of departmental supervision and control of courts-martial. It is probable that the views of the Inspector General in these cases were called for, because of the fact that he had recently visited Fort Bliss and, upon his return, had invited the attention of the Chief of Staff to the unsatisfactory conditions in the Field Artillery at that place. It was not until January, 1919, when this matter became of public notoriety, that the Inspector General knew that a controversy existed, or ever had existed, relative to the interpretation of section 1199, Revised Statutes. Until then he had had no knowledge of the order assigning Gen. Ansell to duty as Acting Judge Advocate General or of the subsequent revocation of same. In fact, until January, 1919, the Inspector General had believed that perfect harmony existed in the office of the Judge Advocate General

The files of the offices of the Judge Advocate General and The Adjutant General were freely consulted and, in addition, the following witnesses were examined:

Maj. Gen. E. H. Crowder, Judge Advocate General. (Exhibit 10.)
Col. J. Easby-Smith, J. A. G. D. (Exhibit 11.)
Brig. Gen. Lytle Brown, G. S. (Exhibit 12.)

Col. B. A. Read, J. A. G. D. (Exhibit 13.)
Lieut. Col. E. R. Keedy, J. A. G. D. (Exhibit 14.)
Lieut. Col. C. C. Tucker, J. A. G. D. (Exhibit 15.)
Maj. W. H. Kirkpatrick, J. A. G. D. (Exhibit 16.)
Maj. S. Moreland, J. A. G. D. (Exhibit 17.)
Maj. J. S. Sanner, J. A. G. D. (Exhibit 18.)
Col. L. W. Call, J. A. G. D. (Exhibit 19.)
Col. E. G. Davis, J. A. G. D. (Exhibit 20.)
Col. John H. Wigmore, J. A. G. D. (Exhibit 21.)
Lieut. Col. R. W. Millar, J. A. G. D. (Exhibit 22.)
Maj. W. H. Keith, G. S. (Exhibit 23.)
Col. A. E. Clark, J. A. G. D. (Exhibit 24.)
Maj. S. Heckscher, J. A. G. D. (Exhibit 25.)
Col. W. S. Weeks, J. A. G. D. (Exhibit 26.)
Lieut. Col. S. T. Ansell, J. A. G. D. (Exhibit 27.)
Maj. A. J. Copp, jr., J. A. G. D. (Exhibit 28.)
J. S. Lyon, civilian clerk, J. A. G. D. (Exhibit 29.)
Col. J. J. Mayes, J. A. G. D. (Exhibit 30.)
Mr. E. L. Brown, clerk, J. A. G. D. (Exhibit 31.)

In order that the facts may be presented in their logical sequence, they will be considered in the following order:

I. Difference of opinion in the office of the Judge Advocate General.

II. The administration of military justice and the machinery organized in the Judge Advocate General's office to further the same.

III. Answers to the questions in the memorandum of the Secretary of War.

I. DIFFERENCE OF OPINION IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

The principal difference of opinion in the Office of the Judge Advocate General has been between Maj. Gen. E. H. Crowder, Judge Advocate General, and Brig. Gen. S. T. Ansell, formerly senior assistant. This difference had its inception in the interpretation of section 1199, Revised Statutes. Subsequent disagreements relate back to that subject. The matters, therefore, which were examined into were:

1. Interpretation of section 1199, Revised Statutes.
2. Appointment of Gen. Ansell as Acting Judge Advocate General.
3. Issuance of General Orders, No. 169, War Department, 1917.
4. Issuance of General Orders, No. 7, War Department, 1918.
5. Establishment in France of branch of Judge Advocate General's Office.
6. Issuance of General Orders, No. 84, War Department, 1918.
7. Opposition of Gen. Pershing to General Orders, No. 84, War Department, 1918.
8. Alleged relief of Gen. Ansell from duty in connection with the administration of military justice.
9. Four cases arising in France wherein sentences of death were imposed.
10. Report of Gen. Ansell on his trip abroad.
11. Amendment to fiftieth article of war.
12. Establishment of Clemency Board.

They will be considered in the order indicated above:

1. *Interpretation of section 1199, Revised Statutes.*—Lieut. Col. S. T. Ansell, Judge Advocate General's Department, became senior assistant in the Office of the Judge Advocate General on August 29, 1917, and acted as Judge Advocate General during the absence of Gen. Crowder. He accepted his commission as brigadier general on October 6, 1917. So far as can be deduced from the records, the first difference of opinion between Gen. Crowder and Gen. Ansell arose in November, 1917. As stated above, Gen. Ansell was then, and for some time had been, acting as Judge Advocate General. Gen. Crowder, while nominally Judge Advocate General, had been almost completely absorbed, both as to time and energies, by his duties as Provost Marshal General. War conditions had led Gen. Ansell to the conclusion that, in order to prevent injustices, the Judge Advocate General must give to general court-martial records a closer legal supervision than theretofore had been the practice. He desired a complete and effectual appellate supervision of courts-martial, and professed to find such a grant of jurisdiction in section 1199, Revised Statutes. That statute, dating back to the year 1864, reads as follows:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commis-

sions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

In a brief under date of November 10, 1917, Gen. Ansell presented his interpretation of the statute. (Exhibit 32.) This was concurred in by a number of officers serving in the department. The Secretary of War asked for the opinion of Gen. Crowder, which was submitted by a memorandum under date of November 27, 1917 (Exhibit 34), and disagreed with Gen. Ansell's interpretation. That the disagreement was as to the meaning of the law and not as to ultimate purpose is shown by a part of Gen. Crowder's concluding paragraph, wherein he said: "I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief." The Secretary of War, on November 27, decided definitely and finally the question of law involved, in the following language: (Exhibit 34, p. 11.)

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser."

The cases referred to by the Secretary of War were those, among them that of the Texas mutineers, wherein Gen. Ansell attempted, without consulting the Secretary of War or the Judge Advocate General, to exercise a power which, according to his interpretation of the statute, was vested in the Judge Advocate General. (Exhibit 5, p. 6.)

Notwithstanding the final decision of the Secretary of War, Gen. Ansell, on December 11, in effect asked for a rehearing and submitted, through Gen. Crowder, a supplemental brief (Exhibit 38) further supporting his views and combating those of the Judge Advocate General. That Gen. Crowder gave Gen. Ansell's arguments full and sympathetic consideration is shown by a letter from him to the Secretary of War bearing date of December 17, 1917 (Exhibit 37), wherewith he transmitted Gen. Ansell's reply brief. That statement indicates very clearly what the issue was in Gen. Crowder's mind. His complete agreement with Gen. Ansell's ultimate purpose is further expressed in the same letter in the following language:

"He (Gen. Ansell) first addresses himself to the evils he would remedy. He shows that a great number of officers not familiar with court-martial procedure have lately been included in the Army, and that there is danger of grave error in court-martial proceedings. * * * He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even the approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors of courts-martial and reviewing authorities. He cites again the mutiny case (from Texas) * * * and says, 'I think justly that there are other cases * * * which demand the exercise of such corrective power,' and down to this point I follow him with substantial concurrence, without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes."

Pending this argument, and under date of December 6, 1917, Gen. Crowder submitted to the Secretary of War a memorandum (Exhibit 35), which was the first result of the "further study" that he had given the matter. The study had actually been made by Col. E. G. Davis and Col. A. E. Clark, Col. Davis at that time being in charge of the military justice division of the Judge Advocate General's Office. Both of these officers had concurred in the original brief of Gen. Ansell with respect to section 1199, Revised Statutes. In this memorandum, the result of their further consideration of the subject, they dealt not only with section 1199, Revised Statues, but, going to another statute, the thirty-eighth article of war, concluded that, by virtue of the power given the President to "prescribe the procedure" of courts-martial, rules could be formulated to effect the result which all agreed was desirable, i. e., an adequate revisory supervision of courts-martial. The views thus expressed were adopted by the War Department and resulted, first, in the issuance of General Orders, No. 169, December 29, 1917 (Exhibit 53) and, later, General Orders, No. 7, January 17, 1918 (Exhibit 54). The former was the forerunner of the latter, and both will be considered later in this report.

In order that Congress might put the whole matter of appellate power beyond question, the Secretary of War on January 19, 1918, transmitted to the chairman of the Committee on Military Affairs of the Senate and House of Representatives a proposed amendment, prepared by Gen. Crowder, to section 1199, Revised Statutes, which was in the following form, new matter being indicated by italics, to wit:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions *and report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall* perform such other duties as have been heretofore performed by the Judge Advocate General of the Army."

There accompanied the draft of amendment in each instance a letter explaining fully the purpose of the proposed legislation. (Exhibits 48 to 51, inclusive.) This amendment failed to become a law.

2. *Appointment of Gen. Ansell as Acting Judge Advocate General.*—On November 8, 1917, an order was made, but not published in the War Department, appointing Gen. Ansell as Acting Judge Advocate General. When the Secretary of War learned of this order, he directed its revocation, and it was revoked on November 19. Concerning this order, both as to its original procurement and its revocation, there is a very distinct and bitter issue. The clear facts of record are as follows:

On November 3, 1917, Gen. Ansell wrote a letter (Exhibit 55) to Gen. Crowder, expressing his embarrassment, and the impediment of public business besides, by the fact that, although performing the duties of Judge Advocate General, he (Gen. Ansell) was not charged with full responsibility for its policies and general administration, and suggesting that Gen. Crowder join him in a memorandum to the Secretary of War recommending that Gen. Ansell be designated in orders as Acting Judge Advocate General. The following day Gen. Crowder replied in writing, as follows (Exhibit 56):

"It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday. For your information, I would say that since taking charge of this office I do not recall that I have been consulted by outsiders in a single instance respecting any matter pertaining to the Judge Advocate General's Department, except in respect of appointment to the Reserve Corps, nor otherwise, except as you yourself have consulted me."

On November 6, 1917, Gen. Ansell, by memorandum (Exhibit 57) to the Chief of Staff, requested the publication of an order designating him Acting Judge Advocate General, and concluded the same with the following words:

"I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention."

The Acting Chief of Staff, in a Staff memorandum dated November 6, 1917, to The Adjutant General, directed that the order be published. (Exhibit 59.) Its publication was suspended. (Exhibit 62.) Gen. Crowder charges that the order was obtained by Gen. Ansell "surreptitiously," and states that the "coincidence" of his not attempting to exercise the appellate power which he claimed was to be found in section 1199, Revised Statutes, until after he had procured the order appointing him Acting Judge Advocate General, "is so remarkable that an inference of deliberate and ambitious planning for personal power, and only for personal power, is unavoidable." (Exhibit 72, p. 56.) Gen. Ansell by oft-repeated statements, both direct and indirect, charges that the revocation of his appointment as Acting Judge Advocate General was connected with, or attributable to, his attempted assertion of supreme appellate power under section 1199, Revised Statutes. The facts of the case are as follows:

The record in the case of the Texas mutineers was received in the Judge Advocate General's Office on October 23, 1917. On October 30 a memorandum (Exhibit 5) was prepared by Gen. Ansell, in which he attempted to exercise the appellate power of revision for the first time and set aside the judgment of conviction and the sentence in the case of each defendant. This memo-

randum bears the following office mark: "Received A. G. O., Nov. 8, 1917." Notwithstanding the fact that the memorandum was dated October 30, it was not received by The Adjutant General until the very day—i. e., November 8—that Gen. Ansell was appointed Acting Judge Advocate General. Gen. Ansell's memorandum on the interpretation of section 1199, Revised Statutes, bears the date of November 10. It reached the War Department not later than November 13 (Exhibit 7), but the exact date upon which it was first brought to the attention of the Secretary of War has not been definitely determined.

About November 17 Gen. Crowder was called to the office of the Secretary of War and saw for the first time a list of recommendations for appointment of officers to the Judge Advocate General's Department, submitted by Gen. Ansell. It appears, and Gen. Crowder was so informed by the Secretary of War, that when this list was submitted by Gen. Ansell he was asked whether it had been passed upon by Gen. Crowder. Gen. Ansell, by way of reply, exhibited to the Secretary of War the order designating him Acting Judge Advocate General. This was the first knowledge that the Secretary of War had of Gen. Ansell's appointment, and Gen. Crowder's first knowledge of the same was at the date of his interview with the Secretary of War; i. e., November 17. On this same date, by letter to Gen. Crowder (Exhibit 64), the Secretary of War inquired if he could not devote more time to the duties of Judge Advocate General, inasmuch as the great machine (the Provost Marshal General's Office) necessary for the mobilization of the selective army had been organized and the work so far advanced as to be more nearly automatic. Gen. Crowder replied, on November 18 (Exhibit 65), that he did not anticipate great administrative duty in connection with the future administration of the Provost Marshal General's Office and stated that he could at once give at least one-half of his time to the office of the Judge Advocate General. Thereupon Gen. Ansell's appointment, although the order announcing the same was still under suspension, was revoked by the Secretary of War, to wit, on November 19. Up to this time Gen. Crowder was ignorant of Gen. Ansell's attempted assertion of appellate power. His memorandum of November 10 appears not to have reached the attention of the Secretary of War until November 23, for on that date he called for Gen. Crowder and stated, in effect, that he had received from the Acting Judge Advocate General a very powerful brief in re appellate power in court-martial cases existing in section 1199, Revised Statutes.

From the foregoing it is obvious that Gen. Ansell's charge that he was relieved from duty as Acting Judge Advocate General by reason of the difference of opinion as to section 1199, Revised Statutes, is without foundation in fact. It is likewise obvious that Gen. Crowder's allegation that Gen. Ansell had obtained his order of appointment surreptitiously is erroneous. It appears and is probable that in his letter of November 4, 1917, Gen. Crowder gave his approval with certain mental reservations and with the intent that the matter was to be taken up personally with the Secretary of War. However, Gen. Ansell could not have known of such mental reservation, and, it is believed, was justified in presenting his case to the Chief of Staff, the recognized channel of communication with the Secretary of War. It is my opinion that responsibility for the issuance of this order, without reference to the Secretary of War and without his knowledge, rests with the then Acting Chief of Staff, and not with Gen. Ansell.

3. *Issuance of General Orders, No. 169, War Department, 1917.*—As early as October 18, 1917, Gen. Ansell was alarmed by the large number of court-martial cases resulting in dishonorable discharge and long terms of confinement. In a memorandum of that date (Exhibit 66) he called the attention of the Chief of Staff to the situation and suggested the policy of suspending all sentences of dishonorable discharge until the pleasure of the War Department was known. He also suggested the idea of divisional disciplinary battalions. Later specific recommendations of Gen. Ansell were approved, and the following instructions, an exact copy of those proposed by Gen. Ansell, were, on December 22, 1917, confidentially issued to all convening authorities (Exhibits 67 and 68):

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the Disciplinary Barracks. Where the offense is not sufficiently grave to warrant a

long term of confinement, it should be assumed that the offender has within him the elements of military service and he should be made to serve.

"(c) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

Before proceeding further, it should be said that the Judge Advocate General has long followed the practice of recommending to the Secretary of War and the President that proceedings of courts-martial, even though finally approved by the reviewing authority, be set aside for want of jurisdiction. This practice was based, not upon any views of the War Department, but upon a series of rulings by Attorneys General, beginning with one by Mr. Cushing in 1854. Such a limitation of power was the real object of Gen. Ansell's criticism. He maintained that, if there was a power to set aside for want of jurisdiction, there should be a similar power to vacate for failure of evidence or errors substantially prejudicing the rights of the accused. Not only did no one dissent from Gen. Ansell's purpose in that respect, but, as it appears from the record, on the suggestion of Gen. Crowder as approved by the Secretary of War, further study was made in order to effectuate it, as far as possible, within the law. The first result of the further study given the subject by Gen. Crowder was the issuance of General Orders, No. 169, War Department, December 29, 1917, but there was another and more important contributing event. About the middle of December the public press announced the execution of 13 colored soldiers who were tried in Texas for mutiny and homicide. Their trial was conducted with the utmost care. They were ably defended and surrounded by all legal safeguards. The record was scrutinized day by day during the trial by an experienced staff judge advocate, who, upon the conclusion of the trial, was able to assure the reviewing authority that there was no possibility of a claim of injustice. The case was a particularly flagrant one. Eighteen persons, 11 of them civilians, had been killed. Proceeding under the forty-eighth article of war, authorizing in time of war confirmation by the commanding general of a territorial department or division of a sentence of death for mutiny, the reviewing authority confirmed the sentences and they were executed within 48 hours after confirmation. There was no review of the records by the Judge Advocate General. Notwithstanding the care with which the trials had been conducted, it was realized by the War Department that, in other like cases, similar freedom from prejudicial error could not be assured and that such sentences ought to be stayed until the trial records could be reviewed by the Judge Advocate General.

On December 22, 1917, Gen. Ansell submitted to Gen. Crowder a forceful memorandum (Exhibit 39) which may be considered as also contributing to General Orders, No. 169, for in that memorandum he said, in part:

"Regardless of your views or mine upon the question of the revisory power of this office, orderly administration as well as justice requires that sentences of death and sentences resulting, if executed, in immediate expulsion from the Army should not be executed until the proceedings may be reviewed for prejudicial error by an officer of and representing this bureau, and not of the administrative staff and representing the officer ordering the court and his power. In order that there might be no delay in such review of proceedings, reviewing authorities should be instructed to forward to the reviewing officer of this bureau all proceedings without a moment of delay."

Gen. Ansell's views, in so far as they related to staying the execution of sentences of death pending review, were adopted, and Paragraph I, General Orders, No. 169, as issued, reads in part as follows (Exhibit 53):

"I. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution * * *."

The order then provides for the procedure of suspending the execution of sentences until receipt of advice that there is no legal objection to carrying them into execution.

4. *Issuance of General Orders No. 7, War Department, 1918*—Immediately after the issuance of General Orders, No. 169, Gen. Ansell, to-wit, on January 9, 1918, submitted to Gen. Crowder a memorandum in which he stated in part (Exhibit 40):

"I have just been advised of the step taken by the Secretary of War to prevent the execution of possibly illegal death sentences in the United States by requiring that the record be transmitted to the department and reviewed here, that its legal correctness may be assured before execution. While a step in the right direction, I deem it my duty to say that in my judgment it falls short of the requisite degree of remediality in that it is not applicable generally, nor to all those sentences which, unless stayed, mean separation of a man from the Army and placing him, in a practical sense, beyond the reach of remedial power subsequently exerted.

"I see no reason why the same measure of relief should not be extended to dismissal and dishonorable discharge; nor do I see any reason why it should not be made applicable to our forces in France, as well as elsewhere; all of which could, with the establishment of a proper and practical system of revision, be done without evil administrative result and to the advantage of law and justice."

He then proceeds to recommend the establishment in France of an office representing the functions of the Judge Advocate General. This recommendation was adopted, as will later appear, without dissent from anybody.

Referring to his recommendation for a broader reviewing activity than was contemplated by General Orders, No. 169, which, as he indicated, suspended only the execution of death sentences in the United States, Gen. Ansell said in conclusion:

"I think no doubt need be entertained but that such a system of revision would be workable, nor is it of more than academic interest to determine whether the power finds its source in the inherent relation of the President to the Army, or in the statutory donation of article 38, or in the revisory functions of the Judge Advocate General established by section 1199, Revised Statutes, though, of course, I think it is clearly established in the latter section, and not otherwise."

In the meantime, Col. E. G. Davis, Chief of the Military Justice Division, by direction of Gen. Crowder, undertook the working out of a system of revision, the necessity for which was first suggested, as indicated above, by Gen. Ansell. In a memorandum dated January 10, 1918 (Exhibit 41), prepared by Col. Davis, but submitted to the Secretary of War over the signature of Gen. Crowder, certain changes were recommended in rules of procedure. It announced finally that, under the thirty-eighth article of war, giving the President power to regulate court-martial proceedings, a system had been devised which would adequately provide for all war-time necessities. It will be remembered that, in his memorandum of January 9, 1918 (Exhibit 40), relative to General Orders, No. 169, Gen. Ansell referred to the latter as a step in the right direction, but criticized it because it did not extend to dismissal and dishonorable discharge. In Gen. Crowder's memorandum of January 10, 1918, the same thought was set forth as follows:

"The question to be disposed of resolves itself, therefore, into one of preventing sentences of death, dismissal of an officer, or dishonorable discharge of an enlisted man from being executed before final review of the record of trial in this office. The scope of the difficulty is very much reduced by the fact that, in the great majority of cases where dishonorable discharge is suspended by the reviewing authority until the soldier is released from confinement, under the authority contained in the fifty-second article of war. Where this is done the correction of injustice is easy of accomplishment."

In a memorandum to Gen. Crowder dated January 12 (Exhibit 42), Gen. Ansell, referring to the former's memorandum of January 10, expresses his disapproval and concludes as follows:

"I have given this question of revisory power the best that is in me. I see no reasons whatever to hesitate at the adoption of that definition of revisory jurisdiction which is found in my recent memorandum and which was adopted after most thorough consideration upon the part of many of the assistants of the office as what the law requires. I do not believe as much as I should like to believe that what Maj. Davis proposes is sound in law and will prove safe in practice. I regret, therefore, that I can not advise you to adopt it."

Gen. Ansell's principal opposition to the plan was that it was "faulty as a definition of revisory power in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed," and that it was "fundamentally wrong as a matter of law." His principal contention was that, in reviewing the cases for errors of law, the Judge Advocate General was denied the power of correction. He was of the

opinion that the system, resting upon mere comity, was not likely to stand. How well practical justice was accomplished will hereinafter be set forth.

On January 15 the Secretary of War returned Gen. Crowder's memorandum of January 10, with the following remarks (Exhibit 41, p. 4):

"The entire plan has my approval. Please have letters written transmitting proposed legislation to appropriate committees. Put orders in course of promulgation."

It will be remembered, as heretofore stated, that effort was made to amend section 1199, Revised Statutes, by vesting in the President the power of revision. That was the "proposed legislation" referred to above by the Secretary of War. General Orders, No. 7, War Department, January 17, 1918, were promulgated, and necessary steps were taken to establish in France a branch office of the Judge Advocate General. (Exhibit 54.) General Orders, No. 7, provided that not only the execution of all sentences of death, as provided in General Orders, No. 169, 1917, but also all sentences of dismissal and dishonorable discharge be stayed until the records of trial could be reviewed in the office of the Judge Advocate General and their legality there determined. In the event that the record was not sufficient to sustain the findings and sentence of the court, provision was made to return the same to the reviewing authority with a clear statement of the error, omission, or defect which was found. If such error, omission, or defect admitted of correction, the reviewing authority was to be advised to reconvene the court for such correction, otherwise he was to be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as might be appropriate in the premises. Provision was made that any delay in the execution of any sentence, by reason of the foregoing, should be credited upon the term of confinement or imprisonment imposed. A branch office of the Judge Advocate General was established in France to consider those cases arising in the American Expeditionary Forces.

Gen. Ansell has given public utterance to the following statements. In a letter, dated February 17, 1919 (Exhibit 69), to Representative John L. Burnett and published in the Congressional Record of February 19, 1919, he stated:

"In September I ordered the boards of review to break away from the office interpretation (which, however, was probably correct) of the administrative method heretofore referred to, which had been construed to forbid this office to make any recommendation or suggestion as to clemency. And I ordered that in a proper case, despite the order, clemency should be suggested to commanding generals."

The provisions of General Orders, No. 7, became effective on February 1, 1918. From that date until April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action be taken where illegality appeared in the proceedings but brought to their attention, with a view to mitigation, sentences which were unduly severe. During this period, all cases arising under General Orders, No. 7, before final action thereon, were handled either independently by Col. Davis, Chief of the Military Justice Division, or by Gen. Crowder upon recommendation from Col. Davis. This was partly because Col. Davis had drafted the orders and was in sympathy with them, and also because Gen. Ansell, after publication of the orders, was plainly antagonistic to them. Col. Davis in his testimony stated (Exhibit 20, p. 5):

"Whenever a case involving the application of General Orders No. 7 would be sent to his desk, Gen. Ansell * * * would contend that the action recommended was improper or ineffective or wrong in theory, or something of that kind, and would again go over * * * the old argument that his action under 1199 was the only correct one after all and that the office was simply compromising with principle by trying to make any other solution work * * * ."

Col. Davis further stated (Exhibit 20, p. 5):

"After General Orders No. 7 went into effect there never arose any case in the Judge Advocate General's office, so far as I know, in which it could be fairly claimed that the department was without power to do full and exact justice to the defendant."

Gen. Ansell left for France in the middle of April, 1918, and Col. J. J. Mayes, Gen. Ansell's assistant, became the senior officer in the Judge Advocate General's office. He gave orders that all cases arising under General Orders No. 7, should pass over his desk, and directed that they be returned to

reviewing authorities only where illegality was discovered. Upon Gen. Ansell's return from France, he overruled the practice established during his absence, and gave orders to suggest to commanding generals the exercise of clemency with respect to unduly severe sentences. (Exhibit 70.) He simply revived the practice based upon Gen. Crowder's and Col. Davis's interpretation of General Orders No. 7, which existed for two months and a half subsequent to the date when these orders first became effective, and his inference that the liberal views were entirely his own is misleading.

The following appears on page 32, "Hearings before the Committee on Military Affairs, United States Senate Sixty-fifth Congress, Third Session," relative to the operation of General Orders No. 7:

A SENATOR. Have those recommendations been generally followed since you have been making them?

Gen. ANSELL. "Generally, in the sense of indicating a majority, yes, sir."

The action of the Judge Advocate General under General Orders No. 7 is purely one of recommendation. There is no power to compel the reviewing authorities to follow his advice. Since February 1, 1918, the date when General Orders No. 7 became effective, 212 cases have been referred back to the reviewing authorities under its provisions. (Exhibit 71.)

The records indicate only seven instances where the recommendations of the Judge Advocate General were not entirely followed. In three of these his recommendations were partly followed, and in four disregarded. It will thus be seen that in 96½ per cent of the cases his recommendations have been adopted in their entirety.

That the Senate committee, by answer of Gen. Ansell, the substance of which is repeated elsewhere with similar lack of frankness, did not receive the complete information or that correct conception to which it was entitled is apparent from what appears on page 131 of the report. Without correction or protest from Gen. Ansell, a Senator stated:

"There have been a great many cases, as the general has testified here, in which they have * * * made a recommendation to the convening power, and those recommendations have been disregarded."

The answer of Gen. Ansell that the recommendations were followed generally in the extent of indicating the majority, while literally true, was wholly misleading and tended to create, in the mind of any uninformed auditor, a conclusion entirely contrary to the facts.

In Gen. Ansell's letter to Representative Burnett, he further stated (Exhibit 69, p. 6):

"The Judge Advocate General recommended and the department finally adopted an administrative method known as General Orders No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative * * *."

In order to ascertain the results accomplished by General Orders No. 7, 500 consecutive records of trial received by the Judge Advocate General immediately prior to the publication of the same were examined. Five hundred cases were selected after the provisions of General Orders No. 7 became operative, and 500 additional cases which reached the Judge Advocate General's Office several months later. These cases represented 9 Departments, 38 divisions, and 15 other miscellaneous general court-martial jurisdictions. Certainly they were representative of the twenty thousand and odd cases tried during the war. A table, indicating the number of dishonorable discharges imposed by the courts, and those executed, suspended, remitted, or set aside by the reviewing authorities, is given below:

Dishonorable discharges.

	First period.	Second period.	Third period
Imposed by the court	230	188	233
Executed	131	84	33
Suspended	47	59	140
Remitted	39	41	46
Set aside	13	4	14

The beneficial results derived from the operation of General Orders No. 7 are apparent. During the first period, viz, prior to the issuance of General Orders No. 7, 58 per cent of the dishonorable discharges imposed by the courts were ordered executed, 43 per cent during the second period, and only 14 per cent during the third period. On the other hand, 20 per cent of the dishonorable discharges imposed during the first period were suspended; 32 per cent during the second period, and 60 per cent during the third period.

It appears that the first suggestion that reviewing authorities stay the execution of sentences of death, dismissal, and dishonorable discharge until review of the records of trial in the Office of the Judge Advocate General originated with Gen. Ansell. His statement, repeatedly made, that General Orders No. 7, adopted to carry out the very views which he himself first advocated, were "an administrative palliative" is not in accord with the facts and is another instance where the public has been misled.

5. *Establishment in France of branch of Judge Advocate General's office.*—In his letter to Hon. John L. Burnett, House of Representatives, Gen. Ansell states (Exhibit 69, p. 6):

"In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, in our own forces in France, which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subject to question."

Gen. Ansell refers above to General Orders, No. 84, War Department, September 11, 1918, amending General Orders, No. 7, War Department, January 17, 1918 (Exhibit 91). Gen. Crowder charges that the issuance of General Orders, No. 84, which will presently be considered, was obtained surreptitiously by Gen. Ansell, and that its language embodies precisely the grant of mandatory appellate power in the Judge Advocate General for which Gen. Ansell had been contending in his brief of November 10, 1917, "a contention which was at that time explicitly repudiated" by both the Secretary of War and the Judge Advocate General. (Exhibit 72, p. 57.)

Paragraph II, General Orders, No. 7, provided for the establishment in Paris, France, of a branch of the office of the Judge Advocate General. The purposes of the branch office are fully set forth in the following language of the orders (Exhibit 54):

"The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file."

Due to a misunderstanding caused by an error in the War Department's cablegram No. 663, of January 20, 1918, or in the decoding of same, a delay was caused in the opening of the branch office. (Exhibits 77 and 89.)

On March 24, 1918, Gen. Pershing's first and only objection to the provisions of General Orders, No. 7, was in the form of a cable, as follows (Exhibit 80):

"With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace, and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as

here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

In a joint memorandum to The Adjutant General, dated April 1, 1918, Gen. Ansell and his assistant, Col. Mayes, took exception to the views expressed in Gen. Pershing's cable. (Exhibit 88.) They stated that his objection was based upon a misconception of the law establishing the relation of the office of the Judge Advocate General to military authorities of whatever rank and power to convene general court-martial. They stated further that the action taken was the result of the most thorough consideraion in the War Department, that it was organic in character and required by law, and that even if it were within the power of the administration to do so the revocation of such orders would constitute a serious reflection upon the administrative capacity of the department.

With respect to the length of time intervening between the War Department's original cable to Gen. Pershing and the latter's cabled reply, they remarked as follows:

"A conclusion so long delayed should weaken the confidence the department might otherwise have had in Gen. Pershing's judgment upon the matter."

Notwithstanding Gen. Ansell's previous opposition to General Orders, No. 7, in the United States, having declared them an administrative palliative only, we find him criticizing Gen. Pershing's opposition to these orders, stating that the action taken was the result of most thorough consideration by the War Department, was organic in character, and required by law.

In a momorandum, dated April 8, 1918, to the Chief of Staff (Exhibit 85), Gen. Crowder discussed the question, believing that if Gen. Pershing had fully understood the purpose and operation of General Orders, No. 7, his cablegram would not have been sent. Gen. Crowder concluded his memorandum with the recommendation that a cablegram, hereafter quoted, be sent to Gen. Pershing. This was done on April 19. The cable reads as follows (Exhibits 82 and 82A):

"The order which included the establishment of a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution. It is desired that conference be held with Gen. Kreger."

In a letter to Gen. Crowder, dated April 15, Gen. Kreger stated that he had explained to Gen. Pershing his views regarding General Orders, No. 7. (Exhibit 87.) On May 1, Gen. Kreger was appointed Acting Judge Advocate General, American Expeditionary Forces, relieving Gen. Bethel from further duty in the branch office.

6. *Issuance of General Orders, No. 84, War Department, 1918.*—No further objection to the operation of General Orders, No. 7, was interposed by Gen. Pershing, but another matter arose which gave the War Department no little concern. On July 11, 1918, the Acting Judge Advocate General in France forwarded to the Judge Advocate General case No. 118312, in which the convening authority refused to accept the opinion of the Acting Judge Advocate General that the record was not legally sufficient to support a conviction of desertion, and declined to follow his recommendation that appropriate action be taken in view of the illegality. (Exhibit 93.) The convening authority, on the contrary, stated to his staff judge advocate in writing: "I have read the entire proceedings and the several memoranda herewith analyzing the case, and I am satisfied that the original action was sound. Let it stand." The Acting Judge Advocate General stated that he was unable to see how the *purposes* of General Orders, No. 7, were to be fully accomplished if reviewing

authorities were to be free to disregard the advice of his office with respect to the legality of findings and sentences. If the opinions of his office were to control, he recommended that reviewing authorities be advised to that effect. General Orders, No. 7, required that only those records of general courts-martial carrying sentences of death, dismissal, or dishonorable discharge be forwarded in the American Expeditionary Forces to the branch office for review. On July 14, 1918, Gen. Kreger, Acting Judge Advocate General, American Expeditionary Forces, wrote a letter to Gen. Crowder in which he recommended that orders be issued requiring that the records of all cases tried in the American Expeditionary Forces be transmitted to his office for review. He stated as follows (Exhibit 94.):

"Before I left Washington I understood that you expected after this branch had been established for some little time to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Orders No. 7 now requires such action."

Gen. Crowder had written Gen. Kreger on June 21, 1918, requesting from him an opinion on this very subject. (Exhibit 95.) Gen. Bethel, in concurring in Gen. Kreger's views, stated as follows (Exhibit 96):

"The European branch reviews for the Judge Advocate General's Office the records in cases of the three sentences named above. (That is, death sentence, dismissal of officers, and dishonorable discharge not suspended); but all other records, sentences involving forfeiture, ordinary confinement, and dishonorable discharge, where suspended, go to the Judge Advocate General's Office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served, or if it is desired to reconvene the court for correction of an error it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make the review of all court-martial cases."

Gen. Ansell concurred in the recommendations of Gens. Bethel and Kreger and, on August 20, 1918, made them the basis for a memorandum to the Chief of Staff, recommending an amendment of General Orders No. 7, so as to require all records of trial in the American Expeditionary Forces to be sent to the branch office for review (Exhibit 98). He went further than that in his draft of amendment submitted to the Chief of Staff. He made provision for the exercise in the American Expeditionary Forces of the selfsame appellate power which he urged so strongly in his memorandum of November 10, 1917, and which the Secretary of War, after careful consideration, disapproved. The only difference was this: Instead of the Acting Judge Advocate General exercising the power himself, the War Department directed that the convening authorities set aside all sentences, or any part thereof, found by the Acting Judge Advocate General to be invalid or void. There was no choice left to the convening authority, so that exactly the same purpose was accomplished as though the power had been exercised by the Acting Judge Advocate General. The actual draft of the amendment was as follows (Exhibit 99):

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence invalid or void in whole or in part. Any sentence or any part thereof so found

to be invalid or void shall be set aside, and the execution of all sentences of death, dismissal, or dishonorable discharge shall be stayed pending said review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General for permanent file."

Gen. Ansell's memorandum and draft were sent to the War College, and, on September 8, 1918, were returned to the Chief of Staff by the Director, War Plans Division, General Staff, recommending approval and issuance of the order as drafted by Gen. Ansell. (Exhibit 100.) A staff memorandum, dated September 11, signed by the Chief of Staff, directed the issuance of the order as drafted. (Exhibit 101.) On September 13 a carbon copy of the original order prepared for the Public Printer was furnished the Acting Judge Advocate General. On September 17 The Adjutant General sent a requisition to the Public Printer, and on September 21 a page proof of the order was received from the Government Printing Office. (Exhibit 102.) On the draft of the general order in the files of the Judge Advocate General's Office appears the following notation: (Exhibit 99.)

"Mr Smith instructed us to substitute third indorsement, attached to 321.4 (8/29/18), instead of this draft of amendment.

"L. G. H."

The original records show a revised draft of this amendment (Exhibit 103), approved by order of the Secretary of War, signed by the executive assistant to the Chief of Staff. The date of this approval is not of record, but this draft is identical with the amendment as published in General Orders, No. 84, and differs radically from the draft originally submitted by Gen. Ansell and approved by the War Plans Division, General Staff, and by the Chief of Staff. The order as published reads as follows, new matter being underscored and rejected matter appearing in brackets (Exhibit 91):

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence [invalid] *illegal* or void in whole or in part. The execution of all sentences [of] *involving* death, dismissal, or dishonorable discharge shall be stayed pending [said] *such* review. Any sentence, or any part thereof, so found to be *illegal, defective* [invalid], or void, *in whole or in part*, shall be *disapproved, modified, or* set aside, *in accordance with the recommendation of the Acting Judge Advocate General.* The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file."

Paragraph IV, General Orders, No. 84, as published is radical in its provisions and gives to the Acting Judge Advocate General in France powers not possessed by the Judge Advocate General of the Army. General Orders, No. 84, came to the attention of Gen. Crowder for the first time in January, 1919.

Notwithstanding the radical changes made in the amended draft, the latter was duly approved by the executive secretary to the Chief of Staff. If, therefore, Paragraph IV, General Orders, No. 84, was issued without its provisions being fully understood and concurred in by the Chief of Staff and the Secretary of War, responsibility rests not with Gen. Ansell but with the office of the Chief of Staff.

During August, 1918, Gen. Crowder's time was fully occupied by his duties as Provost Marshal General, and he gave little or no time to his duties as Judge Advocate General. The fact remains that, at the time the order was issued, Gen. Crowder was Judge Advocate General of the Army and should have been consulted by his assistant, Gen. Ansell, in regard to a change of policy so radical as that effected by General Orders, No. 84, and known by Gen. Ansell to be contrary to the declared policy of the Judge Advocate General and the Secretary of War.

(7) *Opposition of Gen. Pershing to General Orders, No. 84, War Department, 1918.*—With respect to the statement of Gen. Ansell that General Orders, No. 84 are now "being opposed by the commanding general American Expeditionary Forces," the facts are as follows (Exhibit 69, p. 6):

In a letter under date of November 14, 1918, to Gen. Pershing (Exhibit 104), which was forwarded through The Adjutant General to the Judge Advo-

cate General, it appears that Gen. Bethel opposed the principle of General Orders, No. 84, in that it took from the reviewing authority the finality of decision reposed in him by the thirty-seventh article of war. Gen. Bethel did not believe that the Acting Judge Advocate General had any authority to decide as a matter of law what shall be the effect of competent testimony, or what weight is to be given it, or to determine what competent evidence shall, and what shall not, be deemed sufficiently convincing to support a conviction. Quoting from the thirty-seventh article of war as follows:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings it shall appear that the error complained of has injuriously affected the substantial rights of an accused."

Gen. Bethel stated that the above provision of law was so clear as to require no comment; that the reviewing or confirming authority is the officer authorized to approve or confirm the sentence; and that decision as to the effect of the improper admission of evidence rests with him, and can not be made by any other person.

Gen. Bethel's letter was forwarded by the Chief of Staff, American Expeditionary Forces (acting for the commander in chief), to the War Department, by indorsement, as follows:

"The remarks of the Judge Advocate, American Expeditionary Forces, in this letter are concurred in and decision is requested."

A copy of Gen. Bethel's letter was, at the same time, transmitted to Gen. Kreger, Acting Judge Advocate General, American Expeditionary Forces, so that he might submit to the Judge Advocate General his views, which he did in a letter dated November 16, the concluding paragraph of which was as follows (Exhibit 105):

"Gen. Bethel's communication, in effect, calls into question the legal validity of General Orders, 7, War Department, 1918, as amended by Section IV, General Orders, 84, War Department, 1918. In my opinion that order is well founded upon section 1199, Revised Statutes, and upon the power of the President, acting through the Secretary of War, to order a sentence to be executed only in mitigated form, or to forbid its execution entirely. However, it seems entirely unnecessary for me to discuss the validity of the order in question. That, no doubt, was fully considered by your office and by the Secretary of War before the order was issued."

There was no further opposition from either Gen. Pershing or Gen. Bethel. They acquiesced in the action of the War Department. In this connection it should be stated, however, that on March 25, 1919, Paragraph IV, General Orders, No. 84, was amended by Paragraph I, General Orders, No. 41 (Exhibit 106), so as to bring it within the law as interpreted by the Secretary of War.

8. *Alleged relief of Gen. Ansell from duty in connection with the administration of military justice.*—In his letter of February 17, 1919, to the Hon. John L. Burnett, House of Representatives, Gen. Ansell stated, referring to his memorandum of November 10, 1917, to the Secretary of War (Exhibit 69, p. 3):

"Thereupon I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting the administration of military justice."

It will be recalled that, in his letter of November 18, 1917 (Exhibit 65), to the Secretary of War, Gen. Crowder stated that he would be able to assume his duties as active head of the Judge Advocate General's Department, and that he could devote to those duties one-half of his time. Gen. Crowder found, however, that, due to the increased demand for men under the draft, his duties as Provost Marshal General were such as to occupy the greater part of his time, and that he was not able to devote any considerable portion thereof to the Office of the Judge Advocate General. In his testimony Gen. Crowder further states that his recollection was that Gen. Ansell continued with undiminished authority in handling all matters arising in the section of military justice, and determined himself what cases would be passed up to the Judge Advocate General as needing the latter's personal attention. He recalled no instruction, either from himself or the Secretary of War, curtailing the au-

thority or initiation which Gen. Ansell had previously exercised as senior officer in the office.

Col. E. G. Davis, Chief of the Military Justice Division, testified before the Senate Committee on Military Affairs (p. 204, Hearings before the Committee on Military Affairs) that Gen. Ansell's statement that he was relieved from responsibility in connection with the administration of military justice was not correct, for the reason that all cases connected therewith continued to pass through Gen. Ansell's hands. The latter signed many of them himself as Acting Judge Advocate General and actually exercised the discretion of deciding what, if any, cases were to go to Gen. Crowder for his action. Col. Davis further stated that Gen. Ansell exercised final authority in all such cases from November to April, except where he did not wish to take the responsibility of determining a particular case himself. He had the discretion in every instance to determine whether a case was to be disposed of finally by himself or whether it should go to Gen. Crowder. Col. Davis, testifying before the Inspector General, said:

"As I said before, every court-martial case that left my desk for higher action went to Gen. Ansell. * * * The only exception that could possibly exist to the statements I have made is this: That during the period when we were working in the office over the establishment of General Orders No. 7 and formulating the rules for carrying it into effect I frequently consulted directly with Gen. Crowder, and frequently placed the result of investigations I had made on Gen. Crowder's desk. These did not go through Gen. Ansell's hands, for the reason that he was entirely out of sympathy with what we were trying to do and Gen. Crowder had directed us to make the investigation, and we felt this had nothing to do with Gen. Ansell's position in the office and we did not consult Gen. Ansell about anything we did in connection with that order, in getting it established or the rules for getting it into effect. But as to actual action on cases, no case went to Gen. Crowder that did not first pass through Gen. Ansell. There were certain cases in which I assumed the right to act; for instance, when I found that a court-martial record was incomplete; that the record did not show that the judge advocate had been sworn, etc., I exercised the authority of sending it to the reviewing authority for correction; but all matters where correction action was taken or where clemency was recommended, or where anything of that larger nature was involved, those matters passed through Gen. Ansell to Gen. Crowder, according to office memorandum." (Exhibit 20, p. 11.)

Col. Davis further states (Exhibit 20, p. 4), referring to Gen. Ansell's statement that, from some time in November until the time he left for France, about the middle of April, he had nothing to do in connection with the administration of military justice and that the proceedings did not come over his desk, "that statement is not correct * * * As a matter of fact, Gen. Ansell was the senior assistant in the office of the Judge Advocate General but, in this capacity, he signed possibly 50 to 75 per cent of all papers signed in the office, and signed as Acting Judge Advocate General, even though Gen. Crowder was present and at the head of the office."

Col. A. E. Clark, Judge Advocate General's Department, on duty at that time as assistant to Col. Davis, and for a portion of the time during the absence of Col. Davis, Acting Chief of Military Justice Division, states (Exhibit 24, p. 8):

"When I was acting head of the section for a short time in March, I followed the practice of signing these opinions, returning the records in accordance with the practice that Col. Davis had established. Everything was routed over Gen. Ansell's desk except the opinion returning records under General Orders, No. 7. Everything that went up to higher authority, to The Adjutant General, the Chief of Staff, the President, or the Secretary of War, was routed through him and over his desk."

Maj. William H. Keith, chief clerk in the Judge Advocate General's Office until September, 1918, in his testimony to the Inspector General confirms the statement that, during the period November, 1917, to April, 1918 papers intended for the action of higher authority passed over Gen. Ansell's desk. (Exhibit 23.)

On April 10, 1918, a memorandum, subject "Office Organization," was issued by the Judge Advocate General's Office. After prescribing the duties of the various divisions, there appears the following (Exhibit 107):

"Upon receipt of papers in the Chief Clerk's office they are stamped, numbered, precedents attached and charged to the officer handling them. When

completed they are returned to the chief clerk, where the charge against the officer is removed, thus showing the time the officer had them; then they are passed to Col. Mayes, to Gen. Ansell, and to Gen. Crowder. After approval they are sent out either by mail or in jackets by messenger."

In the testimony of Maj. Keith, former chief clerk, and Mr. J. S. Lyon, clerk in charge of the court-martial section of the Judge Advocate General's Office, it appears that this memorandum represented not new rules of procedure for the office but rather a confirmation of the established rules. (Exhibits 23 and 29.)

Col. J. J. Mayes, who was Gen. Ansell's assistant up to the time the latter departed for France in April, 1918, and who succeeded Gen. Ansell as senior assistant in the office, testified (Exhibit 30) that all cases arising under General Orders No. 7, with some exceptions, there being some that were sent through Gen. Ansell's and Col. Mayes's desks, were acted upon by the Disciplinary Division. He stated that all cases requiring the action of the President were passed over their desks, although there may have been some exceptions to that rule. When Col. Mayes became senior assistant he gave instructions that all matters (including those arising under General Orders No. 7) pertaining to the Disciplinary Division should pass over his desk. When asked if there was any reason to believe that the same result could not have been accomplished if Gen. Ansell had so desired, he replied, "No, I don't know of any reason. In fact, I don't know how the other system grew up. I felt that if I would be charged with the responsibility of the office I should know what went out of it, therefore, I permitted nothing to go out expressing the opinion of the office except over my signature, or in important cases Gen. Crowder's signature." He stated that Gen. Crowder had made no objection to the instructions that he had issued, and, moreover, Gen. Crowder was at the time occupied at the Provost Marshal General's Office so that he did not have very much time to be at the Judge Advocate General's Office.

The Judge Advocate General furnished the Inspector General a list of memoranda prepared in that office, containing reviews of court-martial cases during the period November 17, 1917, to April 10, 1918, giving in each instance the name of the officer preparing the memorandum and that of the officer approving the same. (Exhibit 108.) Many signed by Gen. Ansell as Acting Judge Advocate General contain recommendations to the Secretary of War or to The Adjutant General relative to mitigation, remission, approval and disapproval of sentences and declaring null and void proceedings. Fifty-three memoranda contain the signature of Gen. Crowder during the period stated as against 130 bearing the signature of Gen. Ansell. In addition to the papers above referred to, voluminous correspondence from the files of the Judge Advocate General's Office was furnished this office. These papers include memoranda on court-martial cases, letters and indorsements, all relating to the administration of military justice. Forty per cent show the signature of Gen. Crowder, 35 per cent that of Gen. Ansell, and 25 per cent of various other officers in the department.

When, in July, 1918, Gen. Ansell returned from his trip abroad, he automatically reverted to his former duties as senior assistant, and without orders of any kind proceeded to reorganize the office, created boards of review (Exhibit 109) and ordered them "to break away from the office interpretation" of General Orders, No. 7. He proceeded to perform those very duties from which, during the period November to April, according to his statement he was relieved. (Exhibit 70.)

From the records and from all obtainable evidence, it appears that Gen. Ansell's statement that, from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts. On the contrary, it appears that his initiative and authority as senior assistant remained undisturbed and that he was in no degree hampered in any changes which, within the law, he desired to make.

9. *Four cases arising in France wherein sentences of death were imposed.*—In his letter to Representative Burnett, dated February 17, 1919, Gen. Ansell, in conclusion and more particularly by way of reply to Representative Burnett's statement, "Why did he (Gen. Ansell) not appeal to Gen. Crowder? Why did he not appeal to the President to vindicate him? Why did he go on here until he was called before a committee of the Senate to do it?" stated (Exhibit 69, p. 6):

"You seem to think that under these circumstances I should have gone directly to the President. Upon a little reflection you will appreciate, I am

sure, the impossibility of such course. I think, however, that, resting under the charge which you have made against me, I am justified in saying this, that on one occasion I well remember—and doubtless there are others—when four sentences of death were pending in the department for confirmation, and when this office had recommended execution, I went to the head of the office and orally presented to him my views in opposition. I then filed with him a memorandum in which I did my best to show what seemed to me to be obvious, that these men had been most unfairly tried, had not been tried at all, and ought not to die or suffer any other punishment upon such records. Discovering that these memoranda had not been presented to the Secretary of War, and feeling justified by the fact that I had no other forum in this department, I gave a copy of the memorandum to a distinguished member of the Judiciary Committee of the House, and was told by him that he could present the cases to the President himself.

"I was compelled to do this—an act inconsistent with strict military propriety—by the dictates of my own conscience, by my desire to serve justice, and by my sense of duty to my God and those unprotected men that their lives might be spared."

These cases have been frequently referred to in the public press. The facts as shown by the official records and the testimony follow:

On or about February 27, 1918, records were received in the office of the Judge Advocate General in cases Nos. 110751-2-3-4, tried in France, in which the death penalty was imposed. Two men were tried for sleeping on post, and two for disobedience of orders. Upon receipt of these records, they were reviewed by Maj. Rand, of the Division of Military Justice. He wrote a review on each case, stating that the proceedings were regular, the verdict sustained by the evidence, and recommending that the sentences be carried into effect. The records, with the reviews, then went to the desk of Col. Davis, chief of the Division of Military Justice, and from his desk to the office of Gen. Ansell and his assistant, Col. Mayes. The exact date the reviews reached Gen. Ansell's office is not known. In forwarding the records of trial, Gen. Pershing, in a letter to the Judge Advocate General, urged the execution of the sentences as absolutely necessary for the safety and success of the Army in France. (Exhibit 114.) Maj. Rand incorporated in but one of the reviews the text of Gen. Pershing's letter. In the other three this letter was simply referred to. The reviews were returned from the office of Gen. Ansell, through Col. Davis, to Maj. Rand, with the suggestion that Gen. Pershing's recommendation be incorporated in all four. They were accordingly rewritten and returned, through Col. Davis, to Gen. Ansell's office. Col. Mayes approved the reviews, concurring in the recommendation that the death penalty be executed in each case, and the papers for the first time reached the Judge Advocate General without either oral or written dissent from anyone. The usual rule of the office, as testified to by Col. Davis, was that any paper that passed Gen. Ansell and reached Gen. Crowder's desk had met with Gen. Ansell's approval, unless the opposing view was indicated in a memorandum or verbally communicated. Whether, up to this time, Gen. Ansell had seen the papers is not known.

Gen. Crowder, not being satisfied with the review by Maj. Rand, called upon Col. Clark for an independent examination of all four cases and the preparation of a review of each of them, indicating also the necessity for a study of other similar cases from the American Expeditionary Forces.

On March 29 there was prepared in the Office of the Judge Advocate General a four-page memorandum summarizing for the Secretary of War the very numerous letters and petitions which had been received urging clemency. (Exhibit 115.)

The next step was the submission by Col. Clark of his reviews. Two bear date of March 29 (Exhibits 116 and 117) and two of April 4 (Exhibits 118 and 119). Gen. Ansell was not in Washington when these reviews were submitted to Gen. Crowder. He was absent from the office from on or about April 1 until on or about April 6. (Exhibit 133.) Col. Clark's reviews stated the facts of each case much more in detail than anything that had been submitted before. They were without formal recommendation, and on April 5 were submitted by Gen. Crowder to the Chief of Staff, accompanied by a memorandum of that date, which reads in part as follows:

"You will notice that I have not finished the reviews by embodying definite recommendation.

"It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended."

The memorandum concluded with the request for an interview. Gen. Crowder, immediately upon his return to the office of the Judge Advocate General, asked Col. Clarke to "search the records of The Adjutant General's Office and ascertain some facts outside the records which might weigh in the final disposition of the case." As the result of the work so undertaken, Col. Clark, on April 10, submitted another memorandum (Exhibit 121), which was the first formal and definite statement of reasoned and forceful opposition to the imposition of a death penalty made by any of Gen. Crowder's subordinates. The circumstances of the four cases were again referred to. The youth of all the accused was emphasized, and several other cases, more or less parallel both as to time and nature, were cited to show that not only other courts but the same court had either acquitted or, upon conviction, had imposed much lighter sentences. For example, it was stated that the same court acquitted two other soldiers of the same regiment who were tried within a few days of those under consideration, and for the same offense, viz, sleeping on post. In these acquittals the evidence came in part from the same witnesses whose testimony convicted two of the men condemned to death.

On or about April 10, the date of Col. Clarke's memorandum, Gen. Crowder expressed to Gen. Ansell his anxiety with respect to these four cases and requested that he, after a thorough study, submit his views. The evidence is conclusive that prior to this date no word in opposition to the execution of the sentences of death in these cases, either verbal or written, was voiced by Gen. Ansell.

Gen. Ansell's views were evidently first expressed orally to Gen. Crowder shortly before April 15. Of this there can be no doubt, for on that date Gen. Ansell submitted a written memorandum based on "reading these records," referring to an oral statement of his reasons "the other day" and stating that those reasons were produced in writing "at the request of Gen. Crowder." (Exhibit 122.) He then proceeded to consider the cases briefly and strongly opposed confirmation. On April 16, the day after the receipt of Gen. Ansell's memorandum, for which apparently he was waiting, Gen. Crowder submitted another and final memorandum to the Chief of Staff. (Exhibit 123.) He set forth therein the data gathered by Col. Clark concerning the four cases in hand and the other similar cases already referred to, and restated the substance of the arguments advanced by Col. Clark and Gen. Ansell against the execution of the sentences. He called attention to the fact that not one of the accused made any fight for his life, and said: "I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel I should have strongly advised that they plead not guilty and required the Government to maintain its case at every point." He closed this memorandum by referring to Gen. Pershing's urgent request for a confirmation of the sentences and called attention to the propriety of bearing in mind "the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution but as commanding general, anxious to maintain the discipline of his command."

On the next day, April 17, the Chief of Staff submitted the record thus made to the Secretary of War, recommending the confirmation and execution of the sentences. (Exhibit 124.) On May 1 the Secretary of War submitted the whole matter to the President, with a lengthy letter (Exhibit 125) strongly recommending the pardon of the two soldiers convicted of sleeping on post and the remission to confinement for three years of the sentences of the two convicted of disobeying orders. The relationship of this final act of the Secretary of War to the preceding action in the office of the Judge Advocate General, and as an effect thereof, is clear from the documents themselves. The Secretary of War pointed out that the Judge Advocate General had limited his concurrence "to the technical correctness of the proceedings," and that, in a subsequent memorandum, he had called the attention of the Chief of Staff to the other cases already referred to. The final memorandum of the Judge Advocate General of April 16 (Exhibit 123) is quoted and repeatedly referred to, and what was suggested by that officer is by the Secretary of War argued to the President as conclusive against both the justice and expediency of confirming the sentences.

On May 4 the President expressed in writing (Exhibit 126) his entire agreement with the Secretary of War, and made mention of the latter's "very full and convincing letter," and pardoned, unconditionally, the two soldiers convicted of sleeping on post (Exhibits 127 and 128) and commuted the sentences of the two convicted of disobedience of orders to confinement for three years. (Exhibits 129 and 130.)

In Col. Davis's testimony before the Inspector General he made the following positive and unequivocal statement (Exhibit 20, p. 16):

"The next time I had any conversation with either of them about this matter was along about the 10th of April, 1918. I was in Gen. Ansell's room for some other purpose and he came out of Gen. Crowder's room and sat down at his desk and said to me, in words about as follows: 'What in the hell is the matter with Gen. Crowder about those death cases?' I explained to him that he had Col. Clark at work reviewing these cases, and he seemed very anxious to be sure of his ground before making definite recommendations, and that Col. Clark had come to the conclusion that the sentences ought not to be executed. To this Gen. Ansell replied that he did not agree with Col. Clark; that he thought the sentences ought to be executed, and he further stated that Gen. Crowder had directed him to make a review of the cases himself. Those two events stand very clear in my mind, and there is no possible confusion between them."

Col. Clark, the officer who first stated the conviction that the death sentences should not be carried into effect, and who, by direction of Gen. Crowder, expressed his views in the form of a memorandum, testified in part as follows (Exhibit 24, pp. 7 and 8):

"I had talked with Col. Mayes and Gen. Ansell and had taken occasion, although the cases were not then in my hands for review, to express the settled conviction that it would be a great mistake and an injustice to carry these sentences into effect. At that time these officers did not agree with me but were of the opinion that the views of Gen. Pershing with respect to the propriety and the expediency of carrying these sentences into effect should be followed. While these cases were under consideration in the office, and before the records came to me from Gen. Crowder for review, as I have just stated, I discussed them with Gen. Ansell and other officers on more than one occasion, and Gen. Ansell had stated to me, during those discussions, that he thought the sentences should be carried into effect. * * *

"Some time after the records in the death cases from France came to me from Gen. Crowder for further study, Col. Davis informed me of a conversation which he had just had; I mean by that a conversation he had shortly before he spoke to me about it. Col. Davis stated in substance that Gen. Ansell had used some profanely forcible language in connection with these cases. I would not undertake to give the language of the conversation but my recollection of its effect or substance is that he objected to or resented the fact that the sentences were not being promptly carried into effect in accordance with the recommendations contained in Maj. Rand's reviews, instead of which they had been returned to me for further study and report by Gen. Crowder."

In this connection Col. Mayes states (Exhibit 30, p. 5):

"Gen. Ansell was not there when those reviews came in and I passed those records to Gen. Crowder concurring in the reviews. The reviews, I think, recommended the execution of the death penalty. I concurred in that view. Then, when Gen. Ansell came back, Gen. Crowder asked him to review it. Gen. Ansell read the reviews and did not concur. * * * Gen. Ansell and I were in the same office and when these cases were turned over to him to read, he immediately took the view that he afterwards maintained. I do not believe that there was any change in his views. That idea may have grown up from the fact that they were sent to Gen. Crowder by me, concurring in the imposition of those death sentences. Ansell and I differed on those cases and I am sure that Ansell was not here when they were passed to Gen. Crowder. * * * I have held to the view that where a soldier was found sleeping on sentry duty in the front line he should receive the most severe penalty authorized for that offense, which is death unless there was some very mitigating explanation of his conduct. I have held to this view because a sentinel in such position holds the lives of his comrades in his hands. Having stated my opinions I will say that I do not remember of Gen. Ansell ever disagreeing from that view. His disagreement on the four cases from France was upon the sufficiency of those cases and not upon the principle. I can not

say that Gen. Ansell ever said anything to me about this, but it is very probable, in fact extremely probable, that we have discussed the abstract proposition as I have outlined above."

"Q. Was Gen. Ansell in the habit of expressing his views on subjects generally, freely, and forcibly?—A. He was."

Mr. Earle L. Brown, Gen. Ansell's stenographer, testified as follows (Exhibit 31):

"You ask me if I can recall any discussion on the four death cases in France. I can't recall any definite discussion. I do think, though, that when those cases were first discussed that Gen. Ansell, before reviewing the cases at all, had really expressed himself that the conviction ought to be sustained, but I know that after he reviewed the cases and found the circumstances of them, or rather when the circumstances showed those men had, as I recall it, been exposed to so much fatigue and long duty, that on that ground his opinion was altered. I can't say anything definite, but that is my impression."

The question as to whether or not, prior to April 10, 1918, Gen. Ansell entertained, and on that date affirmatively expressed, the views that the death penalty in these specific cases should be executed is not definitely determined by the evidence.

The question of veracity raised by the conflicting testimony is, in my belief, apparent rather than real. Considering the length of time which has elapsed, the fallibility of memory, and considering the circumstances as a whole, it appears reasonable and is believed that, prior to April 10, no special attention had been given to these cases by Gen. Ansell. On general principles he entertained the views that any man found asleep on sentry duty in the presence of an active enemy should be executed. He doubtless expressed those views, and they were interpreted as referring to these specific cases.

So far as revealed by the evidence, Gen. Ansell made no attempt to interview the Chief of Staff or the Secretary of War or the President in regard to these cases. Careful search and inquiry have failed to discover evidence that his memorandum was brought to the attention of the President or the Secretary of War by a Member of Congress. The above facts, stripped of all elements of uncertainty, lead to the conviction that Gen. Ansell's statements, as to his attitude and activities in connection with the cases above considered, are misleading and widely variant from the facts.

10. *Report of Gen. Ansell on his trip abroad.*—In his letter of February 17, 1919, to Representative Burnett, Gen. Ansell says (Exhibit 69, p. 5):

"Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our allies, I filed with the Judge Advocate General a report which among other things, treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War."

On April 17, 1918, Gen. Ansell was directed to proceed not later than April 20 to France and such other countries in Europe as might be necessary for the purpose of observing the principles and practices of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. He was directed to report his observations in writing to the Judge Advocate General of the Army. (Exhibits 134 and 134A.)

Gen. Ansell proceeded to Europe, in compliance with said orders, and his report, prepared at sea, bears date of July 8, 1918. (Exhibit 135.) He visited the armies in the field and the capitals of France, Italy, and England. That his studies were assiduous and thorough-going is apparent from his report. He obtained his data first hand. To a large extent they were drawn direct from the war offices of the Allies. The report is without recommendations as such. It covers war administration generally, with particular attention to military justice. The French systems are gone into in considerable detail. Those of the British are dealt with to a lesser degree. The consideraton of the Italian methods is limited to those of the "Bureau of Military Justice."

In dealing with our problems in France, Gen. Ansell points out the difficulty of maintaining on French soil and amid French people an army of upward of a million Americans under American Government. He deals at length with the application to them, in many of their activities, of the French civil law. By way of illustration, he cites the levying of a tax by certain municipalities upon the food taken into them for the use of American soldiers.

The most important feature of his report, so far as it concerns France, is its explanation of the very broad theory there applied of the legal liability of

the Government to its citizens. The French theory is much more liberal than ours. In France, according to Gen. Ansell, there is practically no limit to the extent to which the Government must answer to a citizen for loss sustained by him from Government activities.

He then raises the query as to whether the liability of the United States to French citizens, growing out of the presence of our Army, is to be determined under French or American law, and urges that steps be taken to gather and record the facts (contemporaneously with their occurrence), with a view to forehanded preparation against unjust claims, and excessive damages for just ones.

The foregoing indicates, sufficiently for present purposes, the nature and comprehensive character of the report. Notwithstanding that it is the result of three months' effort of a general officer, it has, thus far, served no useful purpose. At least, it does not appear that it has ever received the studious attention, or any particular attention, of higher authority.

So far as the records indicate, the history of the report is as follows:

It was submitted to Gen. Crowder, according to Gen. Ansell, in July, 1918 Gen. Crowder's testimony concerning it is as follows (Exhibit 10, p. 11):

"Q. Gen. Ansell states, referring to the report which he made upon his return from Europe, 'This report never reached the Secretary of War.'—A. That statement, as I recollect, first came to my knowledge reading the Congressional Record of recent date, and I think in a letter addressed by Gen. Ansell to Mr. Burnett. I came to the office and asked for the report, as I did not remember to have ever seen it. It is true that, upon his return, Gen. Ansell came to my office and submitted a document which contained a number of observations which he had made, explaining that it was more or less a personal document which he thought I would be interested in. I read it over and it is the one that has been used a lot in public addresses, but he never brought in his official report and I did not see any official report until I instituted this search after noticing the Congressional Record. I called upon the executive officer to give me the report. He brought a carbon copy. I asked him where was the original He said he did not find it on file. Later he came to me with the original and said it was on Gen. Ansell's desk. It was addressed to me, as I remember not to the Secretary of War. I do not remember to have ever seen that report and know he never personally submitted it as he did the informal report. It is true that up to that time it had never been forwarded to the Secretary of War."

The original report bears no date of receipt to indicate that it ever reached the files of the Judge Advocate General's Office. The carbon copy has the following notation: "J. A. G. O. Jan. 8, 1919, 319.1 Personal Reports." That there was a supplemental report is established by the testimony of Mr. Brown, Gen. Ansell's stenographer. (Exhibit 31, p. 2.) It appears that this supplemental report is not of record in the Judge Advocate General's Office or elsewhere.

In the absence of any specific statement from Gen. Ansell, it is difficult to fix, definitely, the responsibility for the nonpresentation of his report to the Secretary of War. It seems safe to say that he himself took no affirmative steps to insure its transmittal to higher authority. It is also clear that Gen. Crowder was remiss. He was Judge Advocate General, to whom the Secretary of War directed that Gen. Ansell's report be submitted. If, as Gen. Crowder suggests, no formal report was ever submitted to him by Gen. Ansell, that officer should have been ordered to prepare and submit a proper report. If the report was prepared and submitted to Gen. Crowder, it was his duty to forward it to the Secretary of War, with his own appropriate comment thereon. In whatever light the matter is viewed, responsibility rests with both Gen. Crowder and Gen. Ansell.

11. *Amendment to 50th Article of War.*—Another matter having a direct bearing on the administration of military justice, rather a difference of opinion between the War Department and the Judge Advocate General's Office than between Gen. Crowder and Gen. Ansell (the former having had, so far as the records indicate, no connection with the subject matter), was the amendment to the 50th Article of War. On July 27, 1918, Gen. Pershing cabled the War Department as follows (Exhibit 142):

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

The thought originated with Gen. Bethel, for, in writing to Gen. Crowder under date of June 24, 1918 (Exhibit 143), he concluded by saying that there have been a number of death sentences recently requiring the confirmation of the President, but the cases were not of such a character as to justify execution of the sentences. In view of the time necessary for the cases to reach Washington they were sent back to the courts for imposition of a milder sentence. Gen. Bethel stated that it would greatly facilitate the administration of military justice if Gen. Pershing had the power to commute death sentences, not only in the cases where he had authority to confirm them, but also in those cases requiring the President's confirmation. He stated that Army commanders in the field should also have the power to commute sentences of dismissal of an officer.

A copy of Gen. Pershing's cablegram was referred to the Acting Judge Advocate General for recommendation. Gen. Ansell expressed his views in a memorandum bearing date of September 5, 1918. (Exhibit 144.) He opposed the suggested amendment, saying in part:

"Commutation, unlike mitigation and remission, * * * is a pardon granted on a condition subsequent that the offender undergo a punishment of a different nature. As such it involves the pardoning power of the President. * * *

"The existing statute * * * deals with fundamental principles which do not undergo modification with every change of circumstances; it is old, has stood for a long time substantially unmodified, and in the absence of a considerable showing of its lack of wisdom or workability, is entitled to deference * * *. It should be changed * * * only upon thorough consideration and in the light of conclusive experience. * * *

"The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army. * * * Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request."

He concluded the memorandum by remarking that, while he was not called upon to draft the proposed legislation, he would take the liberty to suggest the advisability of so drafting it as to confer this power upon such commanding generals in the field as the President might himself designate.

The papers were forwarded to the War College, and, on September 19, 1918, Col. E. G. Davis, formerly Chief of the Military Justice Division of the Judge Advocate General's Office, prepared a memorandum (Exhibit 145) expressing the opinion that no sound reason could be advanced why an officer, who was given power to approve and carry into effect a sentence of death or of dismissal of an officer without reference to higher authority, should not be given the lesser power of commuting such a sentence to one of lower degree, nor could any good reason be assigned why he should not directly exercise the power of mitigation without reference to the President, in those cases requiring the latter's confirmation. He invited attention to the fact that the fiftieth article of war speaks of the "mitigation" or "remission" of sentences of death or of dismissal of officers, and stated that, as mitigation of either of these sentences requires a substitution of some other and distinct form of punishment, mitigation in such a case becomes the "commutation" discussed in the opinion of the Judge Advocate General.

The Director, War Plans Division, in forwarding the papers to the War Department (Exhibit 145), stated that his division was of the opinion that the recommendations of Gen. Pershing could be complied with and that the inconsistencies in the present Articles of War could be remedied by amending the fiftieth article. The proposed change in the fiftieth article of war was set forth, the substance of which is found in the following paragraph of the amended article:

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President, before the same may be executed."

It will be observed that, although Gen. Ansell opposed the amendment, his suggestion that, if it were to become a law, the conferring of power not only upon the commanding general American Expeditionary Forces, but upon such other generals in the field as the President might himself designate, was adopted. On September 19 (Exhibit 146) the Acting Secretary of War trans-

mitted the draft of the bill to Congress and the same became a law on February 28, 1919. (Exhibit 147.)

12. *Establishment of clemency board.*—In his letter of March 8, 1919, to the Secretary of War, Gen. Crowder states (Exhibit 136, p. 6):

"As you were aware, shortly after my resumption of full charge of the office of the Judge Advocate General, I recommended the convening of a board of clemency to undertake with the greatest expedition the adjustment of wartime punishments to peace-time standards."

The facts are these:

On January 11, 1919, by a memorandum (Exhibit 138) to the Secretary of War, Gen. Ansell invited his attention to eight cases, seven from Camp Dix and one from Camp Grant, wherein grossly excessive penalities had been imposed. No additional machinery was suggested for the reviewing and correction of excessive sentences. The memorandum is without recommendation. The introductory paragraph concluded, however, with the statement that, while he was inviting the attention of convening authorities to the great severity of the punishment in those cases in which the punishment appeared to be so disproportionate to the offense as to shock the conscience, yet he did not regard that such an administrative course taken in specific instances was sufficient to achieve and establish military justice. He concluded his memorandum as follows:

"Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed; at least, I believe I have observed, during this war."

Gen. Ansell's memorandum of January 11, 1919, was, by the Secretary of War, transmitted to Gen. Crowder on January 13, accompanied by a letter wherein it was stated (Exhibit 139):

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him (Gen. Ansell) which have been imposed during the war, and are characterized by severity which would not be the case in time of peace."

This suggestion of the Secretary of War was the first one looking toward action concerning cases already finally passed upon, and must, therefore, be accepted as having initiated the Clemency Board as it is now functioning.

Acting upon the suggestion of the Secretary of War, Gen. Crowder, on January 28, published an office memorandum (Exhibit 141). He referred first to the instructions which had been proposed by him and which were published on January 22 (Exhibit 140), the effect of which was to put into operation the Executive order of December 15, 1915, establishing maxima for sentences of courts-martial. He then proceeded with the language establishing the Board of Clemency. That action was expressly stated to be in compliance "with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment, but to adjust that punishment to present disciplinary requirements." The purpose of the board was thus expressed:

"To undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him."

Gen. Ansell does not claim that he originated the idea, but that the basis for the plan was his memorandum, dated January 11, 1919. That is true. The Secretary of War, however, himself made the initial suggestion, and the order creating the board followed the lines laid down by him.

II. THE ADMINISTRATION OF MILITARY JUSTICE AND THE MACHINERY ORGANIZED IN THE JUDGE ADVOCATE GENERAL'S OFFICE TO FURTHER THE SAME.

A study has been made of the functioning of the Judge Advocate General's Department during the present war. The machinery provided in the office of the Judge Adocate General in Washington for the review of general court-martial cases forwarded there by law was examined. Fifteen hundred records of trial were scrutinized, not with an idea of reviewing the evidence—a function not pertaining to this office—but for the purpose of regarding the composition of the court, the kind of counsel provided the accused, the exercise of the right of challenge, the pleas, findings, and sentences, the action of the various reviewing authorities, and, finally, the action of the Judge Advocate General and the Secretary of War. The time required for the records of trial after final action by the reviewing authority to reach the office of the Judge Advocate General

was recorded in each case. Three different periods were chosen and 500 successive cases were selected from each period. These cases represented nine departments, including Panama, Hawaii, and the Philippine Islands; 38 divisions, some in the United States and others in France; and also 2 disciplinary barracks and 15 other miscellaneous general court-martial jurisdictions. It is believed that these are representative of the twenty thousand-odd cases tried during the war.

An effort has been made to ascertain the cause of recent criticism, some of it unquestionably just, as will hereinafter be indicated, of the system of military jurisprudence, which has existed for more than a century. Our military code enacted by Congress in the early Revolutionary days came to us almost intact from the British articles of war, and although restated in the Revised Statutes of 1874, when certain amendments and additions enacted during the Seminole War, the War of 1812, and the Civil War were incorporated, underwent no substantial change until 1916, when, after the unsuccessful attempts of the present Judge Advocate General, covering a period of five years, to bring about a recodification, Congress finally reenacted the American articles into their present form. Before the war an Executive order prescribed the peace-time limits of punishment which could be imposed by court-martial, and, in addition, an intimate knowledge of military law was a prerequisite to graduation from the Military Academy and to advancement through the lower commissioned grades in the Army. With these two safeguards, the legal rights of the accused were protected, and he received substantial justice. If fault was found with the present system, certainly no criticism was offered. With the raising over night of an army of several million men, the drawing of officers from every walk of life, their training undertaken in three months, their knowledge of military law based upon a hasty perusal of the Manual for Courts-Martial, with all Regular officers promoted to the field grades, and the courts composed entirely or preponderantly of captains or lieutenants, with these same officers acting as judge advocates and counsel for the defense, and especially with the Presidential check on limits of punishment removed, it is not surprising that if the system was subject to abuses the latter should at this time become apparent. To what extent these abuses existed and to what extent higher authority failed to check or eradicate them has been made the subject of special inquiry. The trial of the accused, from the preferring of charges until final action on his case, will therefore be considered in light of the facts developed by this investigation.

The accused can be tried only on charges preferred by a commissioned officer. These charges are referred to the officer exercising summary court-martial jurisdiction, usually the regimental or, in a small command, the post or camp commander, who is required by paragraph 76, Manual for Courts-Martial, either to investigate them himself or refer them to a disinterested officer for that purpose. This officer is usually one of experience, who, after an examination of the witnesses, including the accused, if the latter waives his constitutional right to refuse to testify, states whether in his opinion there is sufficient evidence to warrant the reference of the case for trial. The commanding officer, in forwarding a case to the reviewing authority, must forward the statement of testimony and report as follows: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken.

Criticism has been offered that charges are not thoroughly investigated prior to their being forwarded to the convening authority. The critics certainly can have no direct knowledge of this fact, except such as may be gained from an examination of the results of courts-martial. The records of the 1,500 cases examined, of which 82 were those of officers and 1,418 were those of enlisted men, indicate 164 acquittals. Of the 82 officers tried, 14 (17+ per cent) were acquitted. Of the 1,418 cases of enlisted men tried, 151 (10+ per cent) were acquitted. These percentages are not so large as to form a basis for general criticism. As hereinafter shown, abuse has existed in isolated cases, due to failure on the part of the responsible officers to carry out the plain provisions of the Manual for Courts-Martial.

The charges, upon reaching the convening authority, are referred to the staff judge advocate, whose duty it is to determine if the facts presented

warrant reference of the case for trial. It is safe to say that it very rarely happens, if ever, that the convening authority sees or examines the charges before their reference for trial. The staff judge advocate is a lawyer, of not less than the rank of major, carefully selected by the Judge Advocate General of the Army for the very duty of impartially examining the evidence to determine if a prima-facie case has been presented. Many of these officers have had years of experience at the bar in civil practice. The charges, if warranting trial by general court-martial, are forwarded directly to the trial judge advocate. This is usually an officer of the line not above the grade of captain. He is supposed to be the legal adviser to the court and to safeguard the rights of the accused. Before the war, there were but few officers who were not competent, as a result of their education in military law, to perform this important duty. Since the war, unless the trial judge advocate was a lawyer in civil practice, he was manifestly unfit to undertake this duty. It was practically impossible for any captain or lieutenant to acquire, in the short time at his disposal, sufficient knowledge of military law to act in any legal capacity.

The 1,500 cases examined indicate that the following officers acted as trial judge advocate:

	Officers' trials.	Trials of enlisted men.
Colonels		1
Majors	18	71
Captains	36	513
First lieutenants	18	522
Second lieutenants	10	365

The following acted as assistant trial judge advocate:

	Officers' trials.	Trials of enlisted men.
Captains	9	24
First lieutenants	13	177
Second lieutenants	11	312

The accused is very rarely without a commissioned officer as counsel. He is supplied one, unless he states to the court that he does not desire counsel. The record must affirmatively show that he was offered counsel and declined. Counsel for the accused is not a detail sought by officers, is not a pleasant duty, and is usually performed by roster. It is believed that, as a rule, the officers detailed serve the accused to the best of their ability, but their incapacity, since the outbreak of the war, judging by their rank, has been apparent, except in those cases where the counsel assigned was a lawyer in civil practice prior to his entrance into the Army. The cases examined by this office reveal the fact that the following officers have served as counsel:

	Officers' trials.	Trials of enlisted men.
Majors	22	43
Captains	20	232
First lieutenants	17	346
Second lieutenants	10	433
Lieutenants (grade not stated)	6	214
Chaplains	1	33
Enlisted men		3
Civilians	2	11
None	4	99

In addition to the foregoing there were 29 assistant counsel, of whom 8 were civilians.

What has been said of judge advocate and counsel applies equally to members of the court, except that it is an exceptional case where at least one member of the court is not of field rank. Four important cases, Nos. 110751-2-3-4, arising in France, have been the subject of considerable comment in the halls of Congress and in the press. Two soldiers found guilty of disobedience of orders and two of sleeping on post were sentenced to be shot. The sentences of the first two were commuted by the President and the latter two were pardoned. The two soldiers tried for disobedience of orders were permitted to plead guilty. The composition of the court in the first two cases, with the qualifications of the officers to act as members of the court and judge advocate, was as follows (Exhibit 132):

Members of the court.—Colonel, 21 years' commissioned service, Regular Army; first lieutenant, appointed from ranks, Regular Army, graduate of Maryland Agricultural School, civil engineer; first lieutenant, appointed from ranks, Regular Army, high-school education, shipping clerk, salesman, farmer; first lieutenant, graduate of University of Vermont; first lieutenant, record not obtainable.

Judge advocate.—First lieutenant, attorney at law, graduate of law school.

Assistant judge advocate.—Second lieutenant, newspaper reporter, no legal education.

In the other two cases in addition to the foregoing the following officers also sat: Lieutenant colonel, graduate of West Point, 12 years' commissioned service; major, formerly quartermaster sergeant, high-school education; first lieutenant, graduate of Harvard University and Massachusetts Institute of Technology.

The counsel were, in grade and ability, as follows: Case No. 1, second lieutenant, no professional, legal, or business training; case No. 2, second lieutenant, no professional, legal, or business training; case No. 3, second lieutenant, chemist, high-school education; case No. 4, second lieutenant, graduate of University of Maine, no legal education.

The cases were summed up by counsel as follows: Case No. 1, no summing up; case No. 2, no summing up, soldier's statement two lines; case No. 3, counsel's address six lines; case No. 4, counsel's address eight lines.

Had the same careful review, which was submitted for the consideration of the President, been presented to the court, it is safe to assume that the findings and sentences would have been other than as given. It is hard to believe that the soldiers had a fighting chance for their lives. These cases, however, were exceptional.

The actual composition of the courts-martial, after the right of challenge had been exercised, was, for the trial of the 1,500 cases under consideration, as follows:

	Officers' trials.		Trials of enlisted men.	
	Number.	Per cent.	Number.	Per cent.
Brigadier generals	14	1.8	18	0.1
Colonels	105	13.5	201	1.6
Lieutenant colonels	113	14.6	472	3.8
Majors	232	29.9	1,637	13.0
Captains	262	33.8	4,465	35.6
First lieutenants	42	5.4	3,731	29.7
Second lieutenants	8	1.0	2,027	16.2

For the trial of enlisted men, 81.5 per cent of the officers composing the courts consisted of captains and lieutenants, and, inasmuch as only 73 officers of the grade of major or above served as trial judge advocates in the 1,500 cases under examination, it is apparent that the trials of enlisted men were largely in the hands of junior officers and, in a great majority of cases, those with little knowledge of military law. On numerous occasions, the court was composed exclusively of lieutenants. In many instances, however, the original detail contained officers of higher rank, but they did not sit as members of the court by reason of absence or challenge. On the other hand,

there were times when the court was made up of field officers in its entirety. One court contained two colonels, five lieutenant colonels and six majors. The unavailability for detail for courts-martial duty of more officers of experience has been advanced in many instances where the court has been composed almost entirely of lieutenants. While it would be impossible, even were it thought advisable to do so, to detail a court such as the one last mentioned, except in a large command, nevertheless the right of an accused certainly should not be prejudiced by failure to provide a competent tribunal for the consideration of his case. For the trial of officers, only 40.2 per cent of the composition of the court was below field rank. This is accounted for by the fact that, where the accused is an officer, the court is invariably composed of officers senior to him in rank.

The right of challenge was exercised 257 times, and in only 26 instances did the court fail to sustain the objections. Frequently officers arose in court and stated their own disqualifications to sit, although this fact was unknown to the accused. The Judge Advocate also from time to time challenged for cause in behalf of the accused, the latter being unaware of the disqualifications.

The following table will indicate the pleas and findings in the 1,500 cases referred for trial:

	Officers' trials.		Trials of enlisted men.	
	Pleas.	Findings.	Pleas.	Findings.
Guilty	26	117	784	1,769
Not guilty	165	69	1,579	488
Guilty minor included offenses	.....	5	220	326

It is interesting to note that the court returned a finding of guilty to 1,769 specifications, and that the accused pleaded guilty in 784 of them, which is nearly half. In serious cases the court called for the evidence in spite of the accused's plea of guilty. In 15 instances the court returned a finding of not guilty, although the accused pleaded guilty to the offense charged. The accused was found not guilty to 488 specifications, and in 326 instances the court returned a finding of guilty of an offense of a similar nature to, but less serious than, the one charged. Certainly the charge can not be made that the courts do not give careful consideration to questions of fact, even though they are subject to the criticism as above stated, that they are in many instances incompetent to pass upon questions of law.

Two officers and 480 enlisted men were charged with desertion. Of these 201 enlisted men were found guilty, 15 enlisted men not guilty, and two officers and 264 enlisted men guilty of absence without leave.

The periods of confinement awarded by courts and approved by reviewing authorities were as follows:

	Awarded by courts.	Approved by reviewing authority
No confinement	69	.....
0-3 months	202	210
3 months to 6 months	285	343
6 months to 1 year	158	132
1 year to 2 years	144	100
2 years to 3 years	108	88
3 years to 5 years	166	150
5 years to 10 years	108	75
10 years to 15 years	19	11
15 years to 20 years	18	7
20 years to 25 years	10	7
Over 25 years	14	8
Number of cases wherein total confinement was remitted	.....	50
Number of cases wherein total confinement was suspended	.....	16
Number of cases wherein total confinement was set aside	.....	53

It will be observed from the above table that, in some instances, the figures in column two exceed those in column one. This is especially true with reference to the lighter sentences, and is explained by the fact that many heavy sentences were reduced by the reviewing authorities to less severe ones. In practically all cases where confinement was of long duration, dishonorable discharge was imposed. The holding of a soldier to a long period of confinement with an organization without separating him from the service is not in the best interests of discipline and has seldom been resorted to in the Army. An examination of the 1,700 cases indicates that dishonorable discharge was imposed, executed, suspended, remitted, or set aside by the reviewing authorities as follows:

Imposed by court	651
Executed	248
Suspended	246
Remitted	126
Set aside	31

The establishment of disciplinary barracks, to which soldiers found guilty of military offenses, as distinct from common-law felonies, are sent, has made it possible for many young men with elements of military service to win their way back to the colors with an ultimate honorable discharge. To accomplish this, the original dishonorable discharge is suspended until the expiration of the soldier's confinement. Many soldiers, with sentences carrying long periods of confinement, are thus enabled to be restored to duty after serving but a few months at the disciplinary barracks. (Exhibits 148 and 149.)

In 105 cases the reviewing authority returned the records to the court for reconsideration because of failure to return findings of guilty, for the imposition of a heavier sentence than that awarded, or for addition to the sentence of a dishonorable discharge or forfeitures. Of these cases the court in 27 instances adhered to its original findings. In 7 cases it changed the finding of not guilty to guilty, and in 71 cases returned a heavier sentence. In case No. 108614 the reviewing authority, after the court had imposed a sentence of four months' confinement with forfeitures, returned the case for reconsideration, suggesting a specific sentence of dishonorable discharge and two years' confinement. The court declined to change its sentence. In case No. 111094 the court imposed a sentence of three months' confinement and forfeiture of two-thirds pay for one month. The record was returned by the reviewing authority for reconsideration of this sentence, but the court adhered to the one originally imposed. Again the case was returned, and the court, this time stating that it considered the opinion of the reviewing authority controlling, reconsidered its sentence and awarded confinement for two years, with forfeiture of one-half pay for like period. The court was reconvened a third time, and the court informed that it had failed to impose a dishonorable discharge. Upon its third meeting, in revision proceedings, a dishonorable discharge was awarded, including total forfeitures and confinement for two years. The convening authority, upon the unanimous recommendation of the court for clemency, mitigated the sentence to six months' confinement at hard labor and forfeiture of two-thirds pay per month for a like period. More pernicious practices than these can not be imagined. Such instances have brought the court martial system into disrepute.

Although in 668 cases of the 1,371 cases resulting in conviction, the reviewing authorities reduced the sentences imposed by the court, a striking example wherein the exercise of this power by the reviewing authority would have failed to do full justice to the accused was case No. 108540. The court imposed a sentence of dishonorable discharge and five years' confinement. The record was returned with the statement that, while the department commander did not wish it to be understood that he was enjoining particular action or desiring the court to substitute his opinion for its judgment, nevertheless he was convinced that there was insufficient evidence of record to warrant conviction and he was affording an opportunity to the court to reconsider its former findings and sentence before final action was taken. The court acquitted the accused. While the department commander could have disapproved the findings and sentence, nevertheless the stigma of conviction would have attached to the soldier. By the action of the reviewing authority and the subsequent action of the court the soldier was honorably acquitted. While cases of the latter class were less frequent than those of the former, they all indicate

the extremes to which the practice of returning records for reconsideration has been exercised.

Criticism has been offered that the department or division judge advocate, after recommending reference of the charges for trial, acts as trial judge advocate, then returns to headquarters and prepares a review of the case for the department or division commander. Such instances were exceedingly rare in the cases under examination. This practice, however, has existed. Case No. 114492, wherein the assistant division judge advocate acted as trial judge advocate, resulted in acquittal. A review of the proceedings was prepared for the division commander by this same judge advocate, wherein it was set forth that four of the specifications had been proven. Thereupon the case was referred back by the division commander to this self-same officer by indorsement, in practically the same language as was found in the review, with instructions that the court be reconvened for reconsideration of its findings. The court met in revision and adhered to its former finding of acquittal. A subsequent review was prepared by the assistant judge advocate (trial judge advocate), wherein he stated in writing to the division commander that the court erred in adhering to its original findings, and recommended that they be disapproved, which was done by the division commander in his final action on the case, adding that the findings of not guilty by the court on the four specifications in question were without justification.

An other instance in this same division, case No. 114485, resulted in precisely the same action, except that in this case the division commander approved the acquittal after the court had declined upon proceedings in revision to change its original findings.

This unfortunate procedure can not be defended from any standpoint and certainly calls for the adoption of such measures as will prevent the possibility of its recurrence.

If failure to do justice has occurred in the trial court or at the hands of the reviewing authority, it is to appellate power that the soldier must look for relief. What relief on appeal exists and the measure in which it has been exercised has been especially examined into. Appellate review is especially necessary during war, when great latitude is granted courts-martial and reviewing authorities in adjudging sentences by the automatic removal of the presidential order prescribing limits of punishment, and, moreover, the power of execution of death sentences, lodged by law exclusively in the President in time of peace, is extended by the 48th Article of War, in cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies, to the commanding general of the army in the field or to the commanding general of the territorial department or division, who confirms the sentence. Prior to the war, all cases of general court-martial arriving in the office of the Judge Advocate General (and every case must be sent there after final action by the reviewing authority) were carefully examined by a commissioned Judge Advocate for jurisdictional errors (which, if existent at the time, caused the proceedings to be set aside by the Secretary of War), and for errors of law prejudicial to the rights of the accused. In cases of excessive sentences, or where mitigating circumstances appeared within or outside of the record, recommendation was made to the Secretary of War to exercise the power of clemency by remission or mitigation of the sentences. After entrance into the war, and coincident with the raising of the large Army under the draft, errors of law in court-martial proceedings became more frequent, due to the causes heretofore related. The correction of the same by the pardoning or clemency power naturally fails to remove the stigma of conviction. The Acting Judge Advocate General, believing that the power to reverse, modify, and set aside was lodged in the Judge Advocate General by section 1199, Revised Statutes, exercised the same on October 30, 1917, by setting aside the judgments of conviction and the sentences in the cases of the Texas mutineers, on account of prejudicial error due to failure to substantiate, by the evidence of record, the offenses charged. This same power was exercised in several other contemporaneous cases. The Secretary of War held that such power was not to be found in section 1199, Revised Statutes, and prepared a draft of amendment to that section providing for the lodging of the power in the President, and sent a copy of the drafted amendment, on January 19, 1918, to the Military Affairs Committees of the House and Senate, recommending its enactment into legislation. It failed to become a law.

An examination of numerous memoranda bearing the signature of the Acting Judge Advocate General reveals the fact that recommendation was frequently made to the War Department to declare findings null and void. In case No.

107250 the accused challenged one member of the court and the record failed to indicate if he objected to being tried by any other member. The Acting Judge Advocate General recommended "that the findings and sentence in this case be declared void and of no force or effect and that the accused be released from confinement and restored to duty." In case No. 107490 the same recommendation was made, where the court erroneously found a soldier guilty of a lesser included offense, one for which he was not tried, it being held that such irregularity was fatal to the validity of the proceedings of the court. In case No. 107828 the Acting Judge Advocate General recommended that the findings and sentence of the court be declared null and void, where the accused pleaded guilty and was so found to a specification which did not state a military offense. In case No. 107814 the Acting Judge Advocate General recommended that the sentence be set aside and the accused restored to duty, where in its findings the court eliminated certain words in a specification to such an extent that no offense, civil or military, was stated. In case No. 107800 the president of the court made no explanation to the accused as to the effect of his plea of guilty nor advised him of the maximum punishment imposable by the court as required by paragraph 154, Manual for Courts-Martial. The Acting Judge Advocate General held that the requirements of this paragraph can not be ignored without prejudice to the fundamental rights of the accused. It was recommended accordingly that the findings and sentence in the case be declared invalid and the accused released from confinement and restored to duty. To cite other cases would only encumber the record. It should be stated, however, that all of the above recommendations were approved by the Secretary of War.

Another serious matter arose which caused anxiety in the War Department. About the middle of December, 1917, the public press announced the execution of 13 negro soldiers in the Southern Department for murder and mutiny. Their execution occurred within 48 hours after the approval and confirmation by the department commander of their sentences. There was no opportunity for appeal in these cases. This action was denied the accused by their summary execution. The entire action was regular and lawful. No error was later found in the records of trial. The possibilities of injustice, incapable of future correction, were, however, so exemplified in these cases that G. O. No. 169, War Department, 1917, were issued on December 29, 1917, providing that, after the commanding general of a territorial department or division confirms a sentence of death, the execution of such sentence shall be deferred until the record of trial has been received and reviewed in the office of the Judge Advocate General and the reviewing authority informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. Thus the principle of automatic appeal was established, and henceforth all death sentences were stayed until careful review could be had of the records of trial in the office of the Judge Advocate General. About this same time hundreds of cases were reaching the War Department wherein sentences of dishonorable discharge were being imposed with short periods of confinement for comparatively trivial offenses, indicating that a large percentage of the men could be sufficiently disciplined and punished within their organizations during training for active military service without branding the soldier with the stigma of dishonorable discharge and imprisonment and without denying the Government the use of the man power which was so obviously necessary. Therefore, on December 22, 1917, confidential instructions were issued to all general court-martial jurisdictions providing that close scrutiny in all cases be exercised in order that no sentence of dishonorable discharge should be approved where the offender had capacity for military service and where other appropriate form of punishment was sufficient to meet the requirements of the case; and, further, that dishonorable discharge should be imposed only in those cases where the nature of the offenses demanded a long term of confinement in the penitentiary or in the disciplinary barracks and that where dishonorable discharge was not accompanied by a long period of confinement it should be suspended or remitted. (Exhibit 68.)

At the same time, additional measures were being considered in the Office of the Judge Advocate General for safeguarding the rights of the accused, and on January 17, 1918, General Orders, No. 7, were issued, directing that not only the execution of all sentences of death, as provided in General Orders, No. 169, 1917, but also all sentences of dismissal and dishonorable discharge be stayed until the records of trial could be reviewed in the office of the Judge Advocate General and their legality there determined. In the event that the

record was not sufficient to sustain the findings and sentence of the court, provision was made to return the same to the reviewing authority with a clear statement of the error, omission, or defect which was found. If such error, omission, or defect admitted of correction, the reviewing authority was to be advised to reconvene the court for such correction, otherwise he was to be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as might be appropriate in the premises. Provision was made that any delay in the execution of any sentence, by reason of the foregoing, should be credited upon the term of confinement or imprisonment imposed. A branch office of the Judge Advocate General was established in France to consider those cases arising in the American Expeditionary Forces. The order became effective on February 1. The action of the Judge Advocate General was purely one of recommendation. There was no power to compel the reviewing authorities to follow his advice. Since February 1, 1918, the date when General Orders, No. 7, became effective, 212 cases have been referred back to the reviewing authorities under the provisions of those orders. The records indicate that there were only seven instances where the recommendations of the Judge Advocate General were not entirely followed (Exhibit 71). In two of three cases tried in the United States his recommendations were followed in part. In the third case they were disregarded in their entirety. In one of four cases tried in France the recommendations of the Acting Judge Advocate General were followed in part and in the other three absolutely disregarded. One case in the American Expeditionary Forces, No. 118312, where the reviewing authority flatly refused to take the action recommended by the Acting Judge Advocate General of the American Expeditionary Forces was made the basis of a letter from that official on July 11, 1918, stating that if the reviewing authorities are to be free to disregard the advice of his office with respect to the legality of findings and sentences, he was unable to see how the provisions and purposes of General Orders, No. 7, were to be accomplished. Accordingly, on September 11, 1918, the War Department amended General Orders, No. 7, by providing that in the American Expeditionary Forces all sentences of courts-martial or any parts thereof found by the Acting Judge Advocate General to be illegal, defective, or void shall be disapproved, modified, or set aside in accordance with the recommendations of that officer. This order has recently been revoked as being contrary to the decision of the Secretary of War, that the power to reverse, modify, or set aside sentences does not rest with the Judge Advocate General.

During the period February 1 to April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action should be taken where illegality appeared in the proceeedings, but brought to their attention, with a view to mitigation, sentences which were unduly severe.

From April until July it appears that cases were returned only for illegality, but that subsequently the matter of unduly severe sentences again was made the basis for recommendation to the reviewing authorities that the power of mitigation and remission be exercised.

The 1,500 cases selected for examination were chosen as follows: Five hundred immediately prior to the publication of General Orders, No. 7, 500 after the provisions of General Orders, No. 7, were in full operation, and 500 several months later.

The table on page 755 of this report indicates the cases wherein dishonorable discharge was imposed, executed, remitted, or set aside. The following table shows the assignment of these cases to their respective periods:

Dishonorable discharge.

	First period.	Second period.	Third period.
Imposed by the court	230	188	233
Executed	131	84	33
Suspended	47	59	140
Remitted	39	41	46
Set aside	13	4	14

The beneficial results derived from the operation of General Orders, No. 7, are apparent. During the first period, viz, prior to the issuance of General

Orders, No. 7, 58 per cent of the dishonorable discharges imposed by the courts were ordered executed—43 per cent during the second period and only 14 per cent during the third period. On the other hand, 20 per cent of the dishonorable discharges imposed during the first period were suspended, 32 per cent during the second period, and 60 per cent during the third period.

Dishonorable discharge was executed in the following cases:

	First period.	Second period.	Third period.
Murder, attempted murder, manslaughter, or assault	11	1	.....
Burglary, robbery, larceny, forgery, embezzlement, or fraud	52	46	18
Introducing drugs, immorality, or moral degeneracy	2	3	6
Drunk and disorderly conduct	.....	4	1
Mutiny or sedition	12	2	2
Desertion, absent without leave, escape, or attempted to escape	40	25	5
Sleeping on or quitting post	8	.....	.....
Disobedience of orders or disrespect	6	3	1
	131	84	33

An examination of the above table will indicate that dishonorable discharge, especially in the third period, could not have been suspended with due regard for the best interests of the service.

In addition to the remission and mitigation of sentences by the convening authorities upon the recommendations of the Judge Advocate General, numerous recommendations were made from that office to the Secretary of War to exercise the presidential power of clemency, and to set aside and declare null and void the proceedings in those cases where illegalities were discovered. Of the 1,500 cases examined, 50 during the first period carrying 162 years of confinement were sent to the War Department with the recommendation by the Judge Advocate General to remit the sentences in whole or in part, with the result that 84 per cent of the years of confinement were remitted. During the second period, 33 cases with 133 years of confinement were forwarded by the Judge Advocate General for presidential action, and, as a result of his recommendations, 91 per cent of the years of confinement were remitted. In the third period, 39 cases with 228 years of confinement were returned to the Judge Advocate General, approving his recommendation and directing that 95 per cent of the years of confinement be remitted. It will be recalled that, during the first period the provisions of General Order No. 7 were not in force, and in the second and third periods that they were in operation. Neither were the boards of review nor the clemency board at this time in existence. Of all cases tried during the war, and forwarded to the War Department with specific recommendations by the Judge Advocate General, either to set aside, modify, or carry into execution the sentences imposed, in only 13 were his recommendations not followed. In three cases the Secretary of War differed from the Judge Advocate General with regard to the points of law involved therein. In four cases there was a difference of opinion as to the propriety of a commutation of sentence. In one case, where the sentence of dismissal was recommended for confirmation, the President, on the recommendation of the Secretary of War, exercised the power of remission. In five cases tried in France, the Judge Advocate General recommended confinement in the United States Disciplinary Barracks, and the Secretary of War directed that the sentence be served at military posts in France. (Exhibit 71.)

On February 13, 1918, the Judge Advocate General, by circular letter to all department and division judge advocates, urged upon them the necessity of thorough investigation of charges before reference for trial, in order that none might be laid which could not be substantiated by sufficient legal evidence; that endeavor should be made to limit the number of trials by general court-martial, and that no case should be tried where the offense could be adequately punished by a minor court or by the administrative punishments authorized by law. They were further urged to guard against ordering offenders to trial who were lacking in mental responsibility. In all cases wherein it appeared that the accused was lacking in physical, mental, or moral equipment as an efficient fighting man, it was suggested that the psychiatrist assigned to duty with their commands be called into consultation for advice. Department and division judge advocates were informed that it was their duty to thor-

oughly study the records of trial, and, where it was found that the accused had within him the elements of service, the following principles should govern in deciding upon the punishment to be awarded in time of war (Exhibit 74):

I. Guardhouses are breeding places for crime. They are not designed to foster self-respect. Men should be kept out of them in all cases except where restraint is necessary.

II. Time spent in confinement is time lost from training. Our task is to turn out in the shortest possible time the greatest possible number of trained men.

III. Whenever and wherever possible, men sentenced to undergo confinement or hard labor should be drilled with their organizations and required to serve punishment when other men are resting or off duty.

Department and division judge advocates were cautioned to make every possible effort to bring those offenders whom it was deemed necessary to try to trial at the earliest practicable date, to the end that the period between arrest or confinement and the date of trial might be held down to the lowest possible limit, and they were enjoined to expedite, in every possible way, the preparation of the records of trial, their review of the same, the action of the reviewing authority, and the forwarding of the records to the office of the Judge Advocate General. So thorough were the instructions given by the Judge Advocate General that responsibility for failure to carry them out certainly can not be charged against the central office. That failure, in some instances, to follow the plain instructions given, existed is indicated by the fact that, on March 22, 1918, the chief of the military justice division, Lieut. Col. E. G. Davis, informed the Judge Advocate General that many judge advocates, officers of the Judge Advocate General's Department, in the field were failing to properly scrutinize charges referred for trial, with the result that many trials were being held on irregular or insufficient specifications. Too many men were being tried by general court-martial whose cases could be properly disposed of by minor courts or by administrative punishments authorized by the one hundred and fourth article of war. The actual trial of cases was in many respects poorly planned; joint offenders were being separately charged and separately tried by the same court, and important cases were frequently referred to incompetent trial judge advocates. Col. Davis further reported as follows (Exhibit 150):

"More important, however, is the evident failure on the part of judge advocates to understand the policy of the department with reference to the conservation of man power. Men are still being tried and dishonorably discharged the service for trivial offenses, which could be otherwise adequately punished. In many divisions there seems to be an unsympathetic use of the power to suspend sentences of dishonorable discharge. It is my view that, during this war at least, in every case where confinement is to be in a disciplinary barracks the dishonorable discharge should be suspended and the officers of the disciplinary barracks made responsible for saying that the man should not ultimately be sent back to serve with the colors."

It was recommended that the closest possible cooperation and understanding exist between the office of the Judge Advocate General and its representatives in the field. Col. Davis explained the necessity for unity of purpose and understanding between the Judge Advocate General's Office and the commanding officers of the disciplinary barracks on the question of restoration to duty, in order that as many men as possible could be given an opportunity to redeem themselves through actual service. He strongly advised that a representative of the Judge Advocate General's Office be sent on a tour of inspection and instruction to the various division and department headquarters, and the headquarters of the several disciplinary barracks. He recommended that no judge advocate be sent thereafter to a division or department until he had received a course of training in the office of the Judge Advocate General. The Judge Advocate General approved the recommendations of Col. Davis, and this latter officer himself was sent on April 18, 1918, to accomplish the purposes above set forth.

On May 5, 1918, the commanding general American Expeditionary Forces cabled the War Department recommending that in order that exemplary action might be taken in said forces, the forty-eighth article of war be amended in such a manner as to authorize him to confirm all death sentences and order their execution, citing the fact that full authority as to death sentences in the French and British Armies was vested in the military authorities. It will be recalled that, under the forty-eighth article of war, the President alone has

power to confirm death sentences, except in cases of murder, rape, mutiny, desertion, and spying, committed in time of war, and in these cases sentences of death may be carried into execution by the commanding general of the army in the field and by the commanding general of a territorial department or division. The Judge Advocate General advised against this action, and, on May 16, 1918, recommended that the commanding general American Expeditionary Forces be informed that the President had decided not to urge upon Congress any extension of the present authority of the commanding general of an army in the field as to such sentences. (Exhibit 151.)

On July 9, 1918, Congress amended the fifty-second and fifty-third articles of war, and thereby authorized the convening authority to suspend the execution, in whole or in part, of any sentence not extending to death, and to restore the offender to duty during such suspension. Authority was granted to remit, in whole or in part, a sentence, or any part thereof, which had been so suspended, except in cases of persons confined in the disciplinary barracks. Authority was granted to vacate such order of suspension at any time, and order the execution of the sentence or the suspended part thereof, in so far as the same had not been previously remitted. The same power, with respect to prisoners in the United States Disciplinary Barracks, was lodged in the President. The War Department thereby authorized the convening authority to exercise a broader policy of suspending sentences and then finally remitting them, and means were thus provided to avoid, as far as possible, the sending of enlisted men to penal institutions with the consequent branding of them with obloquy.

Subsequently, on July 27, 1918, the commanding general American Expeditionary Forces cabled the War Department for authority to commute those sentences which he was authorized to confirm, and also those which it was necessary to forward to the President for confirmation. Theretofore the power of commutation rested solely with the President. The commanding general was of the opinion that the administration of justice would be facilitated by the exercise by him of said power. A number of death sentences requiring confirmation by the President were being imposed in the American Expeditionary Forces, where the offense was not of such character as to justify so severe a penalty, but required a lesser measure of punishment. Great delay would of necessity be caused by transmitting the cases to Washington for presidential review and action. Accordingly, the Secretary of War transmitted, on September 26, 1918, to Congress a draft of amendment to the fiftieth article of war, empowering the President to delegate, whenever he deemed it advisable to do so, the power to mitigate or remit sentences which, under the Articles of War, required his confirmation before execution, to the commanding general of the Army in the field or to the commanding general of a territorial department or division. (Exhibits 142 to 147, inclusive.)

In the early part of August, 1918, there was established in the military justice division of the Judge Advocate General's office a board of review for appellate consideration of the most serious cases. Prior to this time if the case, by reason of error or the seriousness of the offense, required a written review, the same was prepared and submitted to the chief of the military justice division. The function of the board of review, consisting of three specially selected officers, was to consider the case after the first review and before it reached the chief of the military justice division. Due to the rapid increase in the number of cases received in the office, a second board of review was created, and an idea of the thoroughness of appellate examination of records can be had from the following brief outline of the functioning of the office (Exhibits 109 and 154):

The military justice division is divided into eight main sections. Four of these sections have to do with the review of court-martial proceedings in the first instance. As each case arrives in the office of the Judge Advocate General it is assigned, according to its nature, to an officer in the appropriate section, who makes a careful examination of every step in the proceedings. If the case does not fall in the group of those serious ones which require a written review, and if the record is free from error and nothing else is discovered requiring appellate relief, it is initialed by the officer who examines it, and then passes through the chief of section to the files. If the case is one requiring it, a written review is prepared and submitted to the chief of section, who, if he concurs, forwards it to the proper board of review. These two boards are sections of the military justice division. The board of review may adopt the preliminary review as its own, may modify or rewrite it, or may direct that it be modified or rewritten so as to express its views. Each member of the board must concur

in the approval of the opinion, or note his dissent before the review is transmitted to the chief of the division of military justice. Any dissenting member may indicate the reasons for his dissent, either orally or in writing, to the chief of the division, and, when he so desires, to the Judge Advocate General. The approved opinion must be passed upon by the chief of the military justice division before it reaches the Judge Advocate General. In cases of death, or of dismissal of officers, the record is frequently examined and reviewed independently by two sectional officers before being passed through the chief of section to the appropriate board of review. A more thorough system of appellate review would be difficult to find. Every court-martial case receives appellate review automatically, and through no initiative or act of the accused.

How carefully the interests of the accused are guarded by the review of the records of trial, and how thorough is the examination of the cases in the office of the Judge Advocate General, is indicated in No. 107387. In this case it was discovered that, in relieving and adding members of a general court-martial in a certain department, due to transfer from that department of officers destined for service abroad, one general court-martial had in its composition at the date of trial 14 members, 1 in excess of the number allowed by law, although but 10 officers were actually present for duty in the department at the time. The defect was not discovered by the court, the trial judge advocate, the counsel for the defense, or the department judge advocate. Although the accused was guilty of a serious offense and sentenced to dishonorable discharge with three years' confinement, the Judge Advocate General recommended to the Secretary of War that the findings and sentence be declared null and void and that the accused be released from confinement and restored to duty. The recommendations of the Judge Advocate General were approved.

The average time required after final action by the reviewing authorities for the cases to reach the office of the Judge Advocate General was 18.1 days. Cases tried in the Philippine Islands, Panama, China, and France entered into the computation of this average. During the first period the average time was 16.5 days. As the number of troops in France increased, the average time required for all records to reach the Judge Advocate General's office became greater. In the third period the average time was 22.9 days. It will be recalled, however, that, in aid of the revisory power, a branch of the Judge Advocate General's office was established in France by General Orders No. 7, January 17, 1918, and that the cases arising in France received their first review in that office. From the foregoing it appears that no great amount of time intervenes before automatic review of trials takes place, and the accused is not compelled to remain long in confinement pending action on his case by the Judge Advocate General.

The clemency and restoration section considers all appeals by prisoners, their relatives or friends, for clemency or restoration to the colors, and prepares in writing for the head of the division its recommendations upon such appeals. Every soldier in the disciplinary barracks is entitled to apply for clemency once every six months. His relatives and friends can apply for the same at any time. This is in addition to the automatic appellate review above referred to. The clemency and restoration section also considers recommendations for clemency referred to it by officers of other sections of the military justice division, who, in reviewing a case as to its legality, believe it to be a proper one for the exercise of clemency.

That many cases of excessive punishments were permitted to stand, even after review, in the office of the Judge Advocate General, no recommendation for the exercise of the power of clemency having been made, is true. The clemency board, composed of three officers best suited to carry out its purposes, is actively engaged in reviewing sentences imposed for offenses committed during the war period, with a view not only to equalizing punishments but to adjust said punishments to present disciplinary requirements.

An examination of the sentences imposed during the periods from which the cases were selected indicates some instances wherein heavy punishments were awarded. Some of these sentences were mitigated by the reviewing authorities. Others were permitted to stand. Some were completely set aside. In case No. 108973, where the accused was found guilty of desertion, advising another to desert, attempt to kill, and for carrying a concealed weapon, a sentence of 20 years' confinement was imposed. The reviewing authority, after stating that the judge advocate had erroneously introduced in evidence in a capital case testimony taken before another court-martial in a former and uncom-

pleted trial of the case, and that this action resulted in a complete miscarriage of justice, disapproved the sentence and restored the accused to duty. Instances have been frequent where sentences of long duration have been materially reduced by the reviewing authorities. In many instances sentences of 10 years were reduced to as low as six months. In cases Nos. 114221 and 114398, sentences of 15 years, and in case No. 114364, one of 20 years, were reduced to six months. On the other hand, cases have been cited in the public press—and there are unquestionably others which have not been published—wherein the sentences imposed and approved have been severe beyond all reason. Sentences of undue length have been imposed and permitted to stand when it was known that the offender would never serve more than a small fraction of this imprisonment. The sentences were undoubtedly given for their deterrent effect. The offenses towering above all others wherein unusually heavy sentences were imposed were those of desertion and absence without leave. It is interesting to note in this connection that various expediencies were resorted to in order to prevent these serious offenses, committed, many of them, upon the eve of departure of organizations for France. In one division, in the month of January alone, the number of desertions was 234. The division commander was unusually successful in reducing the number of desertions in the succeeding months. In his report he stated as follows:

"I always approve severe sentences for desertion but reduce the severity when it is shown that the man voluntarily returned. These cases are published to the command. I also make an effort to have all of these cases published in the newspapers, so that the soldiers' relatives and friends can be made to realize the seriousness of desertion in time of war."

The following table indicates the number of cases of desertion in the period January 1 to August 18, 1918, the date of the division commander's report:

January	234
February	82
March	80
April	91
May	67
June	46
July	30
Aug. 1–18	21

As a result of an investigation made by an officer of this department and from his report, dated January 18, 1919, it appears that, from the establishment of the stockade at the Port of Embarkation, Hoboken, N. J., in April, 1918, to November 13, 1918, two days after the signing of the armistice, 9,280 enlisted men were confined therein. The stockade was constructed on account of the alarming increase in the number of absences without leave. One regiment alone departed for overseas service leaving 400 men behind absent without authority. One company had 25 absentees at the date of departure. Before the establishment of the stockade, one soldier absented himself six successive times from as many different casual organizations bound for overseas service. This will give an idea of the difficulties under which the War Department was laboring, due to the frequency of soldiers deserting their commands or absenting themselves therefrom on the eve of departure overseas.

In case No. 120910 the accused was tried (at Camp Gordon, Ga.) for twice absenting himself without leave, for breaking arrest before he was set at liberty by proper authority, all this in spite of the fact that his organization had been instructed to hold itself in a constant state of readiness for overseas service. He pleaded guilty to these offenses, and the only defense offered by him was in the following words:

"I just want to make a statement without being sworn. I went home for the purpose of seeing my father, mother, and sister. I was likely to never see them any more. That is all, I reckon."

He was found guilty and sentenced to dishonorable discharge, and, in addition, to 10 years' confinement. The convening authority approved the sentence of confinement but suspended the dishonorable discharge, and the soldier was sent to the United States Disciplinary Barracks, Fort Leavenworth, Kans. The accused was 30 years of age. After serving five months of his confinement the commandant of the United States Disciplinary Barracks recommended a remission of eight and one-half years of his sentence. The clemency board in the office of the Judge Advocate General recommended restoration to duty.

The Adjutant General concurred in the recommendation of the commandant and recommended that eight and one-half years of the sentence be remitted and that the matter of restoration be allowed to take its normal course. A member of the clemency board stated, in writing, as follows:

"The man ought to be restored at once, first, because apparently he ought never to have been tried at all, and, secondly, because according to every conception of natural justice he has long since expiated his offense. His offense was not serious at the worst. He was absent without leave less than three days, and the memorandum sheet shows that he broke arrest and went absent without leave for the purpose of telling his parents and sisters good-by. He pleaded guilty to these offenses. He had been in the Army but one month when he committed this delinquency. Justice requires that he be restored, and it is only an adherence to routine and mere formalism that suggests that he should be retained longer for the purpose of determining whether he should be restored or not. The whole truth of the matter is the military authorities should never have put him in a position where he would have to be restored. He should have been with the colors all the time. Administration that balks at immediate restoration is the kind that brings military justice into disrepute."

There is nothing in the record, except the unsworn statement of the soldier, to indicate that he went home to say good-by to his father, mother, and sister. On March 4, 1919, six months after the soldier's trial, his father made affidavit in connection with an application for restoration of his son to duty. He stated as follows:

"Just prior to his desertion from Camp Gordon he came home, and deponent undertook to quiet him and explain to him the situation with reference to his duties and the reasons why he should remain with his company, and that his said son resolved firmly that he would stay with them, but in the opinion of deponent as the time approached and he heard the boys talking his fear became uncontrollable. He further says that the practice on the rifle range completely unnerved him, and his son told deponent that he just could not stand it, and his mental condition was very bad."

The Secretary of War concurred in the recommendation of the clemency board, and the soldier, on April 11, 1919, was restored to duty.

The treatment of military offenders at the Disciplinary Barracks is so closely associated with the system of military justice that a brief outline of the functioning of the Atlantic branch, based upon a report from the commandant of that institution, dated April 15, 1919, will be set forth. (Exhibit 148.)

Every military prisoner, upon admission to the Disciplinary Barracks, is given a thorough mental and physical examination. Every possible source of information is made use of to obtain a complete history of the offender, so that, at the end of a month or six weeks, a reasonably accurate estimate of the soldier, his ability and requirements, can be arrived at. Some offenders are mentally deficient, such as the insane, the epileptic, the feeble-minded, and those addicted to drugs and alcoholics. Others show character defects, or inability to adjust themselves to any environment, as shown by truancy in school life and lack of persistence in employment.

The treatment of the military offender in the Disciplinary Barracks has a twofold object, first to return him to the colors a better soldier, and secondly, if unfitted for military service, to return him to civil life, if possible, a better citizen.

Any prisoner, regardless of his offense or length of his sentence, is eligible to the disciplinary battalion, if, after a thorough study of his case, he appears capable of being reclaimed to the military service. The battalion is removed from the general barracks population, and is quartered in a cantonment building. This building has neither bolts nor bars. The battalion cooks and serves its own rations and does its own guard duty. It is under the supervision of one commissioned and several noncommissioned officers. The discipline in the battalion is very strict, yet the members are given considerable liberty. If, after three months' intensive military training, a member of the battalion is certified as capable of taking his place in a regular military organization, he is recommended for restoration to the service.

The numbered men consist of those whose examinations show that they are not desirable for the disciplinary battalion, although some, after further observation, may prove to be so. The treatment of these men is along educational and vocational lines. Classes are conducted by experienced Y. M. C. A. teachers.

In connection with the educational system, an honor system has been instituted among the prisoners. A recognized organization with the better element

of the prisoners in control, subject to the supervision of the officers, was created. The lawless and antagonistic element is placed at a disadvantage. The association has its rules and regulations and its tribunals for trial. Privileges are the reward for good conduct and punishments are the penalty for misbehavior. Every new arrival is met by a member of the Honor Association. Previously, the disgruntled and antagonistic element was the first to approach the newcomer. Recently the honor committee notified the commandant that the organization was having some difficulty with its offending members, who preferred trial by the prison court instead of by the honor court. Recommendation was made that the punishment prescribed by the former be made equal in severity to that of the latter. The commandant reported as follows:

"It is possible, and has happened, that prisoners sentenced to serve upward of 20 years have been restored to the colors in fewer months. In fact, it is possible for a prisoner with a life sentence to be restored to a regular organization in five months. In the case of numbered men, recommendations for their release have been made for various reasons—on account of youth, mental inferiority, inadequate personality, nervous instability, and the financial condition of their dependents—so that in the case of these prisoners, as well as the battalion men, the sentence really cuts but little figure. This practice of recommending prisoners for release, as outlined above, was the general policy of this institution months before the present clemency board was appointed.

"As a matter of fact, we are confronted by a much greater administrative problem by the short sentences now imposed than by the longer ones. Men with short sentences are generally apathetic as to restoration. Six months' sentence, with good-conduct time deducted, releases a man by expiration of his sentence in five months, too short a time for the corrective and disciplinary measures applied to him to become sufficiently effective to warrant restoration. A shorter sentence than six months, and some are shorter, practically precludes the possibility of extending restoration. * * *

"No man shall be sent to the disciplinary barracks for a shorter period than one year. Men with longer sentences have something definite to work for, which is not the case with shorter-term men. The longer sentence awakens the prisoner to a healthy, laudable endeavor, while the shorter sentence stifles ambition. The short-term prisoner sits back and waits for the end of his term, appeals to work for restoration fall on deaf ears, and the morale of the institution is, in consequence, lowered."

The Honor Association of prisoners concluded a recent review of the objects and results of their association in the following language:

"We owe a debt of gratitude to the officials of this institution for the assistance they have rendered us in accomplishing our ideal, and we sincerely hope that the facts and conditions as described in this article will serve as an inspiration and incentive to the inmates and officials of institutions of similar character throughout our beloved United States."

The location of the United States Disciplinary Barracks is at Fort Leavenworth, Kans., to which in far the greater number of prisoners is sent. One branch, the Atlantic, is situated at Governors Island, N. Y.; another, the Pacific, is established at Alcatraz, Calif. The number of men restored to duty during the 12 months ending April 17, 1919, at each place was as follows (Exhibit 149):

Original length of sentence and number of men restored and average time actually served to restoration.

Year.	Fort Leavenworth Barracks.		Atlantic Branch.		Pacific Branch.	
	Number restored.	Average time.	Number restored.	Average time.	Number restored.	Average time.
		Months.		*Months.*		*Months.*
1 to 2	190	6	48	7	69	7
2 to 3	93	7	51	8	3[illegible]	9
3 to 4	10	9	43	8	11	8½
4 to 5	103	8	8	8	2	10
5 to 10	111	8½	70	7	23	9
10 to 20	51	8	6	6	4	11
Over 20	32	8	1	5	1	1

For the fiscal year ending June 30, 1918, the number of men restored from Fort Leavenworth was 374, of whom only 24 were reported as failures.

The following table prepared by The Adjutant General indicates the extent to which the power of executive clemency has been exercised as a result of the operation of the clemency board in the office of the Judge Advocate General. It covers a period of seven weeks immediately prior to April 26, 1919. (Exhibit 152.)

	Fort Leavenworth Barracks.	Atlantic Branch.	Pacific Branch.	Penitentiary.	Posts.	Total.
Unexpired part of sentence remitted	608	53	11	25	2	[illegible]
Portion of sentence remitted	1,373	95	67	103	1	1,[illegible]
Restored to duty	351	49	13	7	1	421
Discharged (A. R. 139)	60	5	1			[illegible]
						2,8[illegible]
Transferred from penitentiary to Disciplinary Barracks	12					
Transferred from penitentiary to Disciplinary Barracks and part of confinement remitted	45					5[illegible]
Total						2,9[illegible]

It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose. That these instances have occurred is partly due to the failure of the Articles of War, and the machinery provided by law for the administration of military justice, to completely function in the rapid assembling of an army, undisciplined and uninstructed, of several million men. Whatever injustice has been done is now being remedied in so far as it is possible to do so in the absence of legislative action. That such legislation is necessary to prevent like injustice in the future can not be denied. This matter is now receiving the attention of able jurists within and without the army, and it is believed that, in the light of the experiences of the recent war, the military code can, without a great deal of legislation, be made proof against those pratices which have been shown to be unjust.

III. ANSWERS TO THE QUESTIONS IN THE MEMORANDUM OF THE SECRETARY OF WAR

"(1) What machinery was organized in the Office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?" (Exhibit 1.)

This question is fully answered on pages 51 to 53, inclusive, of this report. An early review of court-martial records has always been provided in the office of the Judge Advocate General, with a view to detection of error in the proceedings, and to discovering such facts as call for the exercise of executive clemency. Formerly, the review was made by an officer of the Judge Advocate General's Department, who made his recommendations to the divisional chief or directly to the Judge Advocate General. Later boards of review were created, thereby insuring a greater thoroughness of the examination of records of trial. No act of the accused is necessary to insure review of his trial record. The review is, and always has been, entirely automatic. The Judge Advocate General is not limited to the evidence of record in the appellate review.

The establishment of the clemency board provides means for the consideration of records of trial subsequent to their original review in the office of the Judge Advocate General, and also, and in connection therewith, those facts existing prior or subsequent to trial, which called for the exercise of executive clemency. The conduct of the accused at the Disciplinary Barracks or penitentiary has great weight in arriving at the recommendations to be made to the Secretary of War. This review is in part automatic in the sense that many cases are considered without initiation on the part of the accused. The latter has always had the privilege of submitting an application for clemency every

six months, and at any time he had new matter to present which warranted consideration. The machinery in the office of the Judge Advocate General has functioned effectively in accomplishing its purpose.

In a memorandum, dated February 19, 1918, for Capt. K. S. Wallace, War College, dictated by Gen. Ansell and signed by Lieut. Col. R. P. Spiller, Gen. Ansell, referring to the functions of the Judge Advocate General's Department in connection with the present war, states:

"Fundamental rights are involved. Military jurisdiction is to be exercised with care and caution, yet with cautious regard which must be exercised with certainty and assurance. This office has called to its aid some of the most distinguished lawyers of the country. * * *

"But it is as a bureau of military justice that the functions of the department touch personally and individually each officer and enlisted man of the establishment. The rights, duties, and obligations of all military persons are established and regulated by a military code consisting of both written and unwritten law. A member of the establishment is required to conform not only to this special code, but also the general law of the land, and such conformity may in a general way be designated as discipline. Discipline is maintained in the last analysis by the exertion of military power through regularly established military tribunals which function in accordance with a penal code, technically known as the Articles of War. This code is enacted by Congress under its power to make rules and regulations for the government of the Army. An offender against it is charged, arrested, tried, sentenced, and punished in strict accord with the articles. The code is a complete code of penal law, both substantive and adjective. Discipline must be maintained in strict accordance with the code, and with justice.

"The proceedings of every case tried by court-martial must be accurately and completely recorded and forwarded to the office of the Judge Advocate General for review, and that authority makes necessary revision in order that justice may be done every accused man. All human tribunals are imperfect, and especially imperfect will be the military tribunals of our newly created Army. The officers constituting the court have not been experienced in the school of war and in military law, but have only recently come from civil life. Besides, this is the first democratic Army that America has ever raised. Its members come from the fields and the factories, from every class of society, and from every walk of life. Both officers and men alike are uninured to military methods and requirements. The spirit of such an Army is bound to be of the highest quality, notwithstanding there will be abundant opportunity for the exercise of authority upon the part of those who have it, and for numerous infractions of discipline upon the part of men who have had no opportunity to acquire the necessary appreciation of discipline. Courts-martial may be expected to be rather frequent and errors in procedure numerous. The review enjoined by law to be carried out in the office of the Judge Advocate General must be made with all the more cautious regard for the rights of individuals so strangely circumstanced in a new institution. This the people will demand; this, in justice to the Army and the individuals thereof, this office must do; and this this office is equipped to do."

Gen. Ansell, in his report of July 8, 1918, relative to his trip abroad, stated:

"In passing I should like to say, and, considering the nature of this report I think that with entire propriety I may say, that as a result of my observations and study here I have been surprisingly struck with the prevision with which the office of the Judge Advocate General of our Army has been administered for the past several years, including the period of this war. Without particular opportunities for so doing, and without the advantage of actual war experiences had here, it has anticipated necessities of administration which as a rule only experience develops; and, more remarkable still, there is a surprising consonance between the principles of administration which our office had recommended to be adopted and which doubtless in the end will be adopted in the department and those principles which are found to be an approved basic part of the military administration of the allied nations."

It would appear from these statements that at the time they were written, viz. February and July, 1918, Gen. Ansell had full confidence in the military code and in the ability of the Judge Advocate General's Office to protect the interests of the Army.

It is pertinent to here state that the present military code enacted in 1916 is substantially the same as that which on February 6, 1914, was reported to the Senate by the Senate Committee on Military Affairs. In that report the

Senate Military Affairs Committee adopted the unanimous report of its subcommittee which, in conclusion, stated as follows:

"Convinced that the revision embodies many essential reforms in our military law, and that it presents an *adequate and modern military code*, your subcommittee earnestly recommends that the project, as set forth in the amended draft, be recommended for enactment."

"(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?" (Exhibit 1.)

The difference of opinion concerned only a question of statutory construction. There has never been a controversy in the office of the Judge Advocate General over the necessity for exercising as complete a revisory or appellate jurisdiction over courts-martial as was possible without interfering with the necessary disciplinary powers of officers commanding, and therefore responsible for the discipline of, troops.

For a long time after, and in spite of, the adverse ruling by the Secretary of War in November, 1918, Gen. Ansell persisted in his view, under his "reinterpretation" of an old statute, that the Judge Advocate General was the only lawful court of last resort in all court-martial cases, and as such supreme—not subordinate even to the Secretary of War or the President. That view he pressed upon his subordinates while they were acting under General Orders, No. 7. These orders he insisted were wrong in legal principle. This persistence in opposing the announced and final decision of the Secretary of War was marked, and continued with gradually decreasing obtrusiveness until Gen. Ansell departed for Europe in April, 1918. Gen. Ansell's assertion that, during this period, he was relieved from duty in connection with the administration of military justice is not based upon fact. He never was so relieved, nor were his duties in the Judge Advocate General's Office ever curtailed in the slightest degree by the Secretary of War, the Chief of Staff, or the Judge Advocate General. While it is true that, in November, 1917, the Secretary of War was desirous, and expressed the hope, that Gen. Crowder might give more of his time to the office of the Judge Advocate General, it has been seen that the duties of the Provost Marshal General's office prevented. From February until April, 1918, Gen. Ansell's duties and authority remained undiminished, except in so far as he voluntarily failed to have anything whatever to do with the operation of General Orders, No. 7.

Upon his return from Europe in July, Gen. Ansell gave the provisions of General Orders, No. 7, the same liberal interpretation that prevailed when the orders first became effective. While the provisions of General Orders, No. 84, were contrary to the interpretation of section 1199, Revised Statutes, as approved by the Secretary of War, the administration of military justice did not suffer during the period that those orders remained in force.

Until recently, what was first a mere difference of opinion went no further. The opposing views were urged with force, but with dignity. Such opposition as existed was an opposition of opinion, of judgment, and not of personality. There was no diffusion of energies nor conflict of loyalties. The work was carried on with marked diligence and unanimity of purpose by all concerned.

The disagreement did not at any time affect the functioning of the machinery to which it related. It is clear that all the recommendations of Gen. Ansell received most careful consideration by the War Department and there has not been a single instance, except with respect to section 1199, Revised Statutes, and the fiftieth article of war, where his recommendations on matters of policy relating to the administration of military justice have not been adopted in whole or in part.

Recently, there has developed, among the officers now in the Judge Advocate General's Office, a feeling of resentment over the one-sided and unfair discussion of the whole matter in the public press. The testimony to that effect comes in part from officers who concur, or at least concurred originally, in Gen. Ansell's construction of the statute. Most of those officers are lawyers who left positions of prominence at the bar, on the bench, or the faculties of colleges of law to accept their commissions. They have labored with unceasing diligence. They have reviewed all of the thousands of general court-martial cases. Needless to say, not being military men, their intellectual medium of examination, their standard of justice (if there is more than one such standard), has been that of the civilian rather than the soldier.

Feeling as they do that they have accomplished their mission, which has been to prevent injustice, they do not take kindly to an attack from any

source, especially from the man who, more than anyone else, has directed their energies. They frankly point out certain errors and weaknesses of the system. What they resent is the fact that, so far, those errors and weaknesses, the existence of which has been demonstrated by the war, have been the only aspect of the situation which has been presented to the public by their own chief; by that one of their number who, more than any other, was qualified to speak of the good points of the system as well as the bad. But this feeling of resentment, now existing, is restrained and repressed. Its effect, if any, on the work of the office is negligible.

Gen. Crowder did not let the difference of opinion interfere with his sense of duty and justice to Gen. Ansell, as is indicated in his letter of January 2, 1919, to The Adjutant General, recommending Gen. Ansell for a distinguished-service medal as follows (Exhibit 153):

"I recommend that Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, United States Army, be presented the distinguished-service medal for exceptionally meritorious service to the Government as acting head of th Judge Advocate General's Department during this war.

"Gen. Ansell's services have been, in my judgment, preeminently of the kind that the statute contemplates thus to be awarded. His duties have been of fundamental importance and great responsibility, and he has shown himself exceptionally qualified in the performance of them. His legal ability, his general qualifications and attainments, his personality, energy, and capacity for scientific organization and vigorous administration, his judgment and prevision, enabled him at the outset to appreciate and encompass the legal duties involved in the raising, maintenance, and administration of a vast military establishment, and to organize the department for the proper performance of those duties. Those same qualities have enable him at all times to perform them in a way that has appreciably contributed to victory.

"His hundreds, even thousands, of thoughtful opinions on the records of the departmet show that he has been a powerful instrument in aiding in the organization of the new establishment within the law, in keeping it within its proper relation to civil instructions and the law of the land, in conforming military administration to the requirements of law, and in maintaining law and justice within the Army. This he has done without placing impediments in the way of rightful administration, but instead, such administration has been given legal direction and effectual impulse."

He then related in detail those accomplishments of Gen. Ansell which were the basis for the above remarks.

"(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the Office of The Judge Advocate General?" (Exhibit 1.)

The disagreement has had no effect upon the presentation of facts to the Secretary of War. It has, however, created in the minds of the public incorrect ideas as to the administration of military justice. During the entire controversy, until the occasion of the appearance of Gen. Ansell before the Senate Military Committee, the records are free from intemperate language or apparent disposition to question honesty of purpose. In giving to the Senate Military Committee, and thereby to the public, full and complete information, and expressing his views fully and freely, Gen. Ansell performed his full duty and rendered a real service to the Army and to the country. In his testimony before the Senate committee and in his letter to Representative Burnett, Gen. Ansell made statements, some of which were exaggerated and misleading, and without apparent cause or provocation referred to the Judge Advocate General, the Chief of Staff, and the Secretary of War in terms which were intemperate, direspectful, and insubordinate. His letter to Representative Burnett was admittedly called forth by criticisms of Gen. Ansell made by Mr. Burnett on the floor of Congress. With respect to the exchange of these personal recriminations between Gens. Crowder and Ansell, unfortunate as they are, the public is not concerned. They are not covered in this report. The public has been misled by Gen. Ansell's magnifying certain admitted defects in isolated cases, as a result of which the administration of military justice has been brought under severe criticism, some of which is, but most of which is not, deserved.

"(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective organization may be made of all the forces of the Judge Advocate General's Office for the performance of its duties." (Exhibit 1.)

There have been no defects of administration or conduct which should be called to the attention of the Secretary of War, requiring any change in the organization of the Judge Advocate General's Office for the performance of its duties.

J. L. CHAMBERLAIN.

WAR DEPARTMENT,
Washington, May 12, 1919.

From: The Secretary of War.
To: The Inspector General of the Army.
Subject: Investigation of controversies pertaining to the office of the Judge Advocate General.

I return herewith the report of the Inspector General of the Army, dated May 8, covering the investigation of controversies pertaining to the office of the Judge Advocate General, directed by my memorandum of March 7, 1919.

This report is thoroughgoing and complete and deals in the most satisfactory way with all the questions submitted. It should be filed in the office of the Inspector General to be available for use in connection with the various studies now being made by agencies created by the War Department and by outside bodies with a view to suggesting betterments in the substance and administration of military law. Pending the completion of those studies and the presentation of the matter in full to the Congress, no present action will be taken upon the report.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 1.

WAR DEPARTMENT,
Washington, March 7, 1919.

Memorandum for the Inspector General.

Certain controversies have arisen with regard to the presentation of facts growing out of the administration of military justice to the Secretary of War and with regard to the administration of military justice itself in the office of the Judge Advocate General during the war. It may be roughly said that these controversies began with the presentation of a brief in behalf of a certain construction of section 1199 of the Revised Statutes of the United States by Gen. Ansell and reply brief thereto by Gen. Crowder. The legal question involved in that difference of opinion was definitely settled by the Secretary of War and need be given no consideration in the inquiry which you are herein directed to make.

It is conceded that the curative power of clemency existed in the President and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's office for recommendations growing out of their examination of records of court-martial trials. I therefore desire to have you conduct a thorough investigation into the following questions:

(1) What machinery was organized in the office of the Judge Advocate General for the effective consideration of records with a view to making appropriate recommendations for clemency?

(2) To what extent, if at all, has the making of such recommendations for clemency, or otherwise properly administering the business of military justice, been affected by the difference of opinion with regard to the interpretation of section 1199 of the Revised Statutes of the United States?

(3) To what extent, if at all, has the presentation of facts with regard to the administration of military justice, either to the Secretary of War or to the public, been affected by failure of cooperation in the office of the Judge Advocate General?

(4) Any other defects of administration or conduct which appear on investigation proper to be called to my attention in order that effective reorganizations may be made of all the forces of the Judge Advocate General's office for the performance of its duties.

In making the foregoing inquiries you will proceed on the fact that I recognize fully the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee

of the Congress, and do not desire any adverse inference to be drawn from the fact of such testimony where it is frank and straightforward.

Please proceed with the inquiry at your earliest convenience and report the facts in full to me.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 2.

MARCH 8, 1919.

Memorandum for Brig. Gen. S. T. Ansell.

I have been directed by the Secretary of War to investigate certain controversies which have arisen in the Office of the Judge Advocate General with regard to the administration of military justice during the war.

In making this investigation I shall proceed on the fact of full recognition of the right of any officer in the Military Establishment to testify frankly and fully upon any matter as to which he may be interrogated by a committee of the Congress, and no adverse inference will be drawn from the fact of such testimony when same has been given in good faith.

At the time that your testimony was given before the Military Committee of the Senate I was absent from Washington—ill in Florida. I therefore have almost no information as to the controversy as it appeared in the public press, but from comments which have appeared I judge that there have arisen certain questions as to facts. All such questions will be fully considered in this investigation. The investigation will also embrace generally the administration of the Judge Advocate General's department in so far as same pertains to matters of military justice.

Conceding that the curative power of clemency exists in the President and the Secretary of War, and that in the first instance the Secretary of War and the President rely upon the Judge Advocate General's office for recommendations growing out of their examination of records of court-martial trials, information is requested as follows:

1. What machinery has been organized during the present emergency in the Office of the Judge Advocate General for the consideration of records with a view to making appropriate recommendations for clemency?

2. Has such machinery functioned satisfactorily and effectively? If not, wherein has it failed, and reasons for same?

After examining the records in the case I will take the matter up with you with a view to clearing up any disputed points. In the meantime, if you desire to submit any statement, I should be glad to have it. I should also be glad to have any information, written or otherwise, which may bear upon this controversy, as well as the names of any witnesses who may have information of value.

J. L. CHAMBERLAIN,
Inspector General.

EXHIBIT 3.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 10, 1919.

Memorandum for the Inspector General of the Army.

Responding to your memorandum of the 8th, I beg to say:

1. You state no specific controversy or issue which you are to investigate or to which I could intelligently address a statement if I deemed it advisable so to do.

2. If, as seems to be the case, the investigation has to do with my statement before the Senate Committee on Military Affairs, that statement for which, of course, I am responsible, speaks for itself.

3. Above all, however, it is my judgment that any adequate and helpful investigation of the existing system of military justice and the administration of it during this war falls beyond your province. That subject, my attitude toward it, and my connection with it are not when fairly considered particular incidents to which your special capacity of inquiry can be properly applied; they are extradepartmental; they involve fundamental and general considerations of law and justice, the scope of which can not justly be confined to the

War Department or any bureau of it, and which are entirely beyond your legal competency.

4. Besides whatever of controversy has arisen upon these fundamental considerations, concerning which I have given expression to my views, directly involves the Secretary of War, whose subordinate you are. Even more, it directly involves you and your office as well. I beg to remind you what the record will show, that in my original endeavor made near the beginning of the war to subject courts-martial to departmental supervision and control, the Secretary of War, the Assistant Chief of Staff, the Judge Advocate General, and the Inspector General opposed. I had occasion then, in a brief filed with the Secretary of War and read into my recent statement before the committee, to comment upon the views of these military advisers of the Secretary of War and to pronounce them professional absolutists upon this question of military justice. They and you stood upon the one side of this so-called controversy and I upon the other. I can not, therefore, but regard you and your office as disqualified to make a full, fair, and impartial investigation.

5. Knowing nothing specific of the subject, scope, and purpose of your investigation, and excepting, as I do and for the reasons given, to your jurisdictional competency, and likewise to your fair qualifications, to make such an investigation as that which you contemplate, affecting me, I am not inclined to have aught to do with it voluntarily.

S. T. ANSELL.

EXHIBIT 4.

Record of a general court-martial convened at Fort Bliss, Tex., pursuant to paragraph 13, Special Orders, No. 240, Headquarters, Southern Department, August 31, 1917, in the cases of various noncommissioned officers and privates charged with mutiny. Trial was held September 17, 1917, at Fort Bliss, Tex. Sentences approved October 16, 1917, by Maj. Gen. John W. Ruckman, National Army, commanding:

General Court-Martial Order No. 1174.

HEADQUARTERS SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex., October 16, 1917.

Before a general court-martial which convened at Fort Bliss, Tex., pursuant to paragraph 13 Special Orders, No. 240, Headquarters, Southern Department, August 31, 1917, were arraigned and tried:

Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Orel Perrier, Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, 18th Field Artillery.

Charge: Violation of the sixty-sixth article of war.

Specification: In that Sergts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Oral Perrier, Corpls. Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, 18th Field Artillery, acting jointly, and in the pursuance of a common intent, did, at Camp Fort Bliss, El Paso, Tex., on or about the 22d day of August, 1917, voluntarily join in a mutiny which had been begun in Battery A, 18th Field Artillery, against the authority of First Lieut. Harry A. Harvey, the commanding officer thereof, and did refuse to assemble for drill.

PLEAS.

Each: To the specification and charge, "Not guilty."

FINDINGS.

Pvt. Clarence Maheu, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Calvin Kunselman, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Ralph K. Green, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Wilfred Kight, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. John J. Poryanda, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Frank J. Adamik, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. John Van De Vooren, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Orel Perrier, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Not guilty."

Pvt. Andrew J. Brown, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Guilty."

Pvt. Wilburn L. Monson, Battery A, Eighteenth Field Artillery: Of the specification and charge, "Not guilty."

Pvt. Henry C. Park, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Not guilty."

Pvt. William F. Hess, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Not guilty."

Pvt. Roger Graves, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Guilty."

Pvt. Rupert P. Orndorff, Battery A, Eighteenth Field Artillery: Of the specification and charge: "Guilty."

SENTENCE.

Pvts. Clarence Maheu, Wilfred Kight, and Frank J. Adamik, Battery A, Eighteenth Field Artillery, each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentence, and to be confined at hard labor at such place as the reviewing authority may direct, for seven years.

Pvts. Calvin Kunselman, Ralph K. Green, John Van De Vooren, Andrew J. Brown, and Rupert P. Orndorff, Battery A, Eighteenth Field Artillery, each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentence, and to be confined at hard labor at such place as the reviewing authority may direct for four years.

Pvt. Roger Graves, Battery A, Eighteenth Field Artillery, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentence, and to be confined at hard labor at such place as the reviewing authority may direct for three years.

Pvt. John J. Poryanda, Battery A, Eighteenth Field Artillery, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentenec, and to be confined at hard labor at such place as the reviewing authority may direct for five years. (Three previous convictions considered.)

And the court therefore acquits the accused Pvts. Orel Perrier, Wilburn L. Monson, Henry C. Park, and William F. Hess, all of Battery A, Eighteenth Field Artillery.

In the foregoing case of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Andrew J. Brown, Roger Graves, and Rupert P. Orndorff, all of Battery A, Eighteenth Field Artillery, the sentence of each is approved and will be duly executed. The United States Disciplinary Barracks, Fort Leavenworth, Kans., is designated as the place of confinement. The acquittal in the case of Pvts. Orel Perrier, Wilburn L. Monson, Henry C. Park, and William F. Hess, all of Battery A, Eighteenth Field Artillery, is approved (201, J. A., S. D.).

By command of Maj. Gen. Ruckman:

MALVERN-HILL BARNUM,
Colonel, General Staff, Chief of Staff.

Official:

RALPH HARRISON,
Colonel, Adjutant General.

EXHIBIT 5.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, October 30, 1917.

Memorandum for The Adjutant General.

Subject: Trial of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Orel Perrier, Andrew J. Brown, Wilburn L. Monson, Henry C. Park, William F. Hess, Roger Graves, and Rupert P. Orndorff, all of Battery A, Eighteenth Field Artillery.

1. The men named above were tried by a general court-martial at Fort Bliss, Tex., September 17, 1917, for violation of the sixty-sixth article of war. There was but one specification under the charge, in which it is alleged that these men "acting jointly and in pursuance of a common intent did, at Camp Firt Bliss, El Paso, Tex., on or about the 22d day of August, 1917, voluntarily join in a mutiny which had been begun in Battery A, Eighteenth Field Artillery, against the authority of First Lieut. Harry A. Harvey, the commanding officer thereof, and did refuse to assemble for drill."

The first eight of the accused were sergeants at the time of the commission of the alleged offense and the remainder were corporals, but between the date of the charges and the date of trial a regimental order had been issued reducing all of them to the grade of private. A copy of this order was introduced in evidence and made a part of the record, and they were found and sentenced as privates. The court found Pvts. Maheu, Kunselman, Green, Kight, Poryanda, Adamik, Van De Voren, Brown, Graves, and Orendorff guilty as charged, and found Pvts. Perrier, Monson, Park, and Hess not guilty. The court pronounced sentence as follows:

Pvts. Maheu, Kight, and Adamik "each to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due while in confinement under this sentence, and to be confined at hard labor at such place as the reviewing authority may direct for seven years."

Pvt. Poryanda to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for five years.

Pvts. Kunselmn, Green, Van De Vooren, Brown, and Orndorff to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for four years.

Pvt. Graves to be dishonorably discharged, to forfeit pay and allowances as above, and to be confined at hard labor for three years.

Pvts. Perrier, Monson, Park, and Hess were acquitted.

The reviewing authority approved the finding, sentences and acquittal, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kans., as the place of confinement (G. C. M. O. No. 1174, Headquarters Southern Department, Fort Sam Houston, Tex., Oct. 16, 1917).

2. A simple narrative, gleaned from the record, of the events leading up to and constituting the alleged mutiny may be stated as follows: On the evening of August 21, 1917, Capt. Harry A. Harvey was the commanding officer of Battery A, Eighteenth Field Artillery, the organization to which these men belonged. About 7.15 or 7.30 of that evening Capt. Harvey in passing through the streets of his battery noticed, as he states, that practically all of the men present in the battery at that hour were congregated around a "crap game" in the battery street. The number of those actually playing does not appear; neither does it appear that there was any disturbance or disorder as a result of the game. He stopped this game and ordered all the men then present in the battery to go to bed and put out their lights. He further placed, not only these men, but all other men of his battery in arrest, whether present or not, and appears to have directed that as fast as the men returned to camp they should be directed to report to their tents in arrest. The only justification found in the record for this extraordinary action on the part of Capt. Harvey is contained in this statement, made by him while testifying as a witness:

"The reason was—I would like to change that last. There were two reasons: First, that I might get the battery together and have all the men present the next day, and, second, to prevent a recurrence of a rather general disorder and fight which had occurred two nights previous to this between mine and the adjoining battery, which had required the personal attendance of the officer of the day and the commanding officer of Battery B, which kept the latter up

until about 3 a. m. of that morning, and finally necessitated his putting a guard on with night sticks."

There is no allegation and nothing in the record upon which to found a belief that the noncommissioned officers who were tried and convicted, as above set out, were engaged in this disturbance that Capt. Harvey referred to, or that they were participants in the "crap game," which seems to have been the immediate cause of the general arrest ordered by him. It clearly appears from the record that he intended to include in this general order of arrest the entire personnel of his battery from the first sergeant down, although the first sergeant was at the time absent from the post with a provost guard in the city of El Paso. (See p. —.) The next morning at reveille some of the noncommissioned officers of the battery did not leave their tents, but others did, and, of the latter, some, at least, had not then learned of the status of arrest in which the battery had been placed. Similarly, at the formation of the battery for stables, some of the noncommissioned officers formed with the battery for this duty and others did not. Between stables and the formation of the battery for morning drill, the first sergeant seems to have been made aware that the noncommissioned officers of the battery, other than himself, were laboring under a belief that while in the status of arrest it was not proper for them to perform duty, and he sent a message to this effect to the battery commander, who directed the first sergeant to report to him in person. Just what report the first sergeant made to the battery commander does not appear, but the record shows that the battery cammander told the first sergeant to release the noncommissioned officers from arrest "until after drill." The first sergeant then returned to the battery and summoned all the noncommissioned officers to report at the battery office, which they did. He told them that Capt. Harvey had directed that they be released from arrest until after drill. Here again the record does not afford a clear indication of just what happened, but it may be inferred, from what is shown, that these noncommissioned officers protested against the performance of duty until their status of arrest had been definitely terminated. Practically all of the noncommissioned officers who testified as witnesses and who were present at the battery office at this time agree in stating that the first sergeant told them, as they were leaving the office, that he was sending for the battery commander and that they were to "stick around until the battery commander comes." The first sergeant states that he did not make this remark, but claims to have said, "all right, I'll send for the battery commander." At any rate, he appears to have sounded the call for drill, which consisted of two long blasts on a whistle, immediately after this gathering which he had ordered. While the privates of the battery formed for drill, the noncommissioned officers remained near the battery office in a group, where, as they state, the first sergeant had told them to "stick." Capt. Harvey then appeared upon the scene. He states that he went immediately "to the orderly room of the battery and met the first sergeant and asked him what the trouble was." The first sergeant told him that the men were not going to drill, and immediately thereafter stepped toward these noncommissioned officers, who were still standing near the battery office, and said: "Are you men going to drill?" The testimony indicates that there were some replies of "No" from the assembled noncommissioned officers. They explain this by stating that they did not intend to refuse to go to drill, but only to indicate that they did not believe it was proper to require them to attend drill in their official capacities until their status of arrest had been properly terminated. The captain testified that at this point he told the first sergeant "not to ask the men if they were going to drill, to order them to go to drill," and that the first sergeant then began to order them individually to go to drill. The exact form of the order which was given at this time does not appear from the record, but the captain states that after he had ordered about half of them personally and individually to go to drill, "I told him that that would be sufficient, and then I talked to the men for several minutes, I should say probably four or five minutes about the situation." The testimony of other witnesses here is that the first sergeant ordered from two to five or six of the men to go to drill. Capt. Harvey states that in this talk he explained to the men "that they were committing a grave offense, that their conduct was mutinous, and that the crime of mutiny was next to treason, the most serious in the category. I told them that in my opinion they would probably receive as much as 10 years' punishment if they were convicted."

After finishing this talk Capt. Harvey does not appear to have given any further order to any of these men, either collectively or individually, to join their battery for drill, but states that he walked away from the men and

went a short distance, where, after remaining in thought "a moment or two," he called the first sergeant and asked him "if he was sure that he told these men that they were released from arrest," and that, having received a reply in the affirmative, he waited "about a minute longer" and then "told them to fall in a column of file," and marched them personally to the guard tent and turned them over to the officer of the day. There appears to have been no disturbance of any kind when this order was given or refusal, in any form, to obey the same.

3. The situation thus presented is deplorable in the extreme. Capt. Harvey is a young officer, having graduated from the Military Academy in 1915. The accused men were all serving in their first enlistment. Maneu enlisted September 19, 1913; Kunselman, December 27, 1913; Green, November 29, 1916; Kight, January 14, 1916; Poryanda, July 20, 1915; Adamik, February 10, 1916; Van De Vooren, February 7, 1916; Brown, November 23, 1914; Graves, December 12, 1916; and Orndorff, December 22, 1913. The general character of these men is shown by the fact that only one of them (Poryanda), was there any evidence of previous convictions. The only fair inference that can be drawn from the record is that these men were of a desirable type and constituted excellent soldiers in the making. Simple justice demands that their careers should not be blighted and a most henious military crime fastened upon them unless the proof of its commission is clear and unmistakable.

It is not clear upon just what authority they acted in believing, as they seem to have done, that noncommissioned officers in arrest are not required to attend drill, but this seems to be the clear intent of the regulations. Paragraph 929, Army Regulations, provides as follows: "* * * When placed in arrest they (noncommissioned officers) will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement they will not be sent out to work."

Winthrop, in discussing the arrest of noncommissioned officers, states that "the phrase, 'placed in arrest' evidently imparts a mode of arrest similar to that prescribed for officers," and in discussing the status of an officer in arrest, he remarks: "An arrest once duly imposed detaches the officer from the functions of his office. He may not assume to command or to perform any military duty." Whatever the exact status of these noncommissioned officers may have been as a result of the order placing them in arrest, it is clear that the regulations do not contemplate that a noncommissioned officer, once placed in arrest, shall be required, while this status continues, to perform the functions which pertain to his office. To release a noncommissioned officer from arrest for a period of drill or other duty to enable him to perform duty which he could not properly perform while in arrest is but to trifle with the law.

4. These men have been charged with and convicted of a very serious military offense. Mutiny is a thing not lightly to be considered in the military service, and when it occurs must be punished severely. There is little to indicate in this case, however, that anything approaching mutiny was really intended by these noncommissioned officers. Winthrop defines mutiny: "* * * as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same." (Vol. II, p. 892.)

The thing which distinguishes a mutiny from other offenses of a military character is the intent "to usurp, subvert, or override" superior military authority. Conduct may well be mutinous, "such as defiant behavior or threatening language toward superiors, muttering or murmuring against the restraints of military discipline, * * * or declining to perform service in the honest belief that the term of enlistment has expired" (Id. p. 893) without actually amounting to mutiny. In commenting upon offenses of this character, Winthrop further says: "Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offense of mutiny, but are commonly to be treated as 'conduct to the prejudice of good order and military discipline.'" (Id. p. 894.)

He further states: "The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offense as understood at maritime law," and cites several cases which have been held not to constitute mutiny, such as "violence against the officer, without proof of intent to override his authority," or "mere disobedience of orders, unaccom-

panied by such intent." It is clear from what has been said that the conduct of these men did not amount to mutiny, but that it was merely mutinous, and that the same should have been charged as an offense under the ninety-sixth article of war.

5. With reference to Capt. Harvey, it should be stated that his conduct in this case was opposed both to law and the regulations. The sixty-ninth article of war, dealing with arrest and confinement, provides in part as follows: "* * * A soldier charged with crime or with a serious offense under the Articles of War shall be placed in confinement, and when charged with a minor offense he may be placed in arrest."

The authority to place soldiers in arrest is predicated, therefore, upon a commission by them of an "offense." If one or more men, acting singly or in concert, commit an offense, one or all may be placed in arrest; and if an entire battery should join in committing the same offense, it would be a proper exercise of authority to place the entire battery in arrest. It would not be proper, however, to place an entire battery in arrest merely for the purpose of "having all the men present the next day." Neither would it be proper to place an entire battery in arrest in order to prevent the occurrence of some anticipated event. The result desired in either of these cases should be accomplished in some other and proper manner. The Army Regulations provide in paragraph 2 that "military authority will be exercised with firmness, kindness, and justice," and in paragraph 3 that "superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language." In considering all the elements of this case, the conclusion is inevitable that the conduct of Capt. Harvey in placing his battery in arrest was not only capricious and unwarranted, but that it resulted in bringing about a situation which an officer of greater experience would have avoided, and which placed a number of young soldiers in a situation they did not understand and which formed the basis of an alleged offense they did not intend to commit. Nothing could be clearer than that these men did not intend to mutiny, but were merely seeking to ascertain from their commanding officer why they had been placed in arrest and whether or not it was proper for them to attend drill while their status of arrest had not been terminated but only suspended during the period of the duty which they had been directed to attend. One of these noncommissioned officers, Sergt. Maher it appears in the evidence, attempted to speak to the battery commander on this subject when he approached them near the battery office. The testimony is that the captain told his sergeant to shut up; that he would do the talking; and that all the others remained quiet until marched off to the guardhouse. It appears of record that Capt. Harvey did not ask or order these men to join their battery for duty after he had explained to them the nature of their conduct, but merely waited a brief interval for action on their part. This not being taken within the minute or so during which he so waited, he formed them in line and marched them to the guardhouse and turned them over to the officer of the day. Clearly the conduct of the men was not mutiny, but the conduct of the officer, under all the circumstances indicated and of the fact that he was dealing with young and inexperienced men, was not creditable to him or to the service of which he forms a part.

6. The conduct of this case on the part of the prosecution is also open to grave censure. Indeed, the atmosphere that seems to have surrounded the trial of this case was such that it is impossible to believe that the defendants were given a fair trial. The conduct and attitude of the judge advocate (the court permitting) were arbitrary, oppressive, and injurious to those rights of the defendants which the law attempts to guarantee. His conduct was calculated to intimidate the witnesses for the defense to the point where the whole course of justice is rendered uncertain. (Record, pp. 30, 34, 36, 38, 40, 44, 45, 49, 54.) Fairness of trial suffered; fundamental rights were trespassed upon.

7. Inasmuch as the substantive offense charged does not appear to have been made out by the evidence of record; inasmuch, further, as the situation in which these men were placed and out of which charges against them grew resulted largely from the unwarranted and capricious conduct of a very youthful and inexperienced officer; and inasmuch, finally, as the record of this case impresses me with the belief that the accused were not given a fair trial, in the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 6.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, November 15, 1917.

Memorandum for the Chief of Staff:

1. The court, consisting of seven field officers and five captains, embraced what I believe to be a personnel well above the average of military courts.

The accused were represented by counsel, presumably of their own choice, and, so far as appears, this counsel has made no claim to the reviewing authority that the men did not receive a fair trial.

2. While the conduct of the case is, as stated by the Acting Judge Advocate General, open to grave censure, yet it can not be assumed that the members of this court were influenced thereby in their action.

It is also true that Capt. Harvey, the battery commander, is an officer of very short service and that his actions in this case were ill-advised, unjustifiable, and clearly demonstrate his unfitness to command men.

3. Stripped of all technicalities, the evidence is believed to show conclusively that these men, in concert, deliberately refused and failed, and persisted in failing, to obey the orders of their commanding officer, and that they did this in the presence of the entire battery. There is, and can be no doubt as to the fact that they fully understood that they were disobeying orders.

4. The action proposed by the Acting Judge Advocate General, would, in my judgment, have a most demoralizing effect upon discipline. It is believed that these men are guilty of an offense which, under normal peace conditions, would be very serious and which, under war conditions, is even more so, but, in view of the actions of the battery commander, and of the whole circumstances surrounding the case, the exercise of clemency by the Secretary of War appears to be demanded.

It is suggested: First, that the unexpired portion of their sentences be remitted and that they be restored to duty as privates, if same can be done legally; Second, that Capt. Harvey be severely reprimanded and that he be relieved from command of Battery A, Eighteenth Field Artillery, if this has not already been done, and that he be assigned to duty elsewhere.

J. L. CHAMBERLAIN.

EXHIBIT 7.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 13, 1917.

Memorandum for the Chief of Staff.

Subject: Authority of the Judge Advocate General to set aside the judgment of conviction and the sentences of a general court-martial.

1. Herewith are the proceedings of a general court-martial held in the cases of 14 enlisted men of Battery A, Eighteenth Field Artillery, charged with the crime of mutiny, together with an opinion of the Judge Advocate General, which concludes as follows:

* * * "In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, and recommend that the necessary orders be issued restoring each of them to duty."

2. The case is one involving a most flagrant miscarriage of justice. The men were tried for mutiny, when they had not committed mutiny. They were driven into the situation which served as a basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery, who had barely two years' service. In fair justice to the men accused there should and it would seem must be some agency with power to restore them to the status possessed by them prior to their trial and conviction.

3. It is hardly within the province of the undersigned to express an opinion as to the legality of the action indicated by the Judge Advocate General, but a careful reading of the extended opinion of the Judge Advocate General on the exercise of his power under section 1199, Revised Statutes, and submitted under date of November 10, 1917, for the personal consideration of the Secre-

tary of War, leads to the conviction that his authority to act in the manner stated is undoubted.

4. When officers of the Regular Army of long experience, such as most of the members of the general court-martial in question, commit such grave errors as are indicated in this case, how much more danger of miscarriage of justice will there be at this time when the great majority of officers are new to the service and have little knowledge of military law or procedure. Therefore, in this time of war, it is considered highly expedient, as well as legal, that the power of the Judge Advocate General as herein expressed be fully exercised.

5. One criticism to the concurrence in the opinion of the Acting Judge Advocate General is that it may detract from the disciplinary power of commanding generals, who have the power to convene court-martials and review their proceedings; but in view of the fact that injustice has been done in the case in question as well as in many preceding cases, it is believed that the rendering of such justice is paramount and should overrule the above consideration.

6. Action is recommended as indicated in memorandum for The Adjutant General herewith.

R. I. REES,
Lieutenant Colonel, General Staff.

NOVEMBER 13, 1917.

Memorandum for The Adjutant General.

Subject: Trial by court-martial of 14 enlisted men of Battery A, Eighteenth Field Artillery.

The Secretary of War directs that the action indicated in paragraph 7 of the attached memorandum from the Acting Judge Advocate General be executed and that the necessary orders be issued restoring to duty each of the men convicted and whose sentences were approved in General Court-martial Order No. 1174, Headquarters Southern Department, Fort Sam Houston, Tex., October 16, 1917.

_____,
Major General, Acting Chief of Staff.

EXHIBIT 8.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 17, 1917.

Memorandum for the Chief of Staff:

The accompanying papers are the record of the trial by general court-martial of certain enlisted men of Battery A, Eighteenth Field Artillery, on the charge of mutiny, in violation of the sixty-sixth article of war.

There are two phases of the case which merit careful consideration before the action taken and recommended by the Acting Judge Advocate General is carried into effect.

First. The conclusion of the court.

Second. The action of the Acting Judge Advocate General under section 1199, Revised Statutes of the United States.

The court that tried these men was composed of 12 officers of experience. The senior member of the court was commissioned in 1884 and the junior member in 1904.

Mutiny is defined in Digest of Opinions of the Judge Advocate General as follows:

"Mutiny at military law may be defined to be an unlawful opposing or resisting of lawful authority, with intent to subvert the same, or to nullify or neutralize it for the time * * *."

The first sergeant, through whom the battery commander gave his orders, testified as follows:

Q. What signal did you give the battery to form?—A. Two long blasts of the whistle, sir.

Q. Was that signal generally understood by every member of the battery?—A. Yes, sir.

Q. Did any of these accused men respond to that signal and fall in for drill?—A. Corpl. Parks was out in front of the battery sitting down.

Q. Did he remain with the battery from that time until the battery went out to drill?—A. No, sir.

Q. What did he do after that time?—A. He went over and joined the rest of the noncommissioned officers in front of the orderly room.

Q. After you gave these noncommissioned officers the instructions of the battery commander to the effect that they were released from arrest for the purpose of attending drill, were they given ample opportunity to join the battery and go to drill?—A. Yes, sir.

Q. What occurred, Sergeant, immediately after you gave them this order that they were released from arrest and would attend drill?—A. When I delivered the order, sir, all the noncommissioned officers filed out of the office, sir, and went down the other side of the orderly room. I lined the battery up, and there were no noncommissioned officers present. I went back over to the noncommissioned officers and asked them if they were going to drill or not, to which they replied: "No, not under those conditions of being released for just until after drill. * * *"

The action of these soldiers as testified to by the first sergeant, if true, seems to constitute mutiny as defined in Digest of Opinions as quoted above.

The lack of judgment of the battery commander undoubtedly created the situation which finally resulted in the trial of these soldiers. I can not, however, see that this lack of judgment on the part of the battery commander can justify the act of these soldiers. It may, in my judgment, very properly be taken into consideration in awarding sentence by the court and in action by the reviewing authority.

Gen. Ruckman, an officer of long experience, approved the sentence as awarded by the court. These men are at United States Disciplinary Barracks, Fort Leavenworth, Kans., serving sentence.

The proceedings of the court were sent to the office of the Judge Advocate General of the Army, who reviewed the case and concludes his review by stating:

"* * * In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, * * *."

Section 1199, enacted in 1866, provides as follows:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The Judge Advocate General concludes that the word "revise" in the above quoted statute gives him the authority to set aside and completely nullify the action of a court composed of 12 experienced officers, which action had been approved by the department commander.

The definition of "revise" as given in Standard Dictionary is as follows:

"To go or look over or examine for the correction of errors or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review."

As the authority exercised by the Judge Advocate General has, within the memory of the officers of the Army now on the active list, been exercised only by persons who have by law authority to exercise command, it is believed the intent of the law should be beyond question before such radical action is taken. It is believed doubtful if Revised Statutes, 1199, gives the Judge Advocate General the authority he has taken.

The justification for this belief is also found in the Articles of War, contained in the act of June 3, 1916. Articles 46 and 48 provide who have authority to carry into execution the sentence of courts-martial.

The commanders mentioned in articles 46 and 48 have power to disapprove a finding.

Nowhere in the Articles of War can I find the Judge Advocate General is given authority to nullify the acts of courts-martial. As the action of the Judge Advocate General, if permitted to stand, establishes a precedent which may be far-reaching in its bearing on the discipline of the Army, I recommend his action be disapproved.

If it be decided that the Judge Advocate General has the legal right to take the action taken, there is nothing to do but restore these men to duty and order them back to their battery.

I recommend that Capt. Harvey be informed that the evidence in the record of the trial of these men discloses the fact that he was entirely lacking in judgment

in his handling of the men of his battery, not only at the time they committed the offense but the evening before; that the lack of discipline in his battery, which he must have known, should have indicated to him the necessity for absolute justice and the exercise of wise discretion in the handling of the situations that arose; and that he has been woefully lacking in some of the qualities his superiors have a right to expect of all officers, and especially one who has had the advantage he has had.

WM. S. GRAVES,
Colonel, General Staff, Secretary.

EXHIBIT 9.

OFFICE OF THE JUDGE ADVOCATE GENERAL,
December 11, 1917.

Restoration to duty of Pvts. Clarence Maheu, Calvin Kunselman, Ralph K. Green, Wilfred Kight, John J. Poryanda, Frank J. Adamik, John Van De Vooren, Andrew J. Brown, Roger Graves, Rupert P. Orndorff.

The COMMANDING OFFICER UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.

1. Upon the review in this office of the cases against the above-named men, it was held that they had been improperly convicted of the offense charged. The Secretary of War has directed that these men upon their written application therefor, be restored to duty as promptly as possible to complete their enlistment.

2. Will you please, therefore, inform them of this fact and direct each of them should he so desire to make written application for restoration to duty and forward same through proper channels for the action of the Secretary of War.

E. H. CROWDER,
Judge Advocate General.

DECEMBER *22, 1917.*

The COMMANDING OFFICER UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.

Refer to my letter of December 11 in which you were requested to inform the men therein named that upon their written application to that effect they would be restored to duty. Please advise me by wire as to present status of this matter.

E. H. CROWDER,
Judge Advocate General.

OFFICIAL:

_____ _____,
Major, Judge Advocate.

[Telegram.]

FORT LEAVENWORTH, KANS.,
December 23, 1917.

JUDGE ADVOCATE GENERAL,
Washington:

Written applications for restoration to duty of men named in your letter December 11 mailed Adjutant General December 17.

RICE.

[War Department telegram—Official business.]

WASHINGTON, *December 27, 1917.*

COMMANDANT UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans.:

Reference my telegram December 22 and letter December 11, Adjutant General's Office advises applications of men in question received and approved. Kindly advise me by wire when they are restored.

CROWDER,
Judge Advocate General.

Official:

E. G. DAVIS,
Major, Judge Advocate.

[Telegram.]

FORT LEAVENWORTH, KANS.,
January 5, 1918.

JUDGE ADVOCATE GENERAL,
Washington:

Men named your letter December 11 restored to duty January 5.

RICE.

EXHIBIT 10.

MARCH 12, 1919.

Questions by Gen. J. L. Chamberlain; answers by Gen. E. H. Crowder.

Q. When you took up the duties of Provost Marshal General, leaving Col. Bethel, the senior officer in the Judge Advocate General's Office, in charge, was he given any specific instructions relative to the administration of the office in so far as it related to matters of military justice, or did he automatically take up those duties as senior officer?—A. The latter. As senior in the office he assumed charge, leaving it to be determined by the volume of work developed just how much of the burden of Judge Advocate General I could carry consistent with performing the duties of Provost Marshal General. The record of opinions in the office should disclose during this period the amount of attention I gave to the office of Judge Advocate General.

Q. About the middle of August, 1917, when Gen. Ansell became the senior assistant in the office of the Judge Advocate General, did he receive from you, either in writing or verbally, any specific instructions as to the administration of the office or did he assume those duties and perform them automatically as the senior officer?—A. The latter. I do not recall issuing any instructions on the subject at all, either orally or in writing.

Q. In November, 1917, at the time that the order appointing Gen. Ansell Acting Judge Advocate General, was revoked, at which time you resumed active charge of the office, did Gen. Ansell receive from you or, so far as you know, from the Secretary of War or the Chief of Staff any instructions relative to the duties which he should perform in the office, or did he automatically continue, as he had been doing before, his duties as senior officer?—A. I do not recall any such instructions, and his initiative and authority, previously exercised as senior officer, remained undisturbed. (Added.) The records of the office as to opinions signed and as to court-martial cases acted upon will disclose whether there are any exceptions to be made to the statement I have just recorded—that the initiative of Gen. Ansell was left undisturbed as senior officer.

Q. In some paper which I have recently examined I found a statement made by Gen. Ansell to the effect that upon the occasion referred to the duties and responsibilities pertaining to reviews of courts-martial and other matters connected with the administration of military justice were placed in the hands of his junior in the office, and that from that time until his departure for Europe—in fact, until his return from Europe—he had no responsibilities respecting the administration of military justice.—A. My recollections as to that are in substantial accord to the testimony of Col. E. G. Davis, then lieutenant colonel or major, who has covered this point fully in his testimony before the Senate Military Committee, and is to the general effect that he continued with undiminished authority in handling all matters arising in the section of military justice, and determined himself what cases would be passed up to me as needing my personal attention.

Q. Who was the junior officer to whom Gen. Ansell referred?—A. It must be Col. E. G. Davis.

Q. Upon his return from Europe, in July, 1918, did Gen. Ansell resume his duties in the office as the senior officer automatically, or did he receive from you definite instructions relative to the scope and limitations of such duties?—A. He received no such instructions and resumed his former relations with the office automatically.

Q. The point I wish to make is: Between November, 1917, and July, 1918, except during his absence in Europe, was Gen. Ansell performing his duties as senior officer in exactly the same unrestricted manner that he was prior to and subsequent to those dates?—A. Precisely; so far as I had any knowledge and I am not on my warning that he considered that he was in any way re-

stricted, except in so far as he was restricted by the decision of the Secretary of War in section 1199 of Revised Statutes.

Q. He never actually exercised the authority which, under that statute, he claimed?—A. I believe that in more than a dozen cases which remained he exercised and promulgated decisions under that statute.

Q. This without having submitted for interpretation that statute to higher authority?—A. I think while the proper consideration of that was pending that he exercised the authority in probably more than a dozen cases.

Q. Do you recall whether or not the case of the noncommissioned officers of Field Artillery at El Paso was the first case in which he exercised or attempted to exercise this function?—A. I do not.

Q. From the records it appears that the order of November, 1917, detailing Gen. Ansell as Acting Judge Advocate General was never actually issued, or at least given publicity, but that it was a suspended order. Have you any knowledge as to the reasons for that peculiar way of handling an order; by whom, or why?—A. Why it was marked for suspended publication nearly two months later?

Q. Yes.—A. I have no idea. [Gen. Crowder, referring to this suspended order.] There was a memorandum of November 3 (I think the dates are accurate) from Gen. Ansell to me which was delivered to me in my office at Seventh Street, reciting the reasons why he thought an order should be issued under the provisions of 1132 of the Revised Statutes, relieving me from duty as Judge Advocate General and detailing himself as Acting Judge Advocate General. A reply from me on November 4, the following day. On November 6 the submission by him to the Acting Chief of Staff of a formal order necessary to accomplish my relief and his detail, concluding with the statement that he was authorized to say that the issue of this order would be agreeable to Gen. Crowder. The subsequent procedure I am not clear about, for I understand informally that the order submitted by Gen. Ansell was referred to the General Staff and reported back in a modified form. Whatever the facts may be an order of this character was approved by the Acting Chief of Staff, Gen. Biddle, and marked for suspended publication. The first information that I had that such an order had been approved and marked for suspended publication was about November 17, when I was informed of the fact by the Secretary of War in person, the occasion being an interview on the question of appointments to be made in the Judge Advocate General's Department. The Secretary of War passed to me a list of recommendations submitted by Gen. Ansell and asked me if I approved of that list. I glanced over it and saw that most of the names thereon were names of men whose qualifications I had personally inquired into. I handed the list back to the Secretary with the statement that the appointments recommended were, I thought, all well-qualified men. He then acquainted me with the fact that he had asked Gen. Ansell whether the list had my approval; that Gen. Ansell left his office and came back with a copy of this order that had been approved by the Acting Chief of Staff, Gen. Biddle, relieving me from duty as Judge Advocate General and detailing Gen. Ansell. It was the first information the Secretary said that he had had of the issue of such an order. At that time I acquainted the Secretary of War with the correspondence that had passed between Gen. Ansell and myself, recommending the issue of such an order, and my statement to Gen. Ansell in my letter that he should take the matter up directly with the Secretary of War in his own way. I said that, *directly the Secretary of War*, realizing that the question of who should be bureau chief was one upon which the Secretary of War would expect to function personally, and especially as to who should be Judge Advocate General, in view of the large civic jurisdiction of the Judge Advocate General not handled through the Chief of Staff at all. There followed some conversation between the Secretary of War and myself, which was supplemented, I understand, by conversation between the Secretary of War and the Acting Chief of Staff, Gen. Biddle, who undertook to state his personal recollection of the statements made by Gen. Ansell to him at the time he submitted this order. At that time I did not know that there was a written memorandum of submission of the question by Gen. Ansell to the Acting Chief of Staff, which written memorandum settles in a very definite way the representation that Gen. Ansell made to the Chief of Staff in regard to my personal attitude toward the subject.

Q. Did you have any conversation with Gen. Biddle at this time relative to the issuing of this order?—A. I do not remember; I may have had some conversation with him but do not recall it.

Q. So you do not know what lead to that peculiar situation of this suspended publication?—A. No. I remember that the impression that it made upon me was that perhaps that was customary at that time because of the rush of business and was a concession made to the Government printers as to the amount of printing they had to do.

* * * * * * *

MARCH 12, 1919.

Q. What was the proceedure in the four death cases of the A. E. F.?—A. When the records came in they went to the Disciplinary Section and were reviewed therein by Maj. Rand, a lawyer of New York City, recently commissioned in the Judge Advocate General's Department, who is a man who had had extensive criminal practice and was associated with Jerome of New York City in the trial of very important criminal cases which claimed the attention, at that time, of the Nation. He turned in a review all too brief, I thought, sustaining the proceedings. When the review reached me I remarked, to whom I can not say now, that the review in such an important case should be drawn in such a way as to show all the facts of the case necessary to convince the reader that the case had been examined with thoroughness and great care. I am here depending altogether upon my recollection, as I have not attempted to go through the records of the office and follow the administration as accurately as I might do after conference with the officers who were directly charged with this important line of work. Anyway, the cases went back with instructions for a more exhaustive review and when that review came up I was still in a doubtful frame of mind, not because of the insufficiency of the record, although I would have been glad if the cases had been tried with greater attention to that greater detail which the serious character of the offenses required, but I had before me a letter sent directly by the commanding general of the A. E. F., asking that the sentences should be approved and that he be given authority to carry them into execution. I carried the final review up to the Chief of Staff in person and had quite a prolonged conference with him.

The interview between us commenced with a statement by me to him to this general effect: "Gen. March, you are but recently returned from the theater of war. You know the conditions there first hand; you may have some personal knowledge of these cases. The extreme sentence of death has been imposed. They are the first sentences of this character to reach us from the theater of war. I know the public interest that will attach to these cases, and the public attention that will be given to any execution of these sentences. I know also how serious a thing it is to disagree with the commanding general of an army in the field on a question of this character. I have brought the cases to you with a report which concludes without a recommendation, because I wish to leave this question of clemency to be settled after conference between you and me; and later on between us and the Secretary of War. It would be very unfortunate if we went before the President in such a matter with divided counsel if it is possible for us to reach a common conlusion."

Gen. March then and there expressed a view on the cases. The extent to which he claimed personal knowledge of these cases is now dim in my mind, but that he knew generally of conditions over there and proclaimed that he had that knowledge is very distinct in my mind. He announced then his view that the sentences should be approved and carried into execution and that was his final state of mind at the end of the conference. This led me to leave the review with him in the form in which I submitted it, that is, with the statement that the records were sufficient but without a recommendation as to the course which should be pursued respecting clemency.

I returned to my office and gave orders to an officer, whose name I do not recall, but I think was Col. A. E. Clarke, to visit The Adjutant General's Office and obtain from the records of that office some facts respecting the ages of these boys, the length of their service, the amount of training they had, and also to examine our own office to see how many cases of disobedience of orders or sleeping on post had come up from the theater of war in which sentences of less severity had been given, and to examine generally into the rank of punishment. When Col. Clarke (if he were the man) reported back I was advised of the fact that two were under 20 and two under 19 and that they had short periods of service.

I was apprised of the fact that there had been other cases coming up from the theater of war, trials for these same offenses, and that in none of the cases had the death penalty been awarded. I was left in doubt in my own mind

as to whether the officers of the A. E. F. had given these newly enlisted soldiers instructions as to the gravity of these two offenses—disobedience of orders and sleeping on post. Later, I submitted the case to Gen. Ansell, expressing to him the feeling that I had about the execution of these sentences, and asking him to submit me a memorandum. This he did in rough form, which is now in the hands of the Inspector General, and which speaks for itself. My recollection is that he submitted this memorandum on the 15th day of April, 1918, and that on the following day I submitted a supplemental memorandum on these cases incorporating what I thought was the essential part of Gen. Ansell's memorandum to me. My recollection is that the Chief of Staff had not reported on the cases and that when he did report he referred, not only to my original memorandum but to my supplemental memorandum.

In addition to what is stated here I had more than one conference with the Secretary of War as to the final action to be taken upon these cases in respect of clemency. My recollection is that there were three such conferences and that in the last conference between us the Secretary of War stated that his mind was made up not to execute the death penalty, notwithstanding Gen. Pershing's urgent request for authority to carry the sentences into execution.

Q. After his return from France Gen. Ansell issued certain written instructions to the boards which were operating in the department. Did any reason exist whereby he could not have issued those instructions or similar instructions in regard to any matters in the office, except during his absence?—A. No; as I was consulted on the orders he issued.

MARCH 17, 1919.

Q. Do you know the source of the article which appeared in the New York World on January 19?—A. I do not, but I do know personally the man under whose name it was published, Roland Thomas. He called at my office with the Secretary of War's visiting card, and asked to see a limited number of records, which I do not think exceeded six. I gave him access to the records and in the course of an hour, and I think in less than half an hour, he returned with two court-martial orders in his hand. At that time Col. Reed, the head of the Section of Military Justice, was in my office conferring with me. Mr. Thomas said, "Here is a confirmation of what the papers are saying, namely, that there is grave inequality of punishment. I have in my hand," he said, "two court martial orders showing proceedings in two cases tried in two courts at Camp Dix, N. J., both trials for desertion. In one case the man is sentenced to 25 years; in the other to six months." Col. Reed said to him, "Let me see those orders." Thomas passed them to Col. Reed, who looked at them and handed them back. That ended the conversation and Mr. Thomas went out and a few days thereafter there appeared the article in the New York World, occupying the entire first page of the editorial section of the Sunday edition, January 19, and invaded two or three interior columns. I think the total length of time he was in my office did not exceed an hour, and I feel it did not exceed half an hour.

Q. What were your conclusions relative to the preparation of that article?—A. That it was prepared by some one who had access to the records of my office.

Q. You stated that you had no knowledge as to the identity of the person who prepared it?—A. Absolutely not.

Q. Is there anyone in your office who would be in a position to possess that information?—A. Every officer on duty in the office would have access to those records and they would be particularly available to officers at work in the Section of Military Justice and in the clemency section.

Q. Then an article of that kind could be prepared by any one of those officers without it being apparent to anyone else that they had prepared same?—A. I should say so; and add that it might be prepared by any clerk who had the ability to write such an article.

Q. It appears in the evidence that at the time Gen. Ansell was appointed brigadier general, and by virtue of such appointment became senior assistant in the office of the Judge Advocate General that he received certain verbal orders of the Secretary of War regarding his duties. Have you any knowledge regarding that subject?—A. I do not recall ever having heard of such orders being issued, but would not undertake to recollect every conversation I had at that time.

Q. In the order, which was issued on November 8, assigning Gen. Ansell to duty as Acting Judge Advocate General appears this statement: "The verbal

orders of the Secretary of War, dated August 11, designating Brig. Gen. Samuel T. Ansell judge advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record." Have you any knowledge as to those verbal orders?—A. None at all.

Q. My attention has been called to a mimeographed office memorandum of April 10, 1918, signed by you (shown later that same was not signed) as Judge Advocate General, in which is described the organization of the office, in which you are shown as Judge Advocate General; Gen. Ansell as Assistant Judge Advocate General, and Col. Mayes as assistant. It shows Col. Davis as the Chief of the Division of Military Justice. Was that memorandum showing and confirming the organization which then existed or did that memorandum effect a reorganization of the office and refer to a condition which went into effect at that time?—A. I do not recall a memorandum of that date and would like to see it. I do not recall the issue of this memorandum of organization. I can not recall that the subject of the new organization of the Judge Advocate General's Department was discussed at that particular time. My impression is that this is simply confirmatory of an existing organization which had been in force for an indefinite period prior to the date of same, April 10, 1918. I might be permitted to state that Col. Davis, who, as Chief of Military Justice Division, handled probably 50 per cent of the papers coming into the office, and would be able to give definite information as to how long this had been in force. It seems to me that in the rather cursory reading of his testimony before the Military Committee of the Senate recently he covered that point.

Q. Do you happen to recall the approximate date upon which Col. Davis was assigned to that section?—A. He was almost the first choice and had been on duty in that section continuously for a period of several months, except a few weeks that he was absent on a tour of inspection, during which he was substituted by Col. A. E. Clarke. Their administration of the section must cover a period of several months prior to April 10.

Q. In Gen. Ansell's testimony before the Senate committee, he states, "Referring to the occurrences of November, 1917. I was then told that matters of policy, such as this, would not be passed upon by me, except after conference with my chief." In answer to Senator Frelinghuysen's question "Who told you that," Ansell answered, "The Secretary of War; probably also the Chief of Staff and the Judge Advocate General. I know the Secretary of War told me and it was generally understood." Have you any knowledge on that subject; any more than you have already stated?—A. No; except that immediately following my interview with the Secretary of War about November 17, when we discussed the merits of applicants proposed for appointment in the Judge Advocate General's Corps, the Secretary of War addressed me a letter, which I presume you have or can get, discussing these questions, expressing his desire that I give more time to the duties of Judge Advocate General and less time to the duties of Provost Marshal General. In the conference about November 17 he made it very clear that he never contemplated that I would not be in charge of the policies. Referring to Gen. Ansell's memorandum of November 10, 1917, here was the thought: I got my first knowledge of the memorandum of November 10 from the Secretary of War on November 23 or 22, and not at the interview of November 17. I never asked the Secretary of War where that memorandum or brief of Gen. Ansell's of November 10 had been. I have allowed myself to believe that it was one of a large number of papers, perhaps, submitted to him near the date of it, but not taken up by him about the time he spoke to me about it, to wit, November 22 or 23. I say he supposed I was in charge of the office because he apparently had learned on November 17 from a conversation with Gen. Ansell of the issue of the Executive Order No. 1132 of the Revised Statutes, detailing him to Judge Advocate General, the effect of which was to relieve me. Now, it would be strange and something to be explained if he had that brief of Gen. Ansell's dated November 10 on his desk when he talked on November 17, and had not mentioned it. I never, as I say, made any inquiry, but just assumed that he had not yet reached it and that he reached it some time before November 22 or 23, when we had our conversation about the brief.

Q. And after November 17?—A. Yes.

Q. What are the circumstances which led to the clemency board?—A. The whole thing is set forth in correspondence between my office and the Secretary of War direct. My recollection is that during the period I was absent in Chicago, to which place I had gone at the direction of the Secretary of War to address the Selective Service Board, Ansell turned in some kind of a report, which I found on my desk when I returned, and which led to additional cor-

respondence, as the result of which the board of clemency was organized. That correspondence ought to show who made the original suggestion. It should be said that the time for convening such a board of clemency came with the signing of the armistice and resulting conditions approximating those of peace, the matter of convening the clemency board is interwoven in my mind with the further admonition that I caused to be issued about this time to all courts and reviewing authorities, that as to offenses committed after November 11 they would observe the limits of punishment established in the peace-time order, except in those cases where the courts and reviewing authorities could enter on record a valid reason why the punishment imposed in a particular case was in excess of those limits. Both orders were intended to operate in the same field of excessive punishment, the last one mentioned to take care of offenses after the signing of the armistice, and the other to reduce the war-time punishments, that is, punishment for offenses committed during the period of war, to peace-time standards. In my inquiry as to why an order had not been issued of admonition to courts on the question of courts I learned that such an order had been suggested by Col. Read, of my office, to Gen. Ansell in September of 1918, the purpose of the order being to admonish courts, particularly in this country, that less severe punishment would meet the situation here. Col. Read, in giving me this information, submitted the rough of the suggestion he at that time laid before Gen. Ansell, with the remark that Gen. Ansell regarded the suggestion favorably but that at his direction the memorandum went to a board of review to be passed upon there, and that the board of review, probably because of excessive work, had never reached it and the matter died. I used this memorandum that Col. Read said he submitted to Gen. Ansell in September of 1918 in preparing the order admonishing courts in regard to quantum of punishment respecting offenses committed after the signing of the armistice.

Q. Gen. Ansell states, "In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, which would control the commanding general, unless overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and the propriety in procuring the issue of this order is being subjected to question."—A. I am familiar with the memoranda and draft of order which was submitted by Gen. Ansell upon this subject, and also have the draft of the order signed by Col. Brown, General Staff, after revision. I find that the order, as it reads, is quite different from the memorandum which he submitted, and that the order as it reads practically gives to the senior officer of the Judge Advocate General's Department over there the very authority which Gen. Ansell's interpretation of 1199 would have given. Yes, it is the very authority, but sought to be deduced from other sources.

Q. Have there been any circumstances connected with that which do not appear in the records?—A. Yes. Shortly after returning to duty in the office there came to my desk a request from France, from the Board of Review, an opinion rendered upon a controversy which had arisen between Gen. Bethel, the judge advocate on Gen. Pershing's staff, and Gen. Kreger, in charge of the branch office of the Judge Advocate General's Department in France. It appears that Gen. Kreger, in a number of cases, had returned the proceedings under General Order 84, and under the mandatory provisions of that order the reviewing authorities were compelled to give effect to Gen. Kreger's decision. This was the subject of protest and dissent by Gen. Bethel. In looking over the opinion and the accompanying correspondence I learned for the first time of the issue of General Order 84. I sent for Gen. Ansell and asked him as to the origin of that order. He replied that the order had originated with him. I then asked why he had not conferred upon the Judge Advocate General at Washington the same power that he conferred upon the Acting Judge Advocate General in France with respect to the right given by that Order No. 84 to control the action of reviewing authorities. He answered, "I did not think I could get such an order through." My next question was, "Do I understand that this Order No. 84 was issued by the department unwittingly?" His reply I remember with the greatest accuracy, "Most unwittingly." He explained that when the proof of the order came to the office for revision certain of the officers who had helped him consider the original order desired to make some amendments therein, but that he had limited the amendments to what could be described as "verbal changes," so that he might, if interrogated by the Assistant

Chief of Staff, say that there had been no change in the substance. The conversation between us terminated about that point. It was late in the afternoon. The next morning when I returned to the office I dictated a memorandum order to Gen. Ansell asking him to put in writing what he had said to me the evening before, and, as I remember, said with respect to the order having been issued unwittingly by the War Department. In the early morning hours he came to me with my order in his hand and said he did not quite understand why I asked him to put that conversation in writing; that I ought to understand that it would be embarrassing for him to do so. He seemed wrought up and to some extent agitated. It was evident that he desired to avoid compliance with order, and I said to him, "All right, Ansell, just so you and I have the same recollection of the conversation." He left, carrying the order with him, and it must be in his possession. I think he had both the original order and the copy. I have no copy in my office. I expected him to leave the order with me, but he carried it away with him and I never called upon him to return it.

Q. Did you have any conversation with the Secretary of War relative to the issuing of that order?—A. I heard a conversation between the Secretary of War and Gen. Ansell on the subject.

Q. What was its purport?—A. His statement differed in some respects from the statement that I have made. The point was not pursued because during the conversation the Secretary of War stated that he was not particularly concerned with words used, but had sought the interview with Gen. Ansell for the purpose of ascertaining his real state of mind and that he would not indulge in any controversy about words. Gen. March was present at that interview.

Q. Was that order allowed to stand after the Secretary of War and Gen. March learned of it?—A. No immediate action was taken for a few days, perhaps three or four; the matter was left undecided, and the next information I had came from the Secretary of War himself when we were leaving the War Department Building one afternoon. He said to me at that time, "I think the best thing to do is to discontinue the branch office in France and that will automatically repeal General Order No. 84." I said to him, "That will require serious consideration." The next information I had was from a telegram which had gone to Gen. Pershing discontinuing the office in France and revoking all orders and instructions relative thereto. That order was not issued upon my recommendation. A proposition is now pending to revive the office in France, but with the jurisdiction similar to the jurisdiction of the office here, minus this extraordinary power to control the action of the reviewing authorities, respecting their action upon sentences.

Q. Referring to the statement that this order is now being opposed by the Commanding General in France you state, "But it is not true to a certain extent that the order is being opposed by the Commanding General, American Expeditionary Forces. On the contrary no word of opposition is on record nor can any trace be found." In the files which you handed me to-day I found some cablegrams which refer to that matter. I have not been able to digest them and am not able to question you very intelligently on that subject, but in looking it over it occurred to me there were cablegrams which appeared to be a protest to the Judge Advocate General.—A. The protest you found in that bunch of papers, if you could call it a protest, was against the establishment of the office in the first instance, and refers to a prior date and not to this action at all. Our first orders over there were misunderstood and for more than a month action was delayed in establishing the branch office in France, and some inquiries came up which indicated that Gen. Pershing thought it was unnecessary for an army operating in the theater of war. In respect of this last incident, which was a recent incident, the Commanding General of the Expeditionary Forces was not brought into the controversy between Gen. Bethel and Gen. Kreger, in any way that I noticed. It seemed to be a difference between two lawyers and two Judge Advocates General, which had been certified for the opinion of the Judge Advocate General of the Army. I am not aware that Gen. Pershing had the matter brought to his attention and in that sense I made this statement.

Q. Will you state briefly the sequence of events in connection with the four soldiers who were sentenced to death in France?——A. You are entitled, in answer to that question, to an exact chronology of executive administrative action on those four cases, which I am not in a position to give, not having recently revived my recollection by recourse to documents, but can state with substantial accuracy.

Q. Are there documents on file which will cover that completely?—A. Yes; it can be covered completely, but there is an accusation which I saw in the Congressional Record which I would like to cover in my reply. I well remember my first attitude on the question of those four death cases that came up from France. Of course we had administered the office in expectation that cases of that character would reach the office. My attention was particularly attracted to them by the fact that the commanding general of the Expeditionary Forces had addressed a letter to the Judge Advocate General upon the question of execution of the death penalty, and favored the execution of these four men.

The first review of the cases was prepared, as I now recollect, by Maj. Rand, who was working in the section of military justice. Maj. Rand's place at the bar of New York City is an enviable one. He had participated in the trial of notable criminal cases and his assignment, when he reported to be commissioned, was naturally to this section of military justice. He found no prejudicial error in the cases and stated that the findings and sentences were legal. I was dissatisfied with the review because of its brevity, feeling certain that we would not have a proper record of official action unless the review of the case was exhaustive and furnished evidence to the reader that the cases had been carefully considered. My recollection is that in the first draft the unusual letter to which the commanding general of the Expeditionary Forces had sent in was not incorporated. That was one thing that I asked to have incorporated. Just how many times the report was rewritten I can not say, but I remember to have taken the precaution of submitting the records to Col. Wigmore, who was on duty in the office of the Provost Marshal General, and not at all in the office of the Judge Advocate General, for examination, because of the fact that he is the author of a standard work on evidence. I received back a report from him that the records were sufficient to sustain the findings and sentence. I then took the record to the Chief of Staff and submitted them in person, expressing to him the doubt that was in my mind as to the final action to be taken respecting clemency, but assuring him that the best talent in my office pronounced them free from error. I said to him on that occasion that it would be unfortunate to pass up to the President a divided opinion on these cases if by conference we could reach agreement. I referred to the fact that he had but recently returned from the theater of war and knew the conditions there, and might have some knowledge of these four cases. We had a conference, in which he revealed himself of the opinion that the four men should be executed in accordance with the recommendation of the commanding general of the American Expeditionary Forces. I said to him, "If that is your final opinion I shall leave this report with you, to go to the President." I did so and returned to my office. Almost immediately after my return I called in Col. Clarke and asked him if it would not be wise to search the records of The Adjutant General's Office and ascertain some facts outside of the record which might weigh in the final disposition of the cases. I mentioned to him that I particularly desired to know the ages of these men, their earlier environment, and also to search the records of our own office to see how similar cases had been handled in the theater of war. About this time I walked into Gen. Ansell's office and talked about the cases to him and asked him if he would not make an examination of those records and give me his opinion. He made up his report and submitted it to me in the rough, that is, it was not reduced to the form that reports are when intended to be part of the records of the office, but was the kind of report that is given to the head of the office upon request.

Q. Gen. Ansell states, referring to the report which he made upon his return from Europe, "This report never reached the Secretary of War."—A. That statement, as I recollect, first came to my knowledge reading the Congressional Record of recent date, and I think in a letter addressed by Gen. Ansell to Mr. Burnett. I came to the office and asked for the report, as I did not remember to have seen it. It is true that upon his return Gen. Ansell came to my office and submitted a document which contained a number of observations which he had made, explaining that it was more or less a personal document which he thought I would be interested in. I read it over and it is the one that has been used a lot in public addresses, but he never brought in his official report and I did not see any official report until I instituted this search after noticing the Congressional Record. I called upon the executive officer to get me the report. He brought a carbon copy. I asked him where was the original. He said he did not find it on file. Later he came to me with the original and said it was on Gen. Ansell's desk. It was addressed to me, as I remember,

not to the Secretary of War. I do not remember to have ever seen that report and know he never personally submitted it as he did the informal report. It is true that up to that time it had never been forwarded to the Secretary of War.

Q. In connection with the publication of the order of November 8, designating Gen. Ansell as Acting Judge Advocate General, were you, upon any occasion, present during interviews between the Secretary of War and Gen. Biddle?—A. I have a little difficulty in answering the question. My difficulty arises from the fact that I am unable to say whether the Secretary of War repeated to me some conversation that he had with Gen. Biddle, or whether I talked directly with Gen. Biddle. I do recall that I heard about this time that Gen. Biddle said that Gen. Ansell had represented to him that we were agreed that the order should be issued and when he was asked more particularly he remarked, "That is the impression I have carried with me all this time; but if Gen. Ansell should say he did not use language of that kind I would not be in a position to dispute him." I dismissed the thing from my mind after I saw the memorandum Gen. Ansell handed Gen. Biddle and which contained what Gen. Biddle had seemed to recollect.

Q. That, then, was Gen. Biddle's explanation presumably of why he passed that order without bringing it to the attention of the Secretary of War?—A. Yes.

Q. What connection had Gen. Ansell with the revision of the Articles of War?—A. I was appointed Judge Advocate General on February 15, 1911. I do not remember just when Gen. Ansell came to duty in the office, but I think in 1913. The first revision was submitted, I think, in May of 1913, but it was in the course of preparation for probably a year before it was submitted. During that time if I had any correspondence with Gen. Ansell it ought to be on the files of the office or he may have copies of it. I have no recollection of the correspondence to which he refers. It would be quite natural for me to consult him, for his legal abilities had attracted my attention even prior to the date of my appointment. If he has the correspondence it ought to answer your question. I have not it. I have two or three memoranda that he submitted to me upon articles which we were considering for incorporation in the code. I have them put away in a file in which I keep all of the official memoranda I receive from Gen. Ansell that do not become final—of which there are a large number—just as for every other subordinate in my office. I have looked them over to see what evidence they contain and find two or three memoranda on two or three different Articles of War. I have asked questions of the men in the office at the time whether they heard these views of Gen. Ansell's respecting the scope of revision. I have not learned of any expression he made at that time of dissent from the revision on account of it being lacking in scope and fundamentals. I think I have covered your question. He never was aggressive in making suggestions and had the most ample opportunity, because not until 1916 did we get the revision through. Perhaps he has memoranda which would elucidate the subject further.

Q. In that connection can you give the names of the officers of the Judge Advocate General's Department who were especially engaged in the revision of those Articles of War?—A. Gen. Kreger took a more active part than anyone else. He helped on them while yet acting judge advocate of the Department of Colorado. Later, when he entered upon duty in the office, he frequently was consulted thereon. The office was a small one in those days and I do not instantly recall the names of others, but perhaps I could with the aid of my records. Gen. Kreger ought to be asked about this, because his recollection would be better than my own.

EXHIBIT 11.

MARCH 15, 1919.

Questions by Gen. CHAMBERLAIN.

Q. Give your name and rank.—A. James Easby-Smith, colonel, judge advocate, at present on duty in the office of the Judge Advocate General.

Q. How long have you been on duty?—A. I was commissioned a major in July, 1917; on account of being chairman of the district board of the District of Columbia I did not accept same until September 20, 1917, and was then ordered to report to the Judge Advocate General personally for assignment to duty. Was ordered to duty in the Office of the Provost Marshal General, and remained on duty in that office until November, 1918, when I went abroad, and on my return from abroad, the latter part of February, 1919, I was verbally as-

signed to duty in the office of the Judge Advocate General's Department, where I am now on duty.

Q. On what date in November, 1918, did you leave the Provost Marshal General's Office for France?—A. I left on the 27th of November.

Q. During the month of November, 1917, an order issued but never published to the Army, relieving Gen. Crowder from his duty as Judge Advocate General and detailing Gen. Ansell as Acting Judge Advocate General. Some controversy has arisen as to the issuance of that order and other matters directly connected with same. What information, if any, have you bearing upon that subject?—A. Well, I knew nothing about the issuing or revocation of the order, except by hearsay, until recently, when, in compliance with Gen. Crowder's directions, I inspected and secured copies of the original papers in the Office of The Adjutant General, and Chief of Staff, but I can fix certain dates on account of the following facts: On a date, which I have now fixed as Saturday morning, November 24, 1917, Gen. Crowder, whose office was in the room next to the one I occupied, called me in early in the morning, probably 8.30, and handed me a brief, which had been submitted by Gen. Ansell to the Secretary of War dated November 10. I am very positive that he had received it from the Secretary only the day before for the reason that he stated to me that he had been very much humiliated the evening or night before by the Secretary handing him the brief and stating in surprise that it was remarkable that Gen. Crowder had been Judge Advocate General for nearly two terms and was not aware of a power residing in his office. Lieut. Col. Johnson, subsequently brigadier general, was then executive officer, and either at the beginning or during the interview, Gen. Crowder called him in. The general stated that the brief proceeded from false premises and directed Gen. Johnston and myself to drop everything in hand and devote ourselves exclusively to the investigation of the facts and the authorities, and to prepare a memorandum brief for him covering the entire subject. I immediately began an investigation of all statutes by which Congress had vested appellate power in any court or courts, and Gen. Johnston began an investigation of the records of the Judge Advocate General's Office. The next day, which was Sunday, November 25, Gen. Johnson and I spent practically the entire day in the record office of the Office of the Judge Advocate General, examining the action which had been taken by Gen. Holt and others from the sixties to the eighties. Sunday night and the next day, Monday, the 26th, Gen. Johnston and I prepared the reply brief and submitted it to Gen. Crowder, either Monday, the 26th, or Tuesday, the 27th of November. The way that I fixed the dates is that Gen. Crowder's reply brief is dated November 27 and I am positive that the day that I worked in the record office was Sunday, because no one was present in the office and the offices were closed, so that I fixed the date when the brief was handed Gen. Crowder as Friday, November 23, the evening or night before he handed it to me.

By hearsay, which, I think, however, is admissible as establishing the fact itself of receiving information, I will state that when Gen. Johnston and I were working on the brief he then told me that Gen. Ansell had, a short time before, obtained an order from the Chief of Staff appointing him Acting Judge Advocate General and that the order had been revoked by the Secretary. By this information I am sure that the revocation had been made prior to the submission of the brief by the Secretary to Gen. Crowder.

Q. Have you any knowledge or have you heard anything to indicate the date upon which that brief was submitted by Gen. Ansell?—A. No; I have no information concerning that. I observed this concerning the brief: It is dated November 10, 1917. Gen. Ansell has stated, as I understand, that he submitted it on November 10. Before submitting the brief to the Secretary Gen. Ansell passed it around among the officers on duty in the office of the Judge Advocate General. They all signed their concurrence except Col. H. A. White, who signed it at the end with the explanatory words after his signature, "As explained." In the file of the papers is a memorandum dictated and signed by Col. White, under date of November 12, 1917, not concurring altogether with the opinions expressed in the brief. It must therefore have been subsequent to Col. White's memorandum of November 12 that the brief was submitted, but as to the exact date I have no information.

Q. On this occasion, did Gen. Crowder say anything regarding the circumstances under which the order detailing Gen. Ansell as Acting Judge Advocate General had been secured?—A. Gen. Crowder never mentioned that subject to me until within the last two or three weeks. At the time he handed the brief to me he made no reference whatever.

Q. You had no knowledge of it?—A. No; the statement above was made by Gen. Johnston.

Q. Have you any further information which would throw any light upon this controversy which has arisen?—A. I don't think I have any information except what I have gained by an examination of the records recently.

Q. What recent examination have you made?—A. As soon as I returned from France about three weeks ago, Gen. Crowder asked me to examine the entire controversy and all files and records bearing upon the questions in the controversy, and I have done so, submitting a number of memoranda. I also secured, with some difficulty, through Col. Kelly, of The Adjutant General's office, who I think obtained it from the office of the Chief of Staff, the entire file relating to Gen. Ansell's designation as Acting Judge Advocate General and his revocation, but the only information which I ever had, until recently, was in regard to the preparation of the brief, and my presumption is that Gen. Crowder designated Gen. Johnston and myself to prepare this brief because of the fact that all of the officers on duty in the Judge Advocate General's office had signified their concurrence with Gen. Ansell's views. Being in the Provost Marshal General's office I never at any time was connected with the working of the Judge Advocate General's office, except in that one instance.

Q. Referring to the memorandum you mention and to the memoranda which you prepared and the information which you have obtained from the records, has that practically all been embodied by Gen. Crowder in his statements in the courts?—A. I have not seen his statements in the courts, but I presume they have, because they were all submitted to him, and on each occasion he stated that it was exactly what he wanted, and I assume he was satisfied. Some of these memoranda were signed by me and some were not. I don't think, General, I know anything of any importance, except that I feel sure I can definitely fix the dates.

* * * * * * *

Col. SMITH. I have been on the most intimate and friendly terms with Gen. Ansell for many years. Shortly after my work on the brief in November, 1918, he exhibited a very distinct coldness toward me, which, however, seemed to have worn off by the time I went abroad, in November, 1918.

Upon my recent return to this office I met him in the corridor. My son, who had also been to France and also well acquainted with Gen. Ansell, was with me. To my great astonishment he attempted not to speak to me on that occasion and his manner was observed by my son.

About two hours later, on the same day, I passed him in the corridor with Maj. Howard Adams, who had also been on duty in the office of the Provost Marshal General, and Maj. Adams spoke out directly and said, "Good morning, General." Gen. Ansell looked us full in the face and passed on without changing expression.

On two occasions since then, within the past week, Gen. Ansell has declined to speak to me, although of course I have made no approach after the previous rebuffs.

Maj. Adams had nothing to do with it, but during the whole of his time in the Army was chief of one of the divisions in the office of the Provost Marshal General.

I state as hearsay that nearly every officer who was on duty in the office of the Provost Marshal General and closely associated with Gen. Crowder, who are now on duty in the Judge Advocate General's office, has stated to me that Gen. Ansell has ceased to speak to him or recognize them.

Q. Do you know whether this change of attitude on his part has been exhibited in connection with any of the officers who had been connected with the Judge Advocate General's office prior to the return of Gen. Crowder to the office?—A. I know those men very slightly and have no occasion to converse with them.

EXHIBIT 12.

MARCH 17, 1919.

Brig. Gen. Lytle Brown, General Staff, after being duly sworn, testified as follows:

(Questions by Gen. Chamberlain.)

Q. In August, 1918, on account of certain differences of opinion between Gen. Bethel and Gen. Kreger, regarding the force of recommendations made by Gen. Kreger in his review of court-martial cases, Gen. Kreger submitted

a memorandum for the amendment of General Orders No. 7. Gen. Ansell, in submitting the case, states:

"I concur in the views of these two officers, and recommend that the above designated order be amended, so as to require all cases tried by general courts-martial in the American Expeditionary Forces to be reviewed, to determine their legality, by the Acting Judge Advocate General of those forces. The substantive portion of a draft of order to accomplish this purpose is herewith."

In the draft of that order it was provided that "any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General." That order, as it was drawn and issued, gives to the Acting Judge Advocate General in France a power far greater than that possessed by the office of the Judge Advocate General in Washington, and gives, practically, the power which would have been given had Gen. Ansell's interpretation of section 1199 been accepted. You are familiar with that matter?—A. Yes, sir.

Q. It has been claimed that it was never intended to give such a power. Have you any information on that subject.—A. No; I have no information that would clear that up exactly, but I am of the opinion that the object of the order was thought mainly to be the throwing into the Judge Advocate General's office in France the business which should be attended to there without the necessity of referring it to Washington—thereby lightening the work of the Judge Advocate General's office in Washington and expediting the work of the administering of justice in the Expeditionary Forces. I am quite certain that the study of the question in War Plans Division did not contemplate giving authority in France which would be denied the Judge Advocate General's office in Washington. I have no information whatever that anything was inserted in this order surreptitiously. The War Plans Division simply approved the order, as written by Gen. Ansell's office, and sent it up, in the exact form as written by Gen. Ansell, to the Chief of Staff. It was approved in the Chief of Staff's office and sent to The Adjutant General for issue, exactly as it was sent up to that office. In examining the order which was issued, I find that there is a slight change of phraseology, but to my mind not a change of meaning from the order as it left the War Plans Division and passed through the office of the Chief of Staff. There is a slight alteration in the wording and phraseology of the order issued by The Adjutant General. Why that change occurred is not known by me.

Q. Was it that change which made it incumbent upon the commanding general to carry out the recommendations of the Acting Judge Advocate General?—A. The change involved that part of the order. There was a change in the phraseology of that part of the order.

Q. Have you copies of those papers that would——A. I have the copy, the one duplicate copy of the paper that went from the War Plans Divisions to the Chief of Staff, and there signed by Gen. McIntyre and stamped with Gen. March's name and sent to The Adjutant General for issue.

Q. Please have a copy made and sent to this office.

EXHIBIT 13.

WASHINGTON, D. C., *March 17, 1919.*

Col. Beverly A. Read, Judge Advocate General's Department, Chief Military Justice Division, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your full name, rank, organization, and duties?—A. Beverly A. Read, colonel, Judge Advocate General's Department, Chief Military Justice Division.

Q. How long have you been chief of this division?—A. I succeeded Col. Davis in April, 1918.

Q. Before or after Gen. Ansell left for Europe?—A. After, sir. Col. Mayes was in charge of the office at the time I was detailed in charge of that division.

Q. (Inspector handed Col. Read a copy of an office memorandum dated April 10, giving the organization of the Judge Advocate General's office.) Are you familiar with that?—A. Yes, sir.

Q. Do you know by whom that was prepared?—A. No, sir.

WASHINGTON, D. C.,
March 25, 1919.

Recall of Col. Read.

Q. After the record in the case of a court-martial leaves the board of review, what becomes of it?—A. In those cases in which an opinion in writing is rendered, as, for instance, cases involving the dismissal of an officer, death penalty, confinement in the penitentiary, and in all cases of conscientious objectors, the opinion is prepared by the officer to whom the particular case is assigned. After he completes this opinion he submits it to the chief of his section of the Military Justice Division. If the chief of that section concurs in that opinion it then goes directly to one or the other of the two sections of the board of reviews. The section of the board of review concerned then considers that opinion in the same way that an appellate court would consider a case sent to it. If the board of review concurs in that opinion it then goes directly to me as Chief of the Military Justice Division, and also as ex-officio member of each of the two sections of the board of review. The opinion I may say is still in the rough. If I concur with the board then the opinion, the rough copy, is marked "final" and it is written up, initialed by me, and if the case is one for submission to the President, as, for instance, the death penalty or dismissal, or in the infrequent cases where the President himself is the convening authority, the record goes from my office to the Judge Advocate General or the Acting Judge Advocate General, and if he concurs he signs the opinion and it then becomes the opinion of the office and is forwarded to The Adjutant General for transfer, through the Chief of Staff, to the Secretary of War and finally to the President. In those cases which come up to this office under General Orders, No. 7, we deal directly with the reviewing authority concerned through the Judge Advocate General or the Acting Judge Advocate General, as the case may be.

In connection with the review of the records of trials by general court-martial in my division there is, I think, one defect or weakness in the system which, however, it seems to me, is practically unavoidable and irremediable. It is this. The vast majority of the cases which come there for review are those cases in which the dishonorable discharge imposed has been suspended and those cases in which no dishonorable discharge was imposed. No written review is prepared in those cases unless an error is discovered which necessitates either setting the conviction aside or returning the record for certain corrections. Here is where the defect lies to which I refer. The determination as to whether or not the record is legally sufficient to support the findings and sentence is practically a matter submitted to the judgment of the officer who reviews the record and the chief of that particular section of the Military Justice Division. If they should make a mistake, that mistake may not be discovered at all or may only be discovered when the case comes before the office again on an application for clemency, and the record is then again reviewed. There have been occasional instances of this sort, very infrequent, but there have been instances. Of course, with efficient lawyers—officers—to reveiw the record a mistake of this sort should never occur, but we have not always been fortunate in having all high-class lawyers in those lower sections of the division. It would be impracticable, of course, for the hundreds and thousands of records of general courts-martial which come to this office to be reviewed by the boards of review as at present constituted. As a matter of fact, it is almost a physical impossibility for them to keep up with the work, which is properly assigned to them as it is.

Q. That you regard as the only defect?—A. Yes, sir.

Q. This, however, is more a defect of possible personnel than of system?—A. Yes, sir; except that if the sentence is found to be illegal, the accused would have served part of an illegal sentence before the error could have been discovered and the necessary corrective action taken.

Q. When you became Chief of the Division of Military Justice, in the spring of 1918, did you receive any specific instructions relative to the handling of the cases under General Orders No. 7?—A. No, sir.

Q. What was your policy in those cases?—A. Shortly after I took charge of the Division of Military Justice I called Col. Mayes's attention to the fact that quite a number of the sentences imposed by general courts-martial appeared to me to be unnecessarily severe. He agreed with me, but stated that under the provisions of General Orders No. 7 he thought we were limited to passing on the legal sufficiency of the records and that we had no authority under that order to make any suggestions to reviewing authorities as to the quantum of

punishment. He suggested, in view of this limitation, that whenever a record was reviewed and the officer reviewing it considered the punishment too severe he should make a memorandum to that effect, signed by himself, and appended to the record, so that it would immediately attract attention when the question of clemency arose in that particular case. This was the practice of the office. After Gen. Ansell returned from France and assumed charge of the office, I called his attention to this matter and told him the construction which Col. Mayes had placed on General Orders No. 7, and which construction I thought was legally correct. We discussed the matter several times, according to my recollection. Gen. Ansell agreed that the sentences in some instances were too severe, and, if possible, some action should be taken to bring about a correction in this regard. Shortly after he instituted the first board of review, which was in the early part of August, 1918, the board of review and I discussed the question with Gen. Ansell on one or more occasions, and my recollection is that he some time thereafter verbally directed that in those cases which came before the board of review we would not be bound by the limitations of General Orders No. 7 in regard to recommending a reduction in the amount of punishment if we thought that course advisable. Some time in October, however, he formally reduced those instructions to writing and we have followed that procedure since that time. I subsequently informed him that the instructions did not authorize me to make recommendaions in the matter of the reduction of sentences in those cases which did not go before the board of review and he directed me to follow the same policy with regard to all cases where we thought the punishment was too severe. I might say right here that in August I submitted a memorandum to Gen. Ansell, prepared by myself, in which I called attention to some of the sentences which, in my judgment, were too severe, and in that memorandum I referred to the fact that while I thoroughly realized that the sentences were imposed by courts for their disciplinary effect and that the courts in imposing the sentences were actuated undoubtedly by the very highest motives, I thought, among other things, that unduly severe sentences might have an unfortunate effect upon the civil community. Some time after I submitted this memorandum we had a conference in Gen. Ansell's room, at which were present, if my memory is correct, Gen. Ansell, Col. Morrow, Col. Davis, Col. Power, Col. Keedy, Col. Tucker, and myself. There may have been one or two others, but I am not sure. My recollection is that it was understood at that conference that a general order be prepared by me for submission to the War Department, with the recommendation that it be promulgated to the service, calling attention to the severity of certain sentences and suggesting the advisability, particularly within the continental limits of the United States, of adhering wherever possible to the limits-of-punishment order, which, of course, was no longer in effect, it being limited to a time of peace. In September I prepared this general order myself, and submitted it to the board of review, but due to the overwhelming press of work before that board, and which press of work subsequently necessitated the formation of the second board of review, they were unable to complete consideration of the proposed general order prior to the time of the armistice on November 11.

Q. Is General Orders No. 84 in force at the present time as originally promulgated, so far as you know?--A. No, sir; it has been amended within the last few days by a new general order, which was prepared in my division under my direction. It was in force up until the time when the branch office was discontinued, March 1.

Q. In one of his statements Gen. Ansell says that about 10 days before his appearance before the Military Committee, all matters pertaining to military justice were ordered routed in other channels. What was the situation with regard to that?—A. I would have no information about this. All papers leaving my division normally go to the Judge Advocate General or the acting head of the office direct.

Col. B. A. READ. Referring to Gen. Ansell's report, made as a result of his observations while in Europe, I personally have never seen that document. On at least two occasions, once while the office of the Judge Advocate General was located in the State, War, and Navy Building, and once since the office was moved to the Mills Building, he has assembled the officers of the department and delivered a talk, or lecture I presume it might be called, based on his experiences and observations abroad. At the time he delivered the lecture in the Mills Building I recall that he had in his hand and read from a typewritten document which contained, from its appearance, a good many pages, and this

WASHINGTON, D. C.,
March 25, 1919.

Recall of Col. Read.

Q. After the record in the case of a court-martial leaves the board of review, what becomes of it?—A. In those cases in which an opinion in writing is rendered, as, for instance, cases involving the dismissal of an officer, death penalty, confinement in the penitentiary, and in all cases of conscientious objectors, the opinion is prepared by the officer to whom the particular case is assigned. After he completes this opinion he submits it to the chief of his section of the Military Justice Division. If the chief of that section concurs in that opinion it then goes directly to one or the other of the two sections of the board of reviews. The section of the board of review concerned then considers that opinion in the same way that an appellate court would consider a case sent to it. If the board of review concurs in that opinion it then goes directly to me as Chief of the Military Justice Division, and also as ex-officio member of each of the two sections of the board of review. The opinion I may say is still in the rough. If I concur with the board then the opinion, the rough copy, is marked "final" and it is written up, initialed by me, and if the case is one for submission to the President, as, for instance, the death penalty or dismissal, or in the infrequent cases where the President himself is the convening authority, the record goes from my office to the Judge Advocate General or the Acting Judge Advocate General, and if he concurs he signs the opinion and it then becomes the opinion of the office and is forwarded to The Adjutant General for transfer, through the Chief of Staff, to the Secretary of War and finally to the President. In those cases which come up to this office under General Orders, No. 7, we deal directly with the reviewing authority concerned through the Judge Advocate General or the Acting Judge Advocate General, as the case may be.

In connection with the review of the records of trials by general court-martial in my division there is, I think, one defect or weakness in the system which, however, it seems to me, is practically unavoidable and irremediable. It is this. The vast majority of the cases which come there for review are those cases in which the dishonorable discharge imposed has been suspended and those cases in which no dishonorable discharge was imposed. No written review is prepared in those cases unless an error is discovered which necessitates either setting the conviction aside or returning the record for certain corrections. Here is where the defect lies to which I refer. The determination as to whether or not the record is legally sufficient to support the findings and sentence is practically a matter submitted to the judgment of the officer who reviews the record and the chief of that particular section of the Military Justice Division. If they should make a mistake, that mistake may not be discovered at all or may only be discovered when the case comes before the office again on an application for clemency, and the record is then again reviewed. There have been occasional instances of this sort, very infrequent, but there have been instances. Of course, with efficient lawyers—officers—to reveiw the record a mistake of this sort should never occur, but we have not always been fortunate in having all high-class lawyers in those lower sections of the division. It would be impracticable, of course, for the hundreds and thousands of records of general courts-martial which come to this office to be reviewed by the boards of review as at present constituted. As a matter of fact, it is almost a physical impossibility for them to keep up with the work, which is properly assigned to them as it is.

Q. That you regard as the only defect?—A. Yes, sir.

Q. This, however, is more a defect of possible personnel than of system?—A. Yes, sir; except that if the sentence is found to be illegal, the accused would have served part of an illegal sentence before the error could have been discovered and the necessary corrective action taken.

Q. When you became Chief of the Division of Military Justice, in the spring of 1918, did you receive any specific instructions relative to the handling of the cases under General Orders No. 7?—A. No, sir.

Q. What was your policy in those cases?—A. Shortly after I took charge of the Division of Military Justice I called Col. Mayes's attention to the fact that quite a number of the sentences imposed by general courts-martial appeared to me to be unnecessarily severe. He agreed with me, but stated that under the provisions of General Orders No. 7 he thought we were limited to passing on the legal sufficiency of the records and that we had no authority under that order to make any suggestions to reviewing authorities as to the quantum of

punishment. He suggested, in view of this limitation, that whenever a record was reviewed and the officer reviewing it considered the punishment too severe he should make a memorandum to that effect, signed by himself, and appended to the record, so that it would immediately attract attention when the question of clemency arose in that particular case. This was the practice of the office. After Gen. Ansell returned from France and assumed charge of the office, I called his attention to this matter and told him the construction which Col. Mayes had placed on General Orders No. 7, and which construction I thought was legally correct. We discussed the matter several times, according to my recollection. Gen. Ansell agreed that the sentences in some instances were too severe, and, if possible, some action should be taken to bring about a correction in this regard. Shortly after he instituted the first board of review, which was in the early part of August, 1918, the board of review and I discussed the question with Gen. Ansell on one or more occasions, and my recollection is that he some time thereafter verbally directed that in those cases which came before the board of review we would not be bound by the limitations of General Orders No. 7 in regard to recommending a reduction in the amount of punishment if we thought that course advisable. Some time in October, however, he formally reduced those instructions to writing and we have followed that procedure since that time. I subsequently informed him that the instructions did not authorize me to make recommendaions in the matter of the reduction of sentences in those cases which did not go before the board of review and he directed me to follow the same policy with regard to all cases where we thought the punishment was too severe. I might say right here that in August I submitted a memorandum to Gen. Ansell, prepared by myself, in which I called attention to some of the sentences which, in my judgment, were too severe, and in that memorandum I referred to the fact that while I thoroughly realized that the sentences were imposed by courts for their disciplinary effect and that the courts in imposing the sentences were actuated undoubtedly by the very highest motives, I thought, among other things, that unduly severe sentences might have an unfortunate effect upon the civil community. Some time after I submitted this memorandum we had a conference in Gen. Ansell's room, at which were present, if my memory is correct, Gen. Ansell, Col. Morrow, Col. Davis, Col. Power, Col. Keedy, Col. Tucker, and myself. There may have been one or two others, but I am not sure. My recollection is that it was understood at that conference that a general order be prepared by me for submission to the War Department, with the recommendation that it be promulgated to the service, calling attention to the severity of certain sentences and suggesting the advisability, particularly within the continental limits of the United States, of adhering wherever possible to the limits-of-punishment order, which, of course, was no longer in effect, it being limited to a time of peace. In September I prepared this general order myself, and submitted it to the board of review, but due to the overwhelming press of work before that board, and which press of work subsequently necessitated the formation of the second board of review, they were unable to complete consideration of the proposed general order prior to the time of the armistice on November 11.

Q. Is General Orders No. 84 in force at the present time as originally promulgated, so far as you know?--A. No, sir; it has been amended within the last few days by a new general order, which was prepared in my division under my direction. It was in force up until the time when the branch office was discontinued, March 1.

Q. In one of his statements Gen. Ansell says that about 10 days before his appearance before the Military Committee, all matters pertaining to military justice were ordered routed in other channels. What was the situation with regard to that?—A. I would have no information about this. All papers leaving my division normally go to the Judge Advocate General or the acting head of the office direct.

Col. B. A. READ. Referring to Gen. Ansell's report, made as a result of his observations while in Europe, I personally have never seen that document. On at least two occasions, once while the office of the Judge Advocate General was located in the State, War, and Navy Building, and once since the office was moved to the Mills Building, he has assembled the officers of the department and delivered a talk, or lecture I presume it might be called, based on his experiences and observations abroad. At the time he delivered the lecture in the Mills Building I recall that he had in his hand and read from a typewritten document which contained, from its appearance, a good many pages, and this

document I understood was his report. That, so far as my knowledge goes, is the only time I have ever seen it. I know nothing about what disposition he made of it, or to whom he submitted it, or in fact if he submitted it to anyone.

Q. Have you any knowledge of a second document prepared by him in connection with his trip; possibly a summary of this report.—A. No, sir.

EXHIBIT 14.

WASHINGTON, D. C.
March 17, 1919.

Lieut. Col. Edwin R. Keedy, Judge Advocate General's Department, member of the board of review, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your full name, rank, organization and duty?—A. Edwin R. Keedy, Lieutenant Colonel, Judge Advocate General's Department, member of the board of review.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. One year; I reported as I recall, on the 16th day of March, 1918.

Q. Have you been on duty in the Division of Military Justice during this entire period——A. Yes. The only time I was absent was when I was ill for a short time with influenza.

Q. How long have you been a member of the board of review?—A. From its inception, which so far as I recall was August 9, 1918.

Q. You are doubtless familiar with the controversy which is in progress and the various accusations and charges which have been made in the public press and elsewhere regarding the administration of military justice. Of course military justice in the Army is being administered under the laws as they exist and not as they might exist. Under the laws as they exist I would like your opinion as to the manner in which military justice is administered in the Army, as learned by you in the review of cases which come before you from all parts of the Army.—A. I would like to speak first, sir, of one thing which impressed me very much as a civilian coming into the service, by way of the distinction between the review accorded a case by court-martial and one accorded a civil case. In the civil courts there is an appeal or a review of the case only upon the initiative of the accussed and only when he is able to employ counsel to appeal the case for him. In the military law, as a result of the provisions of 48th A. W. and G. O. No. 7, as well as section 1199 of the Revised Statutes and the orders promulgated under it, in all cases by general court-martial the accused is given a review of his case automatically and as a matter of right. When the sentence involves death, the dismissal of an officer, or the unsuspended dishonorable discharge of a soldier, this review takes place before the sentence is ordered to be carried into execution. In other cases the review occurs subsequently to such action. All records of trial by general court-martial are sent to the Judge Advocate General's Department and are there reviewed. In cases where the sentence is death, dismissal, or dishonorable discharge, unsuspended—the only cases regarding which I am in a position to express an opinion—I think that taken as a whole the results of the administration of the law by the Judge Advocate General's Office during the time I have been connected with it have been at least as satisfactory so far as justice is concerned as the administration of justice by the appellate civil courts; in fact I would say on the whole I would think it has been more satisfactory because of this fact that as actually administered the Judge Advocate General's Department did a very great deal toward reducing sentences which civil appellate court has no power to do.

Since the creation of the board of review the Judge Advocate General's Office has had in effect a real appellate court. The functions of that board of review have been those of an appellate tribunal, and that phrase was used in the order promulgated by the then acting Judge Advocate General creating that board of review, and so far as I recall the recommendations of that board of review have been approved by the Judge Advocate General and acting Judge Advocate General in all but one or two cases; and what is even more significant so far as results are concerned, the recommendations of this board of review as approved by the Judge Advocate General have been approved by the Secretary of War and the President in practically all cases. So far as has been brought to my attention and so far as I recall, the recommendations of

the board of review, as approved by the Judge Advocate General or the acting Judge Advocate General, have been overruled by the War Department on questions of law in but two cases. So far as recommendations for the commutation of punishment are concerned I only recall six cases where the Secretary of War did not concur in the recommendation of the Judge Advocate General's Office, and in three of those the President followed the recommendation of the Judge Advocate General's Department instead of that of the Secretary of War. In cases where the commanding general of a territorial department, camp, or tactical division has had the power under the Articles of War to carry the sentences into execution, the recommendations of the Judge Advocate General's Department, so far as I know, have been followed in practically all cases. I only recall three cases—there may be more but I don't think there are many more—where the recommendations were not followed.

Q. You refer now to the review of those cases here?—A. Yes, sir. The great significance of the fact that the recommendations of the Judge Advocate General's Department have been followed in practically all cases is this, that although under the law the Judge Advocate General has not the power to act by way of disapproval of findings and the reduction of sentences, yet practically the views of his office have been carried into effect. Where the sentence imposed by court-martial has involved death or the dismissal of an officer, or penitentiary confinement of either an officer or an enlisted man, the review of the record of trial in the office of the Judge Advocate General, since the creation of the board of review, is, in my opinion, as thorough as that ordinarily accorded the record of trial in a civil appellate court. To be exact, the character of the review is substantially this: The record of trial is assigned to a judge advocate, whose duty it is to read and study the record, considering both questions of law and also the question as to whether or not the evidence is sufficient to support the finding. After he has thus studied the record he prepares what is known as an original report, which is in the form of an opinion, such as is written by an ordinary appellate court. This report and the record are then studied by the immediate superior of the officer who prepared the report. The second officer, after such study, expresses his opinion as to whether the report prepared by the first officer is correct. After this has been done the record of trial, with the report prepared by the first officer and the opinion thereon by the second officer, goes to the board of review, where it is carefully studied by three officers acting in practically the same capacity as an appellate court. After the board of review has determined on what in their opinion is the proper disposition of the case and has prepared or had prepared the complete review of the record, this review and the record are then presented to the head of the Military Justice Division, who expresses his opinion thereon. The record of trial and the review then go to the Judge Advocate General or the Acting Judge Advocate General for his consideration. Since the Judge Advocate General has returned to duty in many instances the opinion of the former Acting Judge Advocate General has been secured by the Judge Advocate General. If the record of trial is one which requires the action of the President, the record of the trial, with the review thereon, is sent to the Secretary of War for his opinion; afterwards to the President. If the record of trial is one to be acted upon by the commanding general of a department, camp, or tactical division, the Judge Advocate General communicates his opinion with the proper recommendation to such commanding officer, and, as has beeen said above and may be appropriately repeated here, the recommendations of the Judge Advocate General have been in practically all cases carried into effect by the particular official whose power it is, under the Articles of War, to carry sentences of general court-martial into final execution. During my service in the office of the Judge Advocate General I have been impressed by the fact that both the Judge Advocate General and the Acting Judge Advocate General have constantly had in mind the proper administration of the military law. So far as has come to my notice both of these officers have striven to secure an administration of the military law that will produce real justice, and in my opinion this result has been substantially accomplished, at least so far as the cases which have come under my observation are concerned.

Q. What apparent effect, if any, has this controversy had upon the question of coördination and teamwork in the Military Justice Division of the office?—A. In my opinion the morale of the office has been very little affected. Of course it is natural that there should be a certain amount of discussion—that is inevitable—but I am unable to see that the real work of the office has been impaired to any appreciable amount. The head of the Military Justice Divi-

sion, who, in my opinion, is an officer of unusual ability and capacity, has insisted at all times that no discussions in connection with this controversy should affect the work of his division. I think I can speak with assurance that it has in no way colored the action of the Chief of the Military Justice Division or the board of review acting under him.

Q. To what extent, if any, has this controversy and the discussions to which you refer affected the personal relations of the officers in the Division of Military Justice?—A. So far as I know, sir, they have not affected the relations of the officers of the Military Justice Division at all.

Q. Have they, so far as you know, in any degree affected the personal relations between Gen. Crowder or Gen. Ansell on the one side and other officers in the department on the other?—A. It is rather difficult, sir, for me to answer that question because most of the communications which either Gen. Crowder or Gen. Ansell have had with the Military Justice Division have been through the head of the division, Col. Read, and I have seen no indication that the relations which existed before this situation arose have been affected by it. I have not noticed that either Gen. Crowder or Gen. Ansell have given any signs of personal feeling toward any officer growing out of the situation in question.

Q. You are familiar with General Order No. 7, 1918, and General Order No. 84?—A. Yes, sir.

Q. Are you familiar with the discussions of memoranda from the Judge Advocate General's Office preliminary to and in connection with the issuance of General Order No. 84 amending General Order No. 7?—A. I don't believe, sir, that I can say that I am. I was present at a discussion with reference to the provisions of General Orders, No. 84, but I recall no information by way of memoranda or otherwise preliminary to that except one case, where the commanding general of the S. O. S. refused to follow the recommendation of the Acting Judge Advocate General in France.

Q. Just what do you mean by saying you were present at a conference regarding the wording of General Order No. 84?—A. I was present at a conference where, as I recall it, some time ago the question of phrasing an order that would go somewhat further than General Order No. 7 had gone would be prepared, and the question of my connection with it was merely as to the matter of phraseology, as to how it should be worded to accomplish what it actually did accomplish. In regard to the question as to whether there was anything of a surreptitious character in connection with the preparation of that order, I recall that somebody made a suggestion as to whether Gen. McIntyre would agree with that, and in my own mind, as it was published, I concluded that Gen. McIntyre approved it.

Q. Do you associate that particular case with a discussion relative to the wording of General Orders, No. 84?—A. That I do not recall, sir. That was the very thing, sir, I was trying to recall, and I can't recall whether that was the exact occasion or whether they were simply coincidental.

Q. Is there anything further you wish to state?—A. In addition to the experience of one year as an officer in the Judge Advocate General's Department, I have been interested in the administration of the civil criminal law for about 13 years and have made studies of the systems in England, Scotland, and Canada, the first two under the auspices of the then President Taft. From the point of view of a civilian lawyer with this experience, as well as an officer of the Judge Advocate General's Department, I have been impressed with the fact that both Gen. Crowder and Gen. Ansell have done a great deal to improve the administration of the military law and toward making it accord in spirit and in practice with the improvements in the administration of the civil criminal law. For instance, Gen. Crowder, I understand, was responsible for the creation of the disciplinary barracks, with the accompanying feature of the indeterminate sentence, and also instituted the system of the suspended sentence, both the indeterminate sentence and the suspended sentence being regarded as propressive of modern penology. Gen. Ansell during my connection with the office on a number of occasions referred to the fact that in instances courts-martial were imposing what seemed to be excessive sentences and took steps in so far as he had the power or influence to bring about the reduction of such sentences. To my mind, although I speak with certain hesitancy regarding this particular matter, the creation of the board of review by Gen. Ansell, giving it in effect and in substance, though of course not officially, the functions of an appellate tribunal, was a most important step toward securing an adequate review of court-martial records and toward the consequent securing of substantial justice in the administration of the military law. In view of these considerations it

has been a source of regret to me that any apparent controversy between these two officers, with the consequent publicity and distorition of the facts relative to the administration of the military law, particularly by reason of the fact that they have been unduly featured by the newspapers, has appeared to cast doubt and discredit upon the real achievements of these two officers.

Q. As the result of your experience in the office of the Judge Advocate General, is it your belief that the interpretation placed upon section 1199 produced an effect which in any degree lessened Gen. Ansell's efforts to improve conditions in so far as he was able to do so under the law?—A. Of course, I am unable to answer as to whether or not the matter referred to lessened his efforts. I can only say that I was impressed by his efforts.

WASHINGTON, D. C.,
March 18, 1919.

Recall of Lieut. Col. Edwin R. Keedy.

Q. What was the date that you went on duty in the Division of Military Justice?—A. About March 16, 1918.

Q. In the application of the provisions of General Order No. 7, did any material change take place upon the occasion of Col. Davis being relieved as chief of that division and Col. Mayes taking up those duties?—A. After I reported for duty to the Military Justice Division, Col. Davis remained as chief of that division for only about four weeks. During that period I did not have the opportunity to form any definite opinion as to the policy pursued by Col. Davis with reference to recommendations under General Order No. 7, as most of the cases reviewed by me during that period had been forwarded for action of the President under the forty-eighth article of war. During the time that Col. Mayes was Acting Judge Advocate General I formed the general opinion that the function of the Judge Advocate General under General Order No. 7 was considered to be less broad than had previously been considered. After Gen. Ansell returned from France and became Acting Judge Advocate General, he undoubtedly gave a more liberal interpretation, so far as the function of this office was concerned, to General Order No. 7 than had been given it under Col. Mayes. More extensive recommendations were made to commanding generals by Gen. Ansell under General Order No. 7 than had been made by Col. Mayes.

As the result of my subsequent inspection of opinions signed by Col. Davis during the period that he was chief of the Military Justice Division, I have formed the opinion that Col. Davis felt more free to make recommendations under General Order No. 7 than did Col. Mayes.

EXHIBIT 15.

WASHINGTON, D. C.,
March 17, 1919.

Lieut. Col. Charles C. Tucker, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, inspector general, and testified as follows:

Q. What is your full name, rank, organization, and duty?—A. Charles C. Tucker, lieutenant colonel, Judge Advocate General's Department, on duty in the office of the Judge Advocate General, Washington, D. C., in the Military Justice Division.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since March 28, 1918.

Q. How long have you been on duty in the Division of Military Justice?—A. Since that date.

Q. As a result of your experience in the Division of Military Justice and as a member of the board of review, what have been your observations and what are your views relative to the manner in which military justice is administered, with special reference to whether or not, within the limitations of the law, everything within reason is being done to protect the interests of officers and enlisted men come to trial before courts-martial?—A. At or about the time that I received a commission as major, Judge Advocate General's Department, a large number of civilian lawyers like myself were commissioned to serve in the Military Justice Division. At that time there were in the Judge Advocate General's Office not more than five Regular Army officers—Gen. Ansell, Col.

Mayes, Col. Morrow, Col. Davis, and Maj. Weeks. The personnel of the office other than these Regular Army officers consisted of civilian lawyers. Roughly speaking, there were in the neighborhood of a hundred civilian lawyers in the department, of whom between 40 and 50 were serving in the Military Justice Division. These men brought to their work the experience, training, and ideals of civilian lawyers. They were instructed, as I was, that their chief duty was to see that the accused in all cases were given the benefit of legal principles and legal safeguards. I found that in the review of general court-martial records by my associates, and this is equally true of myself, we had more in mind the safeguarding of the accused than military discipline. This for the reason that none of us or few of us had had any military experience; certainly I had had none. In other words, I brought to bear in the work of these reviews, and I am sure my associates did the same thing, the ideals, training, and experience solely of the civilian lawyer. After the establishment of the board of review, of which I was made a member, I observed that the men in preparing reviews were acting largely as counsel for the accused rather than writing such opinions as would emanate from an appellate court. This was so apparent that from time to time we had to issue instructions that the reviews should not be in the nature of briefs but rather in the nature of opinions.

Q. Referring to the safeguards placed around an accused, what is the effect of the safeguards in the administration of military justice as now applied compared to those in civil practice?—A. As a result of the reviews of general courts-martial cases in the office of the Judge Advocate General, I am certain that the accused have received as much, if not greater, consideration than the accused receive in appellate civil tribunals. The reviews in the office of the Judge Advocate General are much more carefully prepared than most opinions in civil appellate tribunals; that is to say, the accused receives more careful consideration and his case the scrutiny of more lawyers in the Judge Advocate General's office than it does in any appellate court that I know of. I may add here that for 20 years I have been a reporter of the Court of Appeals of the District of Columbia and accordingly am familiar with its opinions. Every case in the office receives the scrutiny of at least five or six men before it is put in final shape.

Q. What has been the impression produced by this unfortunate controversy upon the officers on duty in the Military Justice Section, so far as you have observed?—A. It has to a certain extent affected the morale of the office and has disorganized it to some extent. The dominant feeling is one of indignation that an impression should be left upon the public that the men of the office have been derelict in their duty in safeguarding men and officers tried by military tribunals.

Q. You say it has affected the morale of the office. Can you explain fully what you have in mind?—A. In the first place, it has resulted in many discussions among the men based upon newspaper reports concerning the controversies between their superior officers. I would not say there have been any factions in the office, but there has been more or less difference of opinion as to the right and wrong of the controversy; the whole thing has been so involved in obscurity that it necessarily has given rise to a great deal of talk and discussion. Few, if any, of the men have understood what the real issues were in the controversy; that is to say, whether they involved personal questions only, or whether they were based solely upon a desire for reform.

Q. Have these discussions led to any personal unpleasantness?—A. Absolutely none, so far as I know. Every man in the office that I have heard discuss the matter has expressed himself in terms of very great admiration for the ability displayed by Gen. Ansell while he was acting as Acting Judge Advocate General and for Gen. Crowder for the work that he has done. I know of no man in the division who has taken any sides in the matter at all.

Q. Do you know of any instance of any man or men in the division who, as the result of this controversy, are not on entirely friendly terms with either Gen. Ansell or Gen. Crowder?—A. Not one. I do know, of course, that since this controversy began the relations between the men and Gen. Ansell have not been as close—that is to say, he has not as often sent for them and consulted with them since Gen. Crowder's return to the office—their relations have been almost entirely with Gen. Crowder. That is perfectly natural under the circumstances.

Q. You do not attribute that to any ill feeling, but rather to his change of status in the office?—A. Exactly.

Q. Do you consider that the conditions which you have just mentioned have interfered with the administration of that division?—A. To a certain extent, yes. Of course, the matter has died down now to a considerable extent, and there is much less discussion and interference with the work of the office than there was when the controversy began.

Q. You are familiar with General Order No. 7, and also General Order No. 84?—A. Yes, sir.

Q. Have you any knowledge as to the discussions or the conditions concerning the issuance of General Order No. 84 in so far as it amended General Order No. 7?—A. My recollection of the matter is this: Some time in the latter part of August or early part of September, as the result of letters received from Gen. Kreger, in which were pointed out differences between himself and Gen. Bethel over the authority of Gen. Kreger in the review of general court-martial records; the matter of granting Gen. Kreger greater authority was discussed by Gen. Ansell with Col. Read, chief of the division, and the members of the board of review, which then consisted of Lieut. Col. Power, Maj. Keedy, and myself. At an interview, at which I think we were all present, the draft of a modification of General Order No. 7 was prepared, dictated, I think, by Gen. Ansell, with numerous suggestions on the part of the rest of us. Col. Read desired to see a copy of this modification that was dictated by Gen. Ansell, and we left, some of us, including Col. Read, with the impression that copies of this dictation would be sent to us for further revision. It appears that Gen. Ansell understood that we all agreed upon the modification of the order as then dictated by him and submitted that to the Chief of Staff. Thereafter, when it was ascertained that a misunderstanding on this point existed, Gen. Ansell sent to the Chief of Staff and procured the papers that he had submitted to it, and Col. Read, Lieut. Col. Power, Maj. Keedy, and I went over the paper again and made some further changes, and finally submitted to Gen. Ansell the modification of General Order No. 84, which met with our approval, and this last paper, which was identical with the General Order No. 84 as published, was then submitted to Gen. Ansell, and I understand submitted by him to the General Staff.

Q. Was that the form of amendment which at that time was agreed upon by Gen. Ansell and you officers, which was identical with the form in which it appeared in General Order No. 84 when it was published?—A. Yes, sir; as finally revised by us. The draft as originally submitted to the Chief of Staff, as I recall it, differed slightly with the final draft that we prepared.

Q. Do you recall the points of difference?—A. No; I do not. They were merely verbal.

Q. But the original draft embodied that feature which compelled the commanding general to abide by a recommendation of the Acting Judge Advocate?—A. Yes; that particular provision was considered the most important part of the whole order.

Q. Was there at that time any discussion of the ruling of the Secretary of War on section 1199?—A. I don't recall section 1199 being discussed. It was recognized that it gave Gen. Kreger a power that was not possessed by the Judge Advocate General of the Army. There is no doubt about that. It was done with that intention—of giving him that greater power. In fact, I remember in the discussion that the expression was used that it was a wedge that perhaps would result finally in a greater power being given the Judge Advocate General of the Army.

Q. Is there anything further you wish to state?—A. It is to be regretted that the public has not been made better acquainted with the actual work of the revision that has been done in the last year by this office and what has been accomplished. It is unfortunate that the impression should be left on the public mind that all of the severe sentences that have been pronounced by courts-martial have been carried into effect; as a matter of fact, they have not been. To illustrate by a concrete case: Czarnechi, a soldier was sentenced to death for desertion last summer. I happened to write the review. The review disapproved the finding or rather modified the finding to absence without leave. The man was sent to the disciplinary barracks for a term of several years. Just a day or two ago I was asked whether there was any reason why the man should not be restored to the colors. I said there was not, and I believe he has been or is about to be restored to the colors. There you have a man sentenced to death a few months ago now at liberty or who will shortly be restored to liberty. This is typical of innumerable cases of that sort, and it is true of many of these cases of alleged barbarous and severe sentences. If the

public were only made acquainted with the fact that the mere imposition of a sentence means practically nothing, it would aid, it seems to me, in placing the office in a very much better position. I went to Gen. Crowder and expressed myself as I have expressed myself to you. I asked him for permission to make public a memorandum prepared by Col. Wigmore on the subject of the administration of military justice, and was told it might be used. After taking up the matter with the correspondent of the New York Times, Gen. Crowder concluded that the memorandum had better be made public by Senator Chamberlain.

Q. Was that memorandum prepared by Col. Wigmore sent to Mr. Chamberlain?—A. Yes; it was sent to the Secretary, and by the Secretary sent to Mr. Chamberlain.

Q. That all was made public?—A. It was put in the Congressional Record, but otherwise not made public.

EXHIBIT 16.

MARCH 17, 1919.

Q. Give your full name, rank, and the duties upon which you are engaged.—A. William H. Kirkpatrick, major, a member of the board of review, Judge Advocate General's Office, second division.

Q. How long have you been on duty in the Judge Advocate General's Office?—A. I was commissioned August 27, 1918, and reported on September 6, 1918.

Q. Have you been on duty during this period continuously in the division of military justice?—A. I have.

Q. Under the military code as it now exists does the organization of the Judge Advocate General's Office, in the division of military justice operate efficiently and effectively in guarding the rights of officers and enlisted men?—A. I should say that it does; without the slightest question.

Q. The protection which the present system gives compares how, in your mind, with the protection given in cases tried by civil courts? I am speaking now of the appellate end of it.—A. Speaking merely from the standpoint of the appellate authority, I should say that the accused receives fuller protection under the present system than does the accused in the civil courts. The only restriction that I meant to make was that I was confining what I say to the appellate end of the proceeding.

Q. State briefly what you have in mind.—A. I think that the entire system of military justice as administered within my experience, works more efficiently and more successfully than justice as administered in the civil courts, for the reason that it has removed a great many of the technical protections, so called, which the accused in civil court proceedings may avail himself of, and thereby frequently defeat the ends of justice.

Q. In your observations has this controversy in any way reacted to affect the morale or efficiency of the division of military justice of the Judge Advocate General's Office?—A. The controversy has, of course, created differences of opinion in the office, but so far as I have observed has not resulted in lowering the morale or creating dissent.

Q. Have these differences in opinion and discussions resulted at all in personal unpleasantness in the relations of the officers, between themselves or the officers and either Gen. Crowder or Gen. Ansell?—A. Only to this extent, sir: That I believe there is some feeling that the published reports of Gen. Ansell's testimony did not do justice to the work which has been done by the officers of this division. I say the published reports, because every time I hear it discussed it has been with the reservation that Gen. Ansell, in his actual testimony, may have actually done full justice to the work of officers in the division. I don't think that at any time Gen. Ansell has been charged with the full newspaper reports.

Q. You say justice has not been done to the officers on duty there. What is the office general opinion as to whether or not justice has been done to the functioning of the office?—A. If you please, General, I did not say that in my mind justice has not been done, but that discussions were based on the fact that the newspaper reports did not do justice to the work, according to Gen. Ansell's testimony. What I mean to say is not to the officers themselves, but to the work which they have done, in that the newspaper reports have, of course, dwelt upon the crudities of the actual court-martial proceedings and did not make anything of the corrective action taken in the office here.

EXHIBIT 17.

MARCH 17, 1919.

Maj. Sherman Moreland, Military Justice Division, Judge Advocate General's Office, after being duly sworn, testified as follows:

Questions by Gen. Chamberlain:

Q. Under the military code, as it now exists, what is your opinion as to the operation of the organizations of the Division of Military Justice of the Judge Advocate General's Office, in the protection of the enlisted man who has disobeyed the laws?—A. I think that, taking the system of military justice from top to bottom, the accused gets justice oftener than he gets it in the civil courts. It possibly is the fact that he gets injustice done to him, in the first instance, more frequenly than he gets it done to him in the civil courts, but, on the other hand, he gets justice done to him more frequently in the first instance in military trials than he does in trials in civil courts, and the injustices which are done to him in the first instance in military courts are corrected. I think, in a manner that is deserving of the highest commendation, and I think can compare very favorably with the protection which he gets in civil courts.

Q. Has this unfortunate controversy, which has arisen in connection with the Judge Advocate General's Office, operated to affect the morale of the Division of Military Justice or to affect the efficiency of its operation?—A. Due to things that occurred about the time the controversy opened, I do not think it has affected the morale or the efficiency of the office.

Q. Has it, so far as you have observed, affected the personal friendly relations between the officers of that division or between such officers and either Gen. Crowder or Gen. Ansell?—A. I do not think it has. I believe that the published reports of Gen. Ansell's attitude have produced a good deal of resentment in the minds of many officers of the department of military justice.

Q. Because of what?—A. The reason being that it was regarded by such officers as, if not an unfair, at least not a full statement of the work of the department and reflected on many who had reason to believe that they were acting, not only legally, but conscientiously in regard to the matters put before them. As an illustration of the effect of the published reports of Gen. Ansell's testimony, the two boards of review met together and requested Gen. Crowder to permit them to make a statement to the press, and also requested him to obtain an opportunity for them to testify before the Senate committee, the members of those boards believing that the published report of Gen. Ansell's testimony had placed them in a false light with the people from whom they came, and that, in order to protect themselves, they would have to clear that up in some way or other.

EXHIBIT 18.

MARCH 17, 1919.

Q. Give your full name, rank, and present duties.—A. James Sidney Sanner; major; member of the second board of review, Division of Military Justice, Judge Advocate General's office.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since the 28th or 29th of October, 1918.

Q. Have you been on duty in the Division of Military Justice during that time?—A. Continuously.

Q. As a result of your service in the Division of Military Justice, what is your opinion as to the protection given to officers and enlisted men tried by court-martial? Does the system in force operate effectively and efficiently to give to these men all the protection which the law permits?—A. I know nothing whatever about officers' cases. My duties are concerned altogether with cases affecting enlisted men. As to them I would say that on review by the Judge Advocate General's office the machinery is extraordinarily elaborate for the protection of accused and convicted persons. In so far as the machinery before review may be involved, the system, in my judgment, functions as well as systems of judicature do generally, that is to say, here and there will be found miscarriages and mistakes, which the Judge Advocate General's Office is busily correcting.

Q. So far as you have observed has this controversy affected the morale of the office, or has it in any way interfered with cooperation and affected the efficient working of the machinery?—A. So far as I have been able to observe,

not in the slightest degree. At the outset of the organization of the second board of review we were given certain liberal and human standards of judgment, both by Col. Reed, chief of the division, and by Gen. Ansell, the acting head of the office, which standards have been in no sense modified by the taking over of the office by Gen. Crowder.

Q. Are you aware of any personal unpleasantness which was brought on by this controversy between officers of the division themselves, or between such officers and either Gen. Crowder or Gen. Ansell?—A. All controversies create partisanship in a sense, and there have been differences of opinion in the office respecting this controversy, but nothing of a bitter character or at all of a character that entered into the execution of the work. I can say that there has been no division into parties or camps, or any division that has the slightest effect upon the point of view or the getting out of the work.

WASHINGTON, D. C., *March 25, 1919.*

Recall of Maj. Sanner.

Q. You are amember of the special board of review, are you not?—A. Yes, sir.

Q. State briefly the functions of that board.—A. A board ordered by Gen. Crowder to consider the legal sufficiency of records criticized by the board of pardons as being either poorly tried or badly tried, or weak, or not convincing upon the evidence. The board is required to advise the general in each instance of such criticism whether the same is just.

Q. State briefly the conclusions which you have formed as to the efficiency of this system.—A. Just what proportion of the whole number are criticized by the clemency board in the first instance I am not able to say except by hearsay. My opinion is that not more than 1 in 10, if that many, are so criticized. The board finds that between 1 and 2 in 10 of these criticisms is justified, so that the proportion of bad trials to the whole number of cases is extremely small—way below the common experience of appellate procedure in the civil law. As the result of four years' experience on the trial bench of Montana and nearly six years' experience upon its appellate bench, my observation is that no system of judicature exhibits any better, if as good a record.

EXHIBIT 19.

WASHINGTON, D. C., *March 18, 1919.*

Col. Lewis W. Call, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. Lewis W. Call; colonel; Judge Advocate General's Department.

Q. You are on duty at the present time in the office of the Judge Advocate General?—A. I am, sir.

Q. How long have you been on duty in the office?—A. As a commissioned officer?

Q. Yes.—A. I have been on duty as a commissioned officer since August 20, 1917.

Q. During the entire period have you been on duty in the Division of Military Justice?—A. No, sir.

Q. Have not been on that duty at all?—A. No, sir.

Q. What duty are you on?—A. I have been chief of the Division of Contracts, Claims, Accounts, and Fiscal Affairs.

Q. You are familiar with this controversy which is going on in connection with the office of the Judge Advocate General?—A. Simply as it appears in the public press.

Q. So far as you have observed, has this controversy affected the morale of the office? —A. I think that it has not to any appreciable degree. The matter is talked over more or less, but I have not noticed that it affects the loyalty to the office of any officer.

Q. Do you consider that it has affected operations to such an extent as to have affected the efficiency of the office?—A. I do not.

Q. So far as you have observed has it affected the personal relations of the personnel of the office?—A. I have not observed that it has.

Q. You tell me you have never been associated with the Division of Military Justice so that you would not be familiar with the details of the operation of that division?—A. Only in this way, that the questions arising in the Division of Military Justice have been discussed in conference, including officers of other divisions.

EXHIBIT 20.

MARCH 18, 1919.

Questions by Gen. J. L. Chamberlain. Answers by Col. E. G. Davis.

Q. Give your full name, rank, and present duties.—A. Col. E. G. Davis, Judge Advocate General's Department; retired officer serving at the present time under the grade of colonel.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. I was in the office of the Judge Advocate General from the 1st of June, 1917, to about the 9th or 10th of September, 1918, since that time I have been on duty with the General Staff.

Q. During what portion of this period were you on duty in the Division of Military Justice?—A. From about the middle of October, 1917, until the middle of May, 1918. Those dates are approximate only.

Q. Are you familiar with the controversy pertaining to the administration of military justice which has arisen and which has become such a prominent feature in the public press?—A. I am.

Q. Will you state briefly, please, any facts which you may have bearing upon this controversy? Going back to October, 1917.—A. As I stated, I took up my duties in the Judge Advocate General's Office on the 1st of June, 1917. I held various positions, including that of executive officer until some time, I think, about the middle of October, 1917, when I was placed in charge of the Disciplinary Division of the Judge Advocate General's Office. At that time Gen. Ansell was Acting Judge Advocate General. He had consulted me freely during the time that he had been in charge of the office and had told me that he was not satisfied with the way in which that office was being administered, in that he thought that a too rigid adherence was being observed toward the Regular Army ideals; that he wanted to find a man more liberal in his tendencies, and who would be less bound by the traditions of the office than the former incumbent had been (referring to Col. White); and he wanted me to try out the work. At the time I took over that branch of the office there were but three or four officers besides myself on duty there, and two or three civilian clerks. The work increased very rapidly from that time on, and the force in the office increased very rapidly also. I had not been there very long when a case known as the "mutiny case" came to the office. The defendants in that case had been sentenced to dishonorable discharge and terms of imprisonment ranging from two to five years. I reviewed the record in that case and wrote the opinion of the Judge Advocate General's Office. We decided, after full consultation, that the men had been improperly convicted of mutiny, and that the fullest kind of restoration which the law authorized should be had in that case. I wrote the review after the customary form and terminated with a recommendation that any unexecuted portion of the sentence be remitted, and that, upon their written application to that effect, the men be allowed to reenlist. Gen. Ansell was dissatisfied with this solution. He argued that it did not do full justice to the men, and he began to hunt around to determine whether or not some fuller remedy could not be found under existing law. He directed that I make a search of the statutes and the decisions to see if something could not be done along that line, and, among other things, I examined section 1199, Revised Statutes, and reported to him that I thought a higher power could be deduced from that statute, if thought advisable. I prepared a brief along that line and submitted it to him, and Gen. Ansell used this brief as a basis of a more elaborate brief which he prepared and submitted to the Secretary of War on this same subject. Briefly, the contention of Gen. Ansell was that the word "revised," as found in 1199, Revised Statutes, conferred authority upon the Judge Advocate General to set aside, vacate, modify, or reverse any sentence of a court-martial, no matter at what stage of execution the sentence might be when the record came to the Judge Advocate General's Office. That brief was submitted to the Secretary of War and by him referred to Gen. Crowder. I might say that before being submitted to the Secretary of War it was submitted, in an office conference, to all officers on duty in the Judge Advocate General's Office, and all of us, I think, including myself, assented to the brief.

My own assent was in effect that the power could be deduced from the statute, if the Secretary thought it advisable to attempt it at this time, but I advised Gen. Ansell against the form of action which he proposed to take in that and similar cases. He believed that the power should reside in the Judge Advocate General to take any corrective action that might be found necessary in a court-martial case. He was not satisfied with the procedure which had theretofore been followed of making recommendations to the Secretary of War, or through him to the President, and letting the corrective action be taken in obedience to an order issued by the Secretary of War, or under the direction of the Secretary. In this mutiny case, to which I referred, he accepted my review of the case, but changed the concluding paragraph of the review. He introduced language of this kind, which, I think, had never before been used in a review prepared in the Judge Advocate General's Office: "I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants, and recommend that the necessary orders be issued restoring each of them to duty." It was Gen. Ansell's contention that this ultimate power of saying whether the verdict of a court-martial should stand should be vested in the Judge Advocate General rather than in the Secretary of War or in the President. From that particular view I strongly dissented at the time the brief was prepared and advised Gen. Ansell against taking that position. I told him that the logical outcome of such a position would be that he (the Judge Advocate General)would be asserting the right to reverse or modify or set aside the completed action of even the President of the United States in cases where he might be the reviewing or confirming authority. Gen. Ansell replied that he would not hesitate on that account; that he thought the principle was right, and he was willing to go to the extreme limit. This opinion, which Gen. Ansell submitted to the Secretary of War in support of his position was, by the Secretary of War, referred to Gen. Crowder, and almost immediately thereafter Gen. Ansell received a note from the Secretary of War which he (Gen. Ansell) showed me, in which the Secretary said that Gen. Crowder had found it possible to so divide his time that he could give a part of each day to the office of the Judge Advocate General, and that he was sure Gen. Ansell would be glad to welcome Gen. Crowder back to his official family. Gen. Crowder thereupon returned to the Judge Advocate General's Office and resumed control.

Q. Upon what date was Gen. Ansell's memorandum of November 10, relative to the construction of section 1199, Revised Statutes, submitted to the War Department?—A. I would say, from my recollection of the matter, that it was probably submitted on that same date, or not more than one or two days thereafter. I mean by date—November 10. I might say in fuller explanation of that that the memorandum which had been prepared in the mutiny case, and which bears the date of October 30, 1917, was held in the Judge Advocate General's office and submitted to the Secretary of War with the memorandum which Gen. Ansell prepared in support of his views as to the construction of section 1199, Revised Statutes.

I discovered that Gen. Crowder had prepared and submitted to the Secretary of War an opposing brief of his views prior to his return to the Judge Advocate General's office. Within a day or two after his return he gave me a copy of his brief and asked that it be made the subject of study in the Disciplinary Division of his office. This was done. He, about that time, or shortly thereafter, directed Col. Clarke, who was my principal assistant, and myself to make a further study for the purpose of ascertaining and stating at length the arguments which could be deduced from a study of the law and the decided cases in support of his view of the statute. Col. Clarke and myself made this thorough study and investigation and we discovered what had been overlooked in the first study of this matter and what, I think, Gen. Ansell had also overlooked; that the very point he was contending for had been made the subject of a decision in one of the Federal courts in a district of New York and decided adversely to his contention. We collected these authorities for Gen. Crowder and began the study of what action could be taken by the War Department to prevent the infliction of hardships in any case tried by military court which might result in a change of status before the case was reviewed by the Judge Advocate General's office. It had been Gen. Ansell's contention that full justice could not be done the men in the mutiny case because they were dishonorably discharged and the discharge had been executed and the men could not be put back until they themselves applied for restoration. We made this study for the purpose of determining whether there was a method of staying

the execution of sentences which could be made of force and effect under the statutes as they then existed, and thus prevent the occurrence of any case which could not be fully corrected by the processes of the Judge Advocate General's office and the War Department, as they had theretofore been exercised. About that time the Houston riot cases came to a climax by the execution of 13 negroes at Fort Sam Houston, Tex. That case had been tried and the sentences executed before the War Department knew what the result of the trial had been. That came as something of a shock to the War Department and it was anticipated that a great deal of objection over the country would arise as to what seemed like a summary execution of the court-martial judgment without opportunity to appeal to the pardoning power for clemency. I think that apprehension was not well founded, because the objection which we expected did not develop, but it emphasized the necessity of having some power of review in the Judge Advocate General's office before a sentence of that character could be executed, and we prepared and asked the War Department to issue a general order, which was paragraph 1 of General Order 169, War Department, 1918. This was an order which stayed the execution of any sentence of death until reviewed in the Judge Advocate General's office. That was simply a first step in the formulation of what later was issued as a General Order No. 7, 1918.

Col. Clarke and I continued our study of that matter, and when we finally had our data together and agreed upon what could be legally done, I drafted what was later General Order No. 7, 1918, and submitted it to Gen. Crowder for approval, together with a memorandum which was prepared for his signature, to be submitted to the Secretary of War, in support of this corrective action. General Order No. 7 was designed to stay the execution of any sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man until such sentence could be reviewed as to its legality in the office of the Judge Advocate General. Gen. Ansell objected to the issuance of this order. He objected to it on the ground that it was not based on correct legal theory; that it was an interference with the power of reviewing authorities conferred by statute, and he filed a memorandum with Gen. Crowder in which he opposed the issuance of this order and stated that in any event it did not go far enough and would not work out the corrective action that was necessary.

Gen. Ansell still contended that his view of section 1199 was correct. He never accepted the other theory and never willingly supported it. When the action of the Federal court of New York was called to his attention, it was found that the exact point had been there passed upon. That was the case, General, of Sergt. Mason, who tried to shoot Guiteau, the assassion of President Garfield. If I remember correctly, the Judge Advocate General decided in that case that there was something irregular with the proceeding and had recommended that they be set aside. The Secretary of War, or the President, had refused to follow his recommendation, and the contention in the civil court was that the ruling of the Judge Advocate General was decisive of the matter; that his views must be followed, or, in other words, that he had the power to set aside and reverse this finding. The Federal court practically laughed the contention out of court, did not treat it seriously, and decided that no such power had been conferred upon the Judge Advocate General.

Gen. Ansell disposed of this case by saying that it was only the decision of an inferior Federal court and not the decision of the highest court of last resort, and he still contended for his own view. After General Order No. 7 had been made effective, Gen. Ansell was in a position intermediate between myself and Gen. Crowder. I disposed of, over my own signature, all cases which were reviewed by the office and found correct. I sent up for his signature all cases in which we found corrective action necessary, or in which we found some error of law which had to be passed upon by the opinion of the head of the office. All of these cases which went forward for action passed through Gen. Ansell's hands. Gen. Ansell has stated in his testimony before the Senate Military Committee that he was relieved of all responsibility for the administration of military justice from some time in November, 1917, until about the middle of July, 1918. I quote these words from his testimony: "From some time in November until the time I left for France, about the middle of April, I had nothing to do with the administration of military justice. I mean that the proceedings did not come over my desk." That statement is not correct. During all the time that he was in the office as Acting Judge Advocate General, every——

Q. When you use the words "Acting Judge Advocate General," do you use it advisedly or do you mean as senior assistant in the office of the Judge Advocate General?—A. As a matter of fact, Gen. Ansell was the senior assistant in the office of the Judge Advocate General, but in this capacity he signed possibly 50 to 75 per cent of all papers that were signed in the office, and he signed himself as Acting Judge Advocate General, even though Gen. Crowder was present and at the head of the office. Therefore, when I referred to Gen. Ansell as Acting Judge Advocate General, I mean that he assumed to act as the Judge Advocate General in the final disposition of papers and signed himself as the Acting Judge Advocate General.

Q. Was the status of Gen. Ansell, by virtue of being the senior assistant from the period, November, 1917, until the middle of April, 1918, in any way different from his status prior to November, 1917?—A. His status was in no wise different, except that after Gen. Crowder returned to the office of the Judge Advocate General in November, 1917, Gen. Ansell had ceased to be the highest ranking officer in the office and had become the senior assistant. In all other respects his position was the same.

* * * So that, as I say, from the middle of November until the middle of April, all cases which I passed up for the action of higher authority passed through Gen. Ansell's hands, and he finally disposed of and signed many more cases than he passed on for the action of Gen. Crowder. If the general court-martial reviews for the months between November and the middle of April were examined they would show that Gen. Ansell's signature will be found appended to a very great many.

My position in the office during this period was a very difficult one, for the reason that all of these cases had to pass through Gen. Ansell. Whenever a case involving the application of General Order No. 7 would be sent to his desk, Gen. Ansell would send for me and would contend that the action recommended was improper or ineffective or wrong in theory, or something of that kind, and would again go over on every possible occasion the old argument that his action under 1199 was the only correct one after all, and that the office was simply compromising with principle by trying to make any other solution work.

Q. Were any memoranda prepared by Gen. Ansell, or is there anything on record which would show that he had persistently adhered to his views and resisted the application of views contrary to same?—A. I am not sure whether anything was made of record in that connection or not. After General Order No. 7 went into effect there never arose any case in the Judge Advocate General's office, so far as I know, in which it could be fairly claimed that the department was without power to do full and exact justice to the defendant. The criticism which has been lately made public that a great many severe sentences were imposed by general court-martial is not, in my judgment, in any way related to the administration of justice under the law as it existed, and under the law which Gen. Ansell found so much fault with. That whole difficulty could have been corrected by a simple suggestion from the War Department as to limits of punishment which should be applicable in time of war. I discovered early in my administration of the disciplinary division that many sentences were excessive; that punishments were widely varying; that in two cases of perhaps the same nature one would be punished mildly and the other severely, and I asked Gen. Ansell in the fall of 1917, many times, as to whether our office should attempt to take corrective action for the purpose of equalizing punishment and making such adjustments, as we could make at the time these sentences were imposed. The answer to that was always that it would perhaps be inadvisable to attempt to make all of those corrections at that time; that many of these men who were sentenced to long terms of confinement would go to the disciplinary barracks for a time, and shortly thereafter return to duty, and long sentences would automatically take care of themselves; that when the war was over would be a more opportune time to make these general corrections.

I perhaps ought to say, in justice to Gen. Ansell on this point, that he was not entirely clear in this matter. Although he never gave any positive directions as to what should be done, there were times when he very much doubted the wisdom of approving a sentence without attempting to reduce it to a punishment more suited to that particular case.

I also consulted Gen. Crowder about this matter, and Gen. Crowder was of the opinion that it would be unwise, with all the work we had to get through with, to attempt to make adjustment at the time the sentences were passed upon; that if the sentences were legal and valid it was well, unless the sen-

tence was extremely excessive, to let it alone. In many cases we recommended substantial reduction, and so far as I know, these were carried into effect by the War Department upon the recommendation of the Judge Adovcate General.

Q. You stated a moment ago that after the issuance of General Order No. 7 the Judge Advocate General's Office found no case which, under the law, they were not able to correct any injustice which was done. Were there any cases in which the recommendations of the Judge Advocate General to undo injustice or to do justice which were not carried out by the War Department? —A. I do not at this time remember a single case in which recommendation was made by the Judge Advocate General for a remission or mitigation of a sentence of an enlisted man that was not carried into effect. There were several recommendations made by Gen. Ansell, while Acting Judge Advocate General, that were not approved by the War Department, but I think the failure to approve was rather because his recommendations would work injustice than otherwise.

I refer to a number of cases in which officers were tried for offenses involving the use of intoxicating liquor. Gen. Ansell adopted the policy early in his administration of the office that whenever an officer was tried for any offense involving the use of intoxicating liquor, no matter what the action of the court was, no matter what the sentence of the court was, if it appeared from the evidence that he had used it, or that he probably used it, Gen. Ansell insisted upon submitting a recommendation that that officer be summarily discharged. Many recommendations of that kind were disapproved by the War Department, but are the only ones disapproved during my incumbency of that position. Yes; there was one other—a case involving the trial of cadets at West Point, recommendations, which were prepared at the direction of Gen. Ansell, were not approved, but they were in the nature of increased punishment rather than a recommendation for clemency. I know of no recommendation for clemency that was disapproved.

Certain cases of considerable importance that have recently been discussed in the public press occurred during my administration of the Disciplinary Division of the Office of the Judge Advocate General. These were known as the four death cases which came from France. Two of them involved a sentence of death for sleeping on post, and two a sentence of death for disobedience of orders. This case has been cited to show the attitude of the Judge Advocate General's Department toward the doing of justice, and inasmuch as this case was reviewed while I was in the office, I think it proper to mention the facts in that connection. Gen. Ansell, in his letter to Congressman Burnett, made it appear that it was necessary for him to go over the head of Gen. Crowder and the Secretary of War and make a sort of special appeal to the President through a member of the judiciary committee of the House in order to prevent the execution of these sentences. Those cases arose under General Order No. 7, and the execution of the sentences was naturally stayed until the record could be reviewed in the office of the Judge Advocate General. More than this, the cases were of that character which required the action of the President as confirming authority before they could be executed.

When these cases first came to the office I assigned them to Maj. Rand for review. Maj. Rand is an exceptionally good lawyer, and reviewed these cases, wrote a brief review in each case, and finally recommended that the sentences be carried into execution. These four cases, as prepared by him, were sent by me to Gen. Ansell. A letter had been written by Gen. Pershing recommending the execution of the sentence of death in these cases. Maj. Rand embodied this letter in the review of one of the cases, and merely referred to it in the review of the other three. Shortly after these cases were submitted to Gen. Ansell I was called to his office, I think by Col. Mayes, who was then acting as Gen. Ansell's assistant, and who read over all papers before they were finally signed by Gen. Ansell or passed on by him for Gen. Crowder's signature. Col. Mayes stated they had decided that it would be better that Gen. Pershing's letter should be embodied in the review of each of the four cases, instead of merely being referred to in three of them. The reviews were sent back for that particular change. No other suggestion was made, either as to the recommendation or as to any other feature of the review. After this correction had been made I again submitted the cases to Gen. Ansell, and they passed through him to Gen. Crowder for his signature. The rule of the office was that any paper which passed Gen. Ansell and got to Gen. Crowder's desk for his signature had met with Gen. Ansell's approval, unless the opposing view was indicated in a memorandum or verbally communicated.

Q. Were such papers initialed by him?—A. I think, if I remember correctly, that Gen. Ansell did not make a practice of putting his initials on the papers but would append a slip of paper and put his O. K. on that.

After these cases had been passed on to Gen. Crowder, he (Gen. Crowder) brought them to the disciplinary division with the statement that he could not sign such reviews; that they were entirely too brief and that it would be an injustice to ask the President to send four men to death without stating fully all the facts and circumstances surrounding the trial, so he would have a complete picture of what he was doing. Gen. Crowder assigned Col. Clarke to a special study of these cases and Col. Clarke reviewed them in connection with all other trials coming from that same division at about the same time. He rewrote the reviews and again submitted them to Gen. Crowder, this time, I think, direct. Gen. Crowder was still dissatisfied and required further elaboration, and finally Col. Clarke prepared them in a manner satisfactory to Gen. Crowder and submitted them, with the concluding paragraph of the review omitted, the idea being that would be inserted by Gen. Crowder in his own words. These cases finally reached this stage along in the early days of April, 1918. One morning about that time I was called into Gen. Ansell's office and Gen. Ansell asked me, "What's the matter with Gen. Crowder?"—I think he said, "What the hell, etc.—about these cases." He said, "He just directed me to write a review in those cases." I said, "Gen. Crowder is very anxious about those cases. He does not want to sign a recommendation that the sentences be executed until he knows that that is justified," and I remarked further that Col. Clarke, who had been studing these cases, thought that these sentences should not be executed, and Gen. Ansell then remarked. "Well, I don't agree with Clarke. I think they ought to be."

The review which he prepared, however, in the manner I have indicated, simply embodied the statement of the case which had been made by Col. Clarke and ended with his own statement that he thought the sentence ought not to be executed.

Gen. Crowder then took all papers prepared for him and he prepared, in his own language, a memorandum for the Secretary of War setting forth all the facts and circumstances connected with the trial of these cases. Gen. Crowder had actually recommended that the sentences be carried into execution, finding that the trials were legal; that there was evidence to support the findings, etc., but his accompanying memorandum, in which he set out all the reasons why the sentences ought not to be executed, was treated by the Chief of Staff as a recommendation for clemency and he filed a memorandum, I think, stating that he did not agree with the views of the Judge Advocate General.

The Secretary of War adopted the views of Gen. Crowder and wrote a long letter to the President, explaining the case and recommending the sentences be commuted. The President wrote to the Secretary of War a letter, in which he thanked him for the clear presentation of these cases and stated that he entirely agreed with his view of the action to be taken, and that he was glad to sign the order prepared for his signature. Both the letter of the Secretary of War and the letter bearing the signature of the President are on file with those cases in the office of the Judge Advocate General.

Referring again to General Order No. 7 and Gen. Ansell's criticism of it, I noticed that in his letter to Congressman Burnett he used the following language: "The Judge Advocate General recommended and the department finally adopted an administrative method known as General Order No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative which was described by the Judge Advocate General as necessary to 'head off a threatened congressional investigation,' to 'silence criticism,' 'to prevent talk about the establishment of courts of appeal,' and to make it 'apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters.'"

He here speaks of the recommendation of the Judge Advocate General as an administrative method and as an administrative palliative which was described by the Judge Advocate General as necessary to head off "threatened congressional investigation," to "silence criticism," to "prevent talk about the establishment of courts of appeal," and to "make it apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters." The use by Gen. Ansell of these quotation marks would seem to indicate that these matters so included were used as an argument for the establishment of General Order No. 7. Inasmuch as I prepared both the order

and the argument in support of it, I am confident that no such language was used in anything that had to do with obtaining the approval of the Secretary of War in the establishment of that order.

Q. What was Gen. Crowder's actual attitude with respect to General Order No. 7?—A. So far as I know, Gen. Crowder's attitude was this: He believed that it would effectively meet any criticism which had been raised by Gen. Ansell as to a lack of corrective power in the office of the Judge Advocate General when cases were reviewed in which we discovered that errors of law had been made in the trial and disposition of the case. I do not know, of course, what the innermost attitude of Gen. Crowder toward this order was, but that was the purpose of its adoption, and it was designed as a complete answer to the contention that the War Department was incapable to do justice to the men tried by court-martial. I note also, in referring to this same order, that Gen. Ansell claims that full action under this order was not taken until September, 1918, after his return from France. He states that prior to that time the office view had been that the Judge Advocate General's office was limited in passing upon any case that came to the office under that order to technical questions of law, and that they were forbidden by the terms of the order to advise convening authorities as to punishments that had been given in particular cases. He states that notwithstanding the order and notwithstanding the view that had been taken by the Judge Advocate General's office he reversed that view and instructed boards of review to express their opinion in addressing military commanders to the effect that justice would require clemency on their part in passing upon certain sentences, and if it was a case in which the commanding general could not take action that we would forward the proceedings direct to the President, which means the Secretary of War.

Gen. Ansell is mistaken in his statement that this is the first time that this corrective action was applied under General Order No. 7. General Order No. 7 was administered during the time that I waa in the Judge Advocate General's Office and in the Disciplinary Division. We conceived it a function of the Judge Advocate General's Office to constantly advise reviewing authorities as to the action which it would be proper to take in particular cases by them. We suggested that they reverse or set aside the action of the court wherever errors of law had been exhibited inasmuch as they had reserved jurisdiction to do so, and we also suggested certain mitigation of punishment in particular cases when we thought the case deserved it.

It was exactly this procedure that Gen. Ansell so strenuously objected to as it was applied in the early part of 1918, under General Order No. 7. He stated, for instance, that a commanding general could not, under the law, reverse jurisdiction to take any further action in a court-martial case which had once passed his hands; that when he had acted on it such action was final, and if any corrective action was later taken it had to be taken by the Secretary of War, or, as he contended, it should be properly taken by the Judge Advocate General, under the power which he claimed could be deduced from 1199, Revised Statutes.

During the time that I was in the Disciplinary Division, notwithstanding these views held by Gen. Ansell, having Gen. Crowder's support for the carrying out of this policy, this action continued to be taken.

On the 18th of April, 1918, I left the office of the Judge Advocate General to make a trip of inspection of the military camps in this country, for the purpose of ascertaining how General Order No. 7 was being carried out and how military justice was administered in these camps under this order. Upon my return to the office of the Judge Advocate General, about the middle of May, I found that Gen. Ansell had, in the meantime, departed for his trip to France, and Col. Mayes had become the senior assistant to Gen. Crowder and was signing papers as Acting Judge Advocate General. Col. Mayes, in the meantime, placed Col. Reed in charge of the Disciplinary Division, and on my return I was assigned to other work, and two or three months thereafter assigned to the General Staff. Col. Mayes supported Gen. Ansell in his objection to the corrective action which the department was taking under General Order No. 7, and when he became senior assistant he reversed these corrective processes which we had established, and it was Col. Mayes's view of this order which Gen. Ansell stated that he reversed in September. His action, therefore, was simply a going back to the policy which was established in the Judge Advocate General's Office when General Order No. 7 was first published, and which he at first strenuously opposed.

Q. Could you from memory, or having access to the files, readily select a few cases that would verify this condition stated by you?—A. I don't know that I could do it from memory. By going through the court-martial records for any given month or period certain cases could be selected which would show this action.

Q. From the statements of Gen. Ansell it would appear that during the period that he was senior assistant in the Office of the Judge Advocate General, but more especially during the period from November, 1917, until April, 1918, that efforts made by him to better conditions of the enlisted man and to throw greater protection about him, were opposed, and he had been unable to bring about results which he desired to bring about. Are you familiar with that statement?—A. I might say in answer to that question that there was no opposition to any effort which Gen. Ansell or anybody made for the purpose of throwing the greatest protection around any man tried by court-martial. The whole question was as to how the greatest protection could be secured under the law. Gen. Ansell's insistence upon his view was not that justice was not done in particular cases, but that it was not done in the way he thought it ought to be done.

Q. So far as you recall was any recommendation or suggestion which was made by Gen. Ansell along the lines of corrective measures turned down or failed to receive consideration except in so far as pertained to the interpretation of section 1199, Revised Statutes?—A. No, sir. I may say that in that connection that following the mutiny case to which reference has been made that Gen. Ansell took the same action in a great many other cases immediately following; that is, he purported to set aside the sentence of the court-martial.

Q. Was that action taken by him after the question of the interpretation of 1199 had been announced by the Secretary of War?—A. No, sir; I think that action was taken in the interim, when the decision of the Secretary was pending. Some cases, I think, you will find slipped through and orders issued by The Adjutant General carrying this action of Gen. Ansell's into effect. Others, depending upon the way they were routed after they left our office, were held up and when Gen. Crowder returned to the Judge Advocate General's Office he found that several of those cases had not been acted upon, and the recommendations of Gen. Ansell that it be done in a particular way, were disapproved and the clemency which he recommended was brought about in the old method, or by doing it according to the established custom of the Judge Advocate General's Office, making the Secretary of War, rather than the Judge Advocate General the authority as to what should be done.

Q. Do you recall whether or not the case of the El Paso mutineers was the first upon which this action was accorded?—A. That was the first. I am positive about that; it was made a test case.

Q. I have here an office circular dated April 10, 1918, giving the organization of the Office of the Judge Advocate General. Do you recognize that circular?—A. Yes, sir.

Q. Can you tell me whether or not that circular confirmed an organization which, at the time existed and which for a considerable period in effect had existed, or whether it shows a new organization to go into effect at this time? When I speak of the organization I do not refer to the individual who may fill a particular place but to the organization of the office. I am speaking with respect to the Division of Military Justice.—A. This does not establish anything new in the Office of the Judge Advocate General. It is simply a statement of what had been in effect in the Judge Advocate General's Office for a long time. As nearly as I recall this was sent out very largely for the benefit of the new officers coming in so they would know what the office organization was and how to handle their work, but no new principle or new ruling is established by this order. It is practically what it was during the whole time I was in the Disciplinary Division. As I said before, every court-martial case that left my desk for higher action went to Gen. Ansell.

Q. Referring to this subject Gen. Ansell states, "He (Gen. Crowder) established for the officer in charge of that division (Military Justice) a direct relation and channel of intercourse, whereby the work of the Division of Military Justice was not subject to my supervision or to Col. Mayes, my immediate assistant. Both Col. Mayes and I believed that this method of military justice was bad, and upon April 15, just before sailing for France, having been invited by the Judge Advocate General to express myself upon the management of this office, I frankly told him so." Have you any information or knowledge on

that subject more than what you have stated?—A. The only exception that could possibly exist to the statements I have made is this that during the period when we were working in the office over the establishment of General Order No. 7, and formulating the rules for carrying it into effect I frequently consulted directly with Gen. Crowder and frequently placed the result of investigations I had made on Gen. Crowder's desk. These did not go through Gen. Ansell's hands for the reason that he was entirely out of sympathy with what we were trying to do, and Gen. Crowder had directed us to make the investigation, and we felt this had nothing to do with Gen. Ansell's position in the office, and we did not consult Gen. Ansell about anything we did in connection with that order, in getting it established or the rules for getting it into effect. But as to actual action on cases, no case went to Gen. Crowder that did not first pass through Gen. Ansell. There were certain cases in which I assumed the right to act; for instance, when I found that a court-martial record was incomplete; that the record did not show that the Judge Advocate had been sworn, etc., I exercised the authority of sending it to the reviewing authority for correction, but all matters where corrective action was taken, or where clemency was recommended, or where anything of that larger nature was involved, those matters passed through Gen. Ansell to Gen. Crowder, according to office memorandum.

Q. From the documents I find this statement made by Gen. Ansell: "I have at all times insisted upon the location of revisory power in this department and I have said, and said in the beginning, that while I preferred that that power be located in the highest law officer of the Army, I was content to have it located in the department somewhere. This was not done. From the time of Gen. Crowder's return to the office in November, 1917, I urged in several memoranda the necessity of closer supervision of court-martial procedure." Can you enlighten me on this subject?—A. I can not say what he said in memoranda after November, because he may have written and submitted a great many which I did not see, but I do know that his contention for a location of the revisory power was the old contention that it ought to be located in the Judge Advocate General. The statement that he was content to have it located somewhere in the department, or anywhere in the department does not accord with my recollection of what actually happened. About the time that General Order No. 7 was being prepared Col. Clarke and I prepared for Gen. Crowder a suggested revision of section 1199, Revised Statutes. Under this revision it was proposed to give the President, as the Commander in Chief of the Army, full power to vacate, set aside, modify, reverse, etc., any judgment of a military court, and to apply whatever corrective action he thought was necessary. The effect of this amendment, if it had been adopted by Congress, would be to carry into legal effect the recommendations which Gen. Ansell made, and the only differences would be that the supreme power would be located in the President rather than in the Judge Advocate General.

I recollect distinctly that Gen. Ansell criticized this proposal and objected to it, and did not support it.

Q. Have you any knowledge relative to issuance of General Order 84, amending General Order 7?—A. I was asked at one time after I left the Disciplinary Division to prepare a proposed amendment of General Order 7, designed to give the Acting Judge Advocate General in France a wider authority in the review of courts-martial cases, and I did prepare such a proposed amendment and submitted it to Col. Morrow, who was then the executive officer, but what was done with it after that, I do not know.

Q. You have no knowledge as to the conditions under which General Order 84 was secured?—A. No, sir.

Q. During the period that you were in the Judge Advocate General's office what were the conditions relative to the personal attitude of Gen. Ansell and Gen. Crowder in respect to each other and with respect to other officers in the department? Was there a spirit of criticism on the part of either?—A. I heard Gen. Crowder make no criticism of any officer in his department, so far as I can recall at this time. I do not even recall that he criticized Gen. Ansell's view in reference to this matter. There was a feeling, I think, in connection with my relations to Gen. Crowder, that there were certain things in connection with this whole thing that were not properly the subject of conversation and we did not discuss it, and I think I can say accurately that I never heard Gen. Crowder discuss or criticize any officers in his department for any view they might have.

I can not say this with reference to Gen Ansell, because, as I say, whenever a case came up involving an application of General Order 7, he would call me into his office and rehash the whole controversy time and time again. He would defend his views and criticize the views which Gen. Crowder had adopted, and it was an unending controversy until some time in, perhaps, March, 1918, when it reached a sort of climax and Gen. Ansell and I had some discussion about the matter, and he told me he was tired of hearing my views on the matter, and I said I was only answering his own questions; and after that he never discussed any of his opinions with me, but frequently thereafter he discussed them with Col. Clarke, my senior assistant.

Q. I am speaking as to whether or not there were any criticisms of a personal nature about the office of such character that they would create or tend to create discord in the office; interfere with cooperation and teamwork?—A. Well, I will answer that question by—I don't think there was. I think Gen. Ansell criticized Gen. Crowder for wanting to hang on to the office of Judge Advocate General—as he termed it—but that was a criticism which, so far as I know, was expressed only to myself and to two or three other officers.

Q. Have you any knowledge relative to the procedure of Gen. Ansell in securing the issuance of the order relieving Gen. Crowder and appointing him. I speak now of anything beyond the memoranda which are of official record?—A. Yes, sir; I have. Gen. Ansell consulted me before asking Gen. Crowder in writing to concur with him in a request that he (Gen. Ansell) be designated in orders as Acting Judge Advocate General. He showed me before he submitted it, and read to me a memorandum which he was sending to Gen. Crowder, in which this request was embodied, and a day or two later he showed me and discussed with me Gen. Crowder's reply. Gen. Ansell was very much disappointed and seemed a little bitter over the fact that Gen. Crowder had refused to join him in that request. I do not know what Gen. Ansell did after that to secure the issuance of the order, inasmuch as he did not thereafter show me or consult with me about its issuance. I only know what I have stated; that he proposed first to get Gen. Crowder's concurrence, and that he failed to get that. What he did after that I am unable to state.

Q. The order relieving Gen. Crowder and appointing Gen. Ansell is dated November 8, and according to the records a copy of that was delivered to Gen. Ansell on that date, or possibly the following day.

The memorandum review of the Texas mutineer cases, as I recall it, was dated October 30. This case was submitted or received in the office of the Chief of Staff on the 8th, the date of the issuance of the order and eight days later than the date of the memorandum. Has this any significance so far as your knowledge goes?—A. I don't know that it has any. My recollection of the delay in submitting the memorandum in the mutiny case was due to the fact that after it was prepared it was held up with the idea that it would go at the time that this supporting brief that Gen. Ansell prepared was submitted. Whether it had any relation to the order designating Gen. Ansell as Acting Judge Advocate General I am not prepared to state.

Q. During the period that you were in the office after November, 1917, did you observe any bad effects upon the morale or upon the efficiency of the office resulting from this controversy?—A. I do not think it did so long as I was in charge of the disciplinary division. Upon my relief from the disciplinary division that whole office went to pieces for a time, in that nobody knew where he was at or what action to take, and the whole procedure was made over again under the views of Col. Mayes, and there was very much disorganization and very much confusion. I don't think it affected the morale of the office particularly, because all the officers were anxious to serve efficiently.

Q. What officers who were on duty in the office at the time of that change would be cognizant of the changed conditions?—A. The officers who were there could tell more than anyone else. Keedy and Millar were there. Col. Clarke continued in the office while I was on a trip of inspection during the time the change was inaugurated, and could tell of the upset condition in the office which resulted.

Recall of Col. E. G. Davis.

Q. State the circumstances which led to the establishment in France of a branch of the Judge Advocate General's office.—A. The branch office of the Judge Advocate General in France was established by General Order No. 7, War Department, 1918. Some time prior to the publishing of this order the establishment of a branch office in France had been suggested. If I remember

correctly it was first suggested by Gen. Ansell. I have a distinct recollection that he found that such a branch office had been established during the Civil War and made the recommendation that such an office be established in France. When we had decided upon General Order 7, which would have the effect of staying the execution of sentences until they could be reviewed in the office of the Judge Advocate General, we realized that the establishment of a branch office in France had become important and embodied a provision for such an office in General Order 7.

Q. Gen. Ansell, referring to the execution of the Houston rioters, states: "At that time the War Department was holding that the department commander had full, final, and complete authority to carry that judgment into execution." There never was any question, was there, as to the authority that was given the department commander under the Articles of War?—A. No, sir; I think not. I think it was conceded that he had that authority.

Q. Gen. Ansell continues: "It was not so some time after that, for as a result of my agitation of the existence of this advisory power an order was issued that the death sentence should not be carried into effect until there should have been a review of the record by the Judge Advocate General." Do you recall whether or not this change was the result of his agitation? A. My recollection of that matter is about as follows: When Gen. Crowder returned to the Judge Advocate General's Office, Col. Clark and I began the study, as heretofore described, for the purpose of working out a solution of the question of administering military justice in such a way that no man could be sentenced to death or dismissed from the service or dishonorably discharged until the record of his trial had been reviewed for its legality. While we were engaged in this study the executions in the Houston riot case occurred at Fort Sam Houston, and this led to the issuance of paragraph 1, I think it was, of General Order 169, War Department, 1917. This order had the effect of staying the execution of a death sentence until the record of trial had been reviewed in the office of the Judge Advocate General. That order was prepared by me. I saw no paper or communication, memorandum of any kind, by Gen. Ansell on this question. It was prepared on my own initiative, and as a result of a study of 1199, which I was then giving to this subject.

Q. What are your recollections regarding the changes which were made in the office of the Judge Advocate General in the wording of the draft of General Order No. 84, amending General Order 7?—A. My only knowledge of that matter is this: At the time any question of amending General Order 7 came up in the Office of the Judge Advocate General I was not serving in the Disciplinary Division but was called into consultation with reference to the amendment of that order. It was agreed in this conference that the order should be amended, and it was suggested that inasmuch as I had written the original order I should prepare the draft of the amendment, and Gen. Ansell directed me to prepare such a draft. I did so and submitted my draft to Col. Morrow, who was the executive officer in the Judge Advocate General's Office, and nothing in connection with that letter afterwards came to my attention. I did not see the papers submitted by Gen. Ansell and only know that I prepared a draft of the amendment.

When the cases were first submitted to Gen. Ansell and Col. Mayes—that is, to the office in which they sat—Col. Mayes, after the papers had been there for a short time, sent for me and pointed out that the letter in which Gen. Pershing had recommended the execution of these sentences had been embodied in the review of only one of the cases, and merely referred to in the review of the other three cases. He stated that it was his opinion that this important letter should be embodied in the review of each case and the papers were taken by me from Col. Mayes's desk, for the purpose of making that change. My recollection is very clear on the point that Gen. Ansell was present in the room at that time, although I do not recall that he took any part in the conversation that ensued between Col. Mayes and myself. There was no argument about it at all; if they wanted that change made in the review, why that was all there was to it. That is so far as Col. Mayes's participation in this case went—to my knowledge.

The next time I had any conversation with either of them about this matter was along about the 10th of April, 1918. I was in Gen. Ansell's room for some other purpose and he came out of Gen. Crowder's room and sat down at his desk, and said to me—in words about as follows, "What in the hell is the

matter with Gen. Crowder about those death cases?" I explained to him that he had Col. Clarke at work reviewing these cases, and he seemed very anxious to be sure of his ground before making definite recommendations, and that Col. Clarke had come to the conclusion that the sentences ought not to be executed. To this Gen. Ansell replied that he did not agree with Col. Clarke—that he thought the sentences ought to be executed, and he further stated that Gen. Crowder had directed him to make a review of the cases himself.

Those two events stand very clear in my mind, and there is no possible confusion between them.

Q. To the best of your recollection, was Col. Mayes present at that time?—A. I do not recall whether or not Col Mayes was in the room at that time. There were other people in the room, but I have no recollection that Col. Mayes was there. I am sure he did not converse. He may have been there, but I would not state so positively.

Q. Up to the time of that conversation have you any knowledge as to what part, if any, Gen. Ansell took in connection with these proceedings?—A. I have no direct knowledge; no, sir; but I know that the rule of the office presupposed that everything that went to Gen. Crowder passed through Gen. Ansell first.

Q. You have no affirmative knowledge?—A. No, sir; I have not.

Q. You don't know, then, whether or not, when the papers originally passed through his office to Gen. Crowder, he personally examined the cases?—A. No, sir; I have no affirmative knowledge on that point, but I am quite sure he was in the office on the occasion that Col. Mayes turned the cases over to me, with the suggestion that Gen. Pershing's letter be embodied in each. The impression I received was that this was the only change they wanted made in the reviews.

Q. After that change had been made, do you recall whether you took the papers in yourself, or did they go in in the routine way?—A. I have no distinct recollection of that; I suppose, though, that they went in the usual routine way.

Q. Do you remember the circumstances of the circular which went out along in March, 1918, relative to joint trials? Was that over your signature?—A. I think it was over Gen. Crowder's signature, but I prepared the paper.

Q. Do you recall whether or not Gen. Ansell or Col. Mayes had any connection with that paper at all Did they make a protest?—A. I think they did not. That is, they made no protest. Whether or not they had anything to do with the paper or not I do not know. My recollection of it is that I turned it over to Col. Spiller, the executive officer, for office approval, before sending it out, and I am quite sure that it bore the signature of Gen. Crowder, when finally published. After it was published, and some cases came in which showed that judge advocates misunderstood the purpose of the circular there was, I think, some criticism by Col. Mayes, but none before, as I recall.

Q. Was that circular the cause of any special trouble or embarrassment?—A. A misunderstanding of that circular, I think, resulted in faulty trials in several cases which were criticized by the department; and the results, I think, were set aside. To that extent; yes. I don't know to what extent it was the subject of embarrassment. It was misunderstood by some judge advocates in the field, and they applied it in cases where it was not intended that it should be applied.

The reason for the publication of the circular was as follows: There were several cases which came to the department in which joint defendants; that is to say, men who participated jointly in the commission of crime, had been separately charged and separately tried; tried each of them by the same court. Now, it was perfectly obvious that the members of the court, after trying one defendant, would have a perfectly clear idea as to the other defendants. We sent this circular out with the idea in mind of informing judge advocates that when a situation of that kind arose, the practice should be to try them jointly.

Q. Referring back to the four death cases in France, do you recall the circumstances under which those cases first came to your desk? Were they returned by you for correction?—A. I don't recall that; but if that was the situation, I probably did, because I would want each case complete in itself. I don't even recall that there was a letter from Gen. Pershing with them; I had so many cases on hand at that time.

Q. You don't recall the circumstance of returning them?—A. No, sir. It is probable I did if that situation existed.

Q. Was this during Gen. Ansell's absence?—A. I think he was absent during all of that. I don't think those cases were called to Gen. Ansell's attention until after they had been sent to Gen. Crowder.

Q. Your idea is that they were not called to his attention until Gen. Crowder called upon him for a review?—A. Yes; unless I talked with him when he came back. I was trying to refresh my memory by talking to him, and he thinks that I told him about these cases then, and that he disagreed with me—from what I told him—and that is probably true, because I know we disagreed, and in some way or other they were turned over to him to examine, I thought by Gen. Crowder's initiative. It may be I asked Gen. Crowder to turn them over, but at any rate they had gone to Gen. Crowder before Gen. Ansell had anything to do with them and had gone to Gen. Crowder with the prepared review.

Q. Then it is your belief that Gen. Ansell never examined those cases himself until after he had been requested by Gen. Crowder to do so?—A. That is my recollection. I don't know about the request of Gen. Crowder.

Q. Was not that a case which, prior to the time it came up to your desk the first time, had been the occasion of a lot of talk in the office?—A. I can't say as to that. I think I had discussed the case with Davis and Clarke, as I frequently did with important cases, but could not say whether Gen. Ansell had talked about it or not.

Q. You are confident in your own mind that at no period during the handling of these cases he expressed or even entertained the views that the sentences should be executed?—A. I am quite sure that he did not; that is, upon the merits of these particular cases. We might have talked about the abstract question of whether a man who went to sleep on post in the presence of the enemy and endangered the command should suffer the death penalty.

Q. Have you any reason to believe that about this particular time he did or may have expressed himself that way?—A. That is a general supposition on my part—arising out of the fact that I often discussed abstract questions of that kind—especially with Gen. Ansell.

Q. You spoke the other day about the Camp Grant cases. Were those cases especially conspicuous?—A. Yes, sir.

Q. Briefly, what was the point?—A. Those are the cases of, I think, 21 Negroes who assaulted one woman and were separately charged with the offense and jointly tried, there not being even an allegation of conspiracy or joint action in any of the charges. The records had to be disapproved. A number of them were sentenced to death and deserved it—but all were disapproved.

EXHIBIT 21.

WASHINGTON, D. C., *March 18, 1919.*

Col. John H. Wigmore, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. John H. Wigmore; colonel; judge advocate, United States Army.

Q. Have you any means of fixing the date upon which Gen. Ansell's memorandum of November 10, 1917, came into the possession of Gen. Crowder?—A. I being then on duty in the office of the Provost Marshal General, the general called me into his office and showed me a memorandum which he stated had been handed to him the night before by the Secretary and that it had given him a most extraordinary shock at the doctrine contained in it. He asked me to look it over and give him my informal opinion, which I did within a day or so. The day was a Saturday; this is the only positive item as to the date that I can contribute; but I know that thereafter Col. Easby-Smith and Col. Johnson, at Gen. Crowder's direction, worked upon the materials for a brief in reply to the memorandum and that this work extended over the succeeding Sunday and Monday. The identification of this Saturday with November 24 is made out by other data contributed by the other officers.

Q. Did you assist in the preparation of the letter of February 13, 1919, submitted by Gen. Crowder to the Secretary of War?—A. I did.

Q. Referring to that letter, charges have been made in the public press that it contained certain misstatements and misinformation. What information have you in regard to that?—A. The first draft of that letter is dated February 8. On page 2 of the draft occurs the sentence, "The story was disbelieved and he was found guilty." This sentence occurs in a concise allusion to a case cited by Senator Chamberlain, the allusion being prefatory to a full explanation. The Senator's description of the case had already stated that the court-

martial had at first found the case not guilty, but afterwards, a consideration being directed by the commanding general, the court had found the accused guilty. This intervening stage in the action of the court was therefore perfectly well known to the Senator, for he himself had stated it; in the draft of the reply, therefore, the full description of the case was not thought necessary. On February 12, Wednesday, at 10 a. m., Gen. Crowder informed me that a meeting of the Senate committee had been suddenly appointed for the next day and asked me whether I could complete the draft in season to assist him at the hearing. I replied that the draft must be completed, and I worked with two stenographers until 1 o'clock that night to complete the draft. It was presented to Gen. Crowder the next morning at 8.30, February 13. In the final draft, which he went over with me, he noted the above passage and remarked that it omitted to state the intervening finding of the court. I explained to him how the omission had been made and he directed that in the subsequent copies the omission be restored. He then, as the hearing was coming on that day, signed and sent the letter to the Secretary of War for transmission to the Senator. In the meanwhile I returned to the office and caused four new sets of carbons to be made of the letter with the omission restored. That afternoon Senator Chamberlain telephoned the Secretary of War concerning this omission, and upon my meeting Gen. Crowder later that afternoon he remarked, "It has happened just as I told you. This omission has been noticed and should not have occurred in the first draft of the letter." The second series of copies were dated February 13, Thursday, the day of the hearing, and carbons were dispatched to the Secretary of War and the original containing the omission was withdrawn. As Senator Chamberlain was already aware of the omission, and as it was not deemed to be material in any event, no further notice was sent to Senator Chamberlain.

As to the second alleged erroneous statement referred to by Senator Chamberlain in his recent letter, it consisted in the statement, on the same page of the draft letter of February 12, that the review of the case in question was prepared by judge advocates "who were not commissioned in the Regular Army, but were experienced lawyers fresh from civil practice." This sentence was inserted after the first above draft dated February 8 and during the second revision in the intervening days. I had received from Maj. Rigby a statement of the case and returned that statement to him, but I recall in completing the dictation of the draft that the judge advocate at Camp Gordon was named Taylor and I immediately inferred that it must be Maj. Orville J. Taylor, of Chicago, who was known to me to be a reserve officer recently commissioned. I inserted the above sentence in the draft provisionally, knowing that if the fact were otherwise the sentence could be deleted before signing, but that if the fact were as stated it would be too late afterwards to insert the sentence in the signed letter. Meanwhile I made a memorandum to verify the fact by telephoning Maj. Rigby. Owing to interruptions of telephone service, the reply did not come until Wednesday afternoon, February 12, in the midst of the final rush of preparation and the memorandum was mislaid and failed to attract my attention. The sentence therefore remained in the draft as presented to Gen. Crowder Thursday morning, February 13. But on my return to my office on that same morning I found the memorandum from Maj. Rigby replying to my telephone, reporting that the judge advocate's name was William Taylor. Upon referring to the Army directory I discovered that Lieut. Col. William Taylor was a commissioned in the Regular Army. I therefore deleted the sentence and in the copies which were then being made, dated February 13, that sentence was omitted. I also immediately dictated a correction to be sent to the Secretary of War. A copy of this correction has been placed in your hands by Maj. Rigby. It did not receive Gen. Crowder's signature until February 17, on the succeeding Monday, and was forwarded to the Secretary of War. On February 21 the Secretary of War forwarded the correction to Senator Chamberlain in a special letter.

EXHIBIT 22.

WASHINGTON, D. C., *March 18, 1919.*

Lieut. Col. Robert W. Millar, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, and organization?—A. Robert W. Millar; lieutenant colonel; Judge Advocate.

Q. How long have you been on duty in the office of the Judge Advocate General?—A. Since March 11, 1918.

Q. In what division?—A. Military Justice Division.

Q. During the entire period?—A. Yes, sir.

Q. You are doubtless familiar with the controversy that has been going on in the public press relative to the affairs of the Judge Advocate General's Office?—A. Yes, sir.

Q. I would like to have your views briefly as to the efficiency of the Division of Military Justice as administered under the laws as they exist in protecting the interests of the enlisted man.—A. I would answer that, General, by saying that it is my judgment that, on the whole, the interests of the enlisted man have been efficiently protected by the Military Justice Division to the extent of its powers as construed by those in charge. Some difference of policy has existed from time to time with reference to the powers of the office under General Orders, No. 7, 1918. When I entered the office, the Military Justice Division, then being in charge of Col. Davis, the impression I received was that there was then a disposition to make recommendations to commanding generals more freely than later in the spring when Col. Mayes became Acting Judge Advocate General. How far such recommendations included recommendations of reduction of punishment I can not say. Col. Mayes made it plain that he considered that the function of the office was limited to passing upon the legality of the sentence under General Orders, No. 7. Later, after Gen. Ansell took charge, there came about a policy of making distinct recommendations in regard to the reduction of punishments more freely than had been the case before. In October, 1918, as I recall, a memorandum was prepared by Gen. Ansell empowering the Military Justice Division to make such recommendations where it was thought the case demanded it. I do not wish to be understood as saying that such recommendations were never made under General Orders, No. 7 during the time Col. Mayes was Acting Judge Advocate General, but I would judge that no such recommendations was had only in exceptional cases. In October, 1918, and shortly before the memorandum of Gen. Ansell was prepared I became a member of the board of review. Since the memorandum in question, there has been no hesitancy in recommending reduction of punishment wherever the case seemed to require it, at least in the cases which have come before the first section of the board of review. The board of review at the time which I became a member of it passed upon virtually all papers in the Military Justice Division except those relating to applications for clemency. Later, owing to the accumulation of business its functions became restricted to a smaller class of cases and at present it is occupied chiefly with cases involving commissioned officers. Making allowance for this fluctuation in the construction of the powers conferred by General Orders, No. 7 upon the office of the Judge Advocate General, I am of the opinion that, on the whole, the Military Justice Division, so far as its powers have extended, has protected the rights of accused to a degree which is not inferior to that protection accorded them in civil appellate courts.

Q. As to length and breadth of action, how do the operations under General Orders, No. 7 as applied at the present time compare with those which were in force prior to the advent of Col. Mayes as chief of this division?—A. Prior to Col. Mayes taking charge of the office I was doing work of a subordinate character and consequently I am not in a position to make a satisfactory answer to the question.

Q. How has the morale of the office been affected, if at all, by this controversy?—A. There has, of course, been considerable discussion among the members of the Military Justice Division, which has to some extent perhaps interfered with full attention to the work, but the resultant detriment has in my judgment been very slight and there has been in my opinion no impairment of any material character of the work of the division.

Q. Has this controversy given rise to any feeling on the part of any officers of that division, that an injustice had been done them, so far as you know, or had been done the division as a whole?—A. Speaking for myself I would say—and I think this view is shared by certain other members of the Military Justice Division, civilian lawyers—that the newspaper statements purporting to give the testimony of Gen. Ansell before the Senate Military Committee have had a tendency to unjustly reflect upon us and our work in the Military Justice Division.

EXHIBIT 23.

WASHINGTON, D. C., *March 18, 1919.*

Maj. William H. Keith, United States Army, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. What is your name, rank, organization, and duty?—A. William H. Keith; major, United States Army; on duty with Purchase, Storage and Traffic Division, General Staff.

Q. How long were you chief clerk of the Office of the Judge Advocate General?—A. I think June 1, 1914, I was appointed and resigned September 17, 1918.

Q. Were you chief clerk during November, 1917?—A. Yes.

Q. You are familiar with a controversy which took place in the Office of the Judge Advocate General about that time with respect to interpretation of certain sections of the Revised Statutes and other matters?—A. Well, I can't say that I am familiar with it, General.

Q. You know that there was such a controversy?—A. I know that a discussion took place in the Military Justice Division. I was chief clerk of the whole division and it just came to me casually.

Q. I have before me an office circular, Judge Advocate General's Office, dated April 10, 1918, which gives the organization of the office of the Judge Advocate General's Department. Do you recognize that circular?—A. Yes.

Q. Could you tell me by whom that was prepared?—A. I am not sure of it, General, but I believe it was prepared by Col. Spiller.

Q. From your knowledge of the office I would like you to tell me whether or not that circular shows an organization which at the time existed in the office, and which had previously existed, or whether it refers to the results of a reorganization of the office differing materialy from the organization which had existed?—A. This was the general organization that had been in existence for some little time. There were details in changes coming from time to time, depending upon the nature of the work or the duties assigned to the various offices.

Q. Referring to paragraph A of this order, which has to do with the routing of papers, does that give a correct statement of the method then in force and which had been in force prior to that time?—A. It gives in a general way the usual practice that has been in existence for some time. In this particular section here Col. Mayes was detailed as an assistant to Gen. Ansell, and papers passed into Col. Mayes's desk to be O. K.'d and would go on to Gen. Ansell and then to Gen. Crowder, as the case may be.

Q. Is that the policy which was followed between November, 1917, and the date of this order?—A. I don't know just the date Col. Mayes was detailed on that; it was some time, one of those dates. It had not been done like that before.

Q. How had it been done before this?—A. Before that the papers would come back O. K.'d, and then they were to be charged out to the various divisions to which they pertained, and then when the papers were completed and prepared they would be sent again to the Judge Advocate General or the Acting Judge Advocate General, as the case may be.

Q. Why do you say "as the case may be"?—A. If the Judge Advocate General was there they were sent to him; if the Acting Judge Advocate General, they were sent to him.

Q. In case both Gen. Crowder, the Judge Advocate General, and Gen. Ansell, the senior assistant, were present, would those cases probably go through Gen. Ansell before going to the Judge Advocate General?—A. Yes. They would pass in to Gen. Ansell, then when Gen. Crowder's time was taken up, mostly with the other office, he had Col. Mayes in to act as his assistant, to review the papers as they came in.

Q. During that period, did all important papers pass through the office of Gen. Ansell before going to Gen. Crowder? I am speaking now particularly of the papers which pertained to the Division of Military Justice.—A. Well, now, I would not know about that, General.

Q. In November, 1917, an order was issued detailing Gen. Ansell as Acting Judge Advocate General; subsequently, a few days after, that order was revoked and about that time Gen. Crowder took up the duties of the office, which up to that time he had to a great extent been leaving to Gen. Ansell. Is that correct?—A. Yes, sir.

Q. At that time was any change made in the channels through which the papers of the office pertaining to the Department of Military Justice passed?—A. I can not answer that, General. I don't know, because the Military Justice Division had a colonel in charge of it and he carried these papers in the important cases either to Gen. Ansell or to Gen. Crowder.

Q. That matter did not come under your personal observation?—A. That did not come under me, so I could not answer that question.

EXHIBIT 24.

WASHINGTON, D. C., *March 21, 1919.*

Lieut. Col. Alfred E. Clark, Judge Advocate General's Office, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. State your name, rank, and organization.—A. Alfred E. Clark; lieutenant colonel; Judge Advocate General's Office.

Q. During what period were you on duty in the office of the Judge Advocate General?—A. From approximately October 1, 1917, until the latter part of May, 1918, to the best of my present recollection. Since that time I have been on assignment as counsel for the War Department Board of Appraisers and other special boards.

Q. Were you at any time on duty in the Division of Military Justice?—A. Yes, sir.

Q. During this entire period?—A. Substantially so; yes.

Q. What were your special duties in that division?—A. The first two months or so, possibly a little more than two months after coming here, I was, in so far as that section is concerned, engaged in the routine work of examining court-martial records and writing opinions with respect to them and the like—general work. From, I should say, the latter part of December, 1917, or early in January, 1918, I had status of assistant to Col. Davis, Chief of the Section of Military Justice, and continued in that capacity until relieved from duty in that section.

Q. Please state fully your recollections relative to the case of the Artillery mutinies at El Paso, the action taken in connection with the interpretation of section 1199, Revised Statutes, and the order appointing Gen. Ansell Acting Judge Advocate General, subsequent revocation of same, and cognate matters.—A. Some time in October of 1917 there were two or three cases that gave rise to considerable discussion in the office of the Judge Advocate General. One of these cases involved the conviction of seven or eight noncommissioned officers; in fact, all of the noncommissioned officers of an Artillery battery at Fort Bliss, I think it was, Texas. In each of the cases—the first the Narber case and the second artillerymen—dishonorable discharge had been executed. It was the view of the Section on Military Justice, where I was then on duty, that in each of these cases, and particularly in the case of the noncommissioned officers of the Artillery battery, an erroneous conclusion had been reached by the courts. The question arose as to what disposition could be made of the cases in the absence of jurisdictional error. It was at this time, which was the latter part of October or the early part of November, that Gen. Ansell first propounded his theory that the word "revise," as found in a statute first enacted in 1862, conferred upon the Judge Advocate General full appellate power. He prepared a memorandum in support of that view, which I believe came to the attention of Gen. Crowder, to my best recollection, the last part of November. I undertake to fix that time for the reason that Col. Davis and myself, under date of the 6th of December, prepared a memorandum embodying a study of the historical aspects of the legislation at Gen. Crowder's request. Gen. Crowder prepared a memorandum, in which he controverted the legal soundness of the views of Gen. Ansell. Gen. Ansell prepared a supplementary memorandum in reply, and the matter was later submitted to the Secretary of War, who, I believe, concurred in views of Gen. Crowder that it was inexpedient to undertake to deduce from the old statute the broad appellate powers for which Gen. Ansell was contending. In the cases of the men charged with mutiny the office of the Judge Advocate General, after reviewing the records in accordance with the established practices of the office, reached the conclusion that the evidence did not sustain the findings and sentence and recommended to the Secretary of War that an order be issued setting aside, mitigating the unexe-

cuted portion of the sentence, and, upon application of the accused, restoring them to duty. It is my recollection that the Secretary disposed of the cases in accordance with this recommendation. With respect to the order which appointed Gen. Ansell Acting Judge Advocate General and the order which subsequently revoked the prior order, I have no personal knowledge whatever.

Q. Have you any definite knowledge as to the date upon which Gen. Ansell's memorandum was submitted beyond what you stated a moment ago?—A. Not just at this moment, General, but probably if I should go over my old files I could locate the date approximately by reference to some memorandum prepared about that time for Gen. Crowder; that is, locate it within two or three days.

Q. Are you familiar with General Order 169, the order which provided that death sentences should not be carried into effect until the cases had been reviewed in Washington?—A. If my identification by number is correct, that was a general order issued the latter part of December, 1917, or early in January, 1918, preceding General Order No. 7. At the time General Order 169 was issued, and for two or three weeks prior to that time, there had been under study and preparation by Col. Davis and myself the plan which was subsequently embodied in General Order No. 7. While the plan embodied in General Order No. 7 was in process of development a number of colored soldiers who rioted at Houston, Tex., were convicted. The convictions were approved by the commanding general of the Southern Department and 13 of the men executed by the department commander before the records had reached Washington for review. General Order No. 169 was a temporary expedient to prevent like occurrences until such time as General Order No. 7 or the plan which was embodied in that had been formulated and the order drawn and promulgated. General Order No. 7 reached all death cases as well as cases involving dismissal of an officer or dishonorable discharge.

Q. Did Gen. Ansell submit a memorandum which referred specifically to this case and which had important bearing upon the issuance of General Order 169.—A. I have no knowledge of any memorandum submitted by Gen. Ansell which suggested the issuance of General Order 169 or any order of like character. From November on the contention of Gen. Ansell was that the word "revise" conferred full appellate power upon the Judge Advocate General, and he vigorously opposed the plan which was embodied in General Order No. 7. I do not now recall whether he specially opposed the issuance of General Order 169, but never understood that he recommended or approved of it. In relation to the reform accomplished by General Order No. 7 and the practices which grew up under it, Gen. Ansell opposed them. I think there will be found in the files of the office a written memorandum prepared and signed by him opposing the issuance of this order. In this connection it may be said, with respect to other proposed changes and reforms as well as that embodied in General Order No. 7, that they did not meet the favor of Gen. Ansell, because his contention seemed always to be that these several proposed reforms were in conflict with his theory as to the true construction of the word "revise." For several months following November, 1917, Col. Davis and myself worked out and proposed a number of changes in court-martial procedure. The changes then proposed embodied substantially all of the so-called reforms now proposed. None of these proposals, as far as I know, was acted upon favorably by the acting head of the office. It was the view of both Col. Davis and myself that under existing legislation there could be worked out all necessary and practical reforms, and that this could be done largely through the promulgation of rules of procedure by the President of the United States under authority of the thirty-eighth article of war. Whenever these proposed changes and reforms became the subject of discussion, it was the invariable contention of Gen. Ansell that certain revisory powers were lodged in the Judge Advocate General, and that any change or reform which would undertake to lodge appellate powers directly or indirectly with the President or any other officer or department of the War Department impinged upon the rights of the Judge Advocate General. This led to many vigorous, if not heated, discussions not only with respect to the changes and reforms that were deemed expedient by Col. Davis, myself, and others in the department, but also with respect to the disposition to be made of pending cases.

Q. In the carrying out of the provisions of General Orders, No. 7, after it was promulgated, what was Gen. Ansell's attitude, so far as became apparent?—A. Gen. Ansell took no part in the preparation of General Orders, No. 7. He was not in sympathy with it. It was prepared by direction of Gen. Crowder

ıd approved by him. Owing to the fact that the order and the practices which contemplated did not meet with the approval of Gen. Ansell, the practical orking out of the order and the development of the practice under it were by en. Crowder very largely confided to Col. Davis for some time. There was evelopeel in that section under Col. Davis the practice of making distinct recomıendations with respect to the character of sentence which should be imposed hen records came up under that order. Gen. Ansell and his immediate assistnt, Col. Mayes, opposed the practice of the Judge Advocate General undertaking control, direct, or influence the disposition to be made of a case by the eviewing authority through any recommendation made by him in cases coming p under General Orders, No. 7. Practically all the opinions written by officers the Military Justice Section first came to my desk for approval with the esult that I was frequently called into the office of the acting head for the urpose of discussing some opinion with Gen. Ansell or Col. Mayes, or both, ecommending mitigation or clemency, and the continued intrusion of the conoversy as to the proper construction of the word "revise" into the discussion f opinions written under the practice established by General Orders, No. 7, led a great many arguments which at times were both vigorous and heated.

Q. After Col. Davis ceased to be Acting Chief of the Division of Military Jusce, what change, if any, took place in the policy governing the application of eneral Orders, No. 7?—A. The first time that Col. Davis went away was in larch, for a period of 10 days or so. During that time I was acting head of e division, being the senior officer in that division. During the time that he as away upon this first inspection trip all of the opinions which carried recomendations under the practice established by General Orders, No. 7, had to be proved by me. All discussions relating to the propriety of the Judge Advocate eneral making recommendations were had between Gen. Ansell and Col. Mayes on the one side and myself upon the other. There was a manifest disposion on the part of Gen. Ansell and Col. Mayes to undertake to stop or abolish e practice, a very beneficent one, in my judgment, of making recommendaons to the various reviewing authorities in the field with respect to the characr of sentence to be imposed. I insisted that during the absence of Col. Davis, asmuch as he had built up the practice, as I understood it, conformably to the ews of Gen. Crowder, that no change should be made in the practice until he turned. When Col. Davis returned I reported the situation to him, my expeence, which was the same as he had been going through for some time before. y recollection is that he then took the matter up with Gen. Crowder, who proved the continuance of the practice, but that is just my recollection ıd may be inaccurate. A little later on, some time in April, Col. Davis left a prolonged inspection trip. The primary purpose of the trip was to acquaint e service in the field more fully with the purposes of General Orders, No. 7, ıd in this way secure the thorough cooperation of the reviewing authorities ıd divisional and department judge advocates. In the meantime Col. Spiller ıd been transferred from the position of executive officer in the Judge Advocate eneral's Office to the Military Justice Section, and was the senior officer that section next to Col. Davis, so that when Col. Davis left upon the spection trip Col. Spiller became acting head of the section. Col. Spiller was ting head of the section for but a short time, perhaps a week or 10 days, when ol. Read was assigned to duty in the section, and as senior officer became the ad. Immediately after Col. Davis left on this inspection trip the practice hich had grown up under General Orders, No. 7, was modified, if not, indeed, practical effect, abolished, and thereafter the office confined itself in dealing ith records coming up under General Orders, No. 7, to the bare question of e legality of the proceedings. So far as I know, the change in policy was not lled to the attention of Gen. Crowder at the time. The change in policy was bstantially in accordance with the views which had been so many times exessed by Gen. Ansell and Col. Mayes during the many discussions while Col. avis and myself were building up the practice I have referred to under Gen al Orders, No. 7.

Q. During these various discussions to which you refer, did you ever hear en. Ansell express the views in effect that while he believed that the only oper solution of the question was his views regarding the proper interpretaon of section 1199, yet that he would be content to use that power, if that wer of revision were given, even though it rested elsewhere? A. No, sir. In at connection it may be said that a lengthy memorandum was prepared in rt by Col. Davis, in part by myself, which is in the files of the Judge Advote General's Office. It dealt with the two questions, first, the inherent

power of the President to exercise appellate jurisdiction by such methods as he might adopt; and, second, his powers under existing legislation through general orders to control the progress of the case from its inception to its execution. We sought to find in the powers of the President such inherent and statutory powers as would meet all of the then needs. Gen. Ansell was vigorously opposed to these views. Not only was he opposed to the view that such inherent power was lodged in the President, but also the view that there was any legal sanction for the exercise of any such power under existing law. The memorandum prepared by Col. Davis and myself was submitted to Secretary Baker, by Gen. Crowder, who expressed his sympathy with the legal views expressed therein. The Secretary, however, suggested that in order to remove any doubt as to the power of the President to exercise full appellate jurisdiction and rather than undertake to deduce such a power from legislation, the construction of which might be open to discussion, that a bill be presented to Congress asking for such power. Conformably with this suggestion I prepared a bill by direction of Gen. Crowder which was an amendment to section 1199 of the Revised Statutes. That bill was prepared in January, 1918. In connection with the preparation of the bill I prepared, in collaboration with Col. Davis, an argument of some pages in support of the legislation.

Q. The proposed legislation did not meet with the approval of Gen. Ansell.—A. He was opposed to the amendment, which sought to confer these broad appellate powers upon the President. I discussed this matter with him several times during the preparation of the amendment and the preparation of the argument in support of the amendment. His contention was, as it had been theretofore, that the word "revise" gave certain power to the Judge Advocate General, that the proposed amendment was an encroachment upon such powers, and that he could not, therefore, favor it. Col. Davis and myself then prepared letters which embodied the argument to which I have referred in support of the bill, and these letters were signed by the Secretary of War and transmitted with copies of the bill to the Military Committee of Senate and House.

Q. What was Gen. Ansell's attitude and what position did he taken with respect to the propriety of interfering at that time during the war with long sentences which had been imposed by courts-martial and duly approved by the reviewing authority, provided the record of the case showed no legal or other irregularities?—A. Speaking generally, his attitude was that it was frequently necessary in the interest of military discipline that severe sentences be imposed; that such sentences must be frequently imposed for their salutary or moral effect upon the Army at large. I have often heard him say, in justification of a policy of not interfering during the war with such sentences, that it was not to be supposed that long sentences would be actually served out in full for military offenses after the war was over.

Q. Did you hear Gen. Crowder express any views upon this subject, or are you familiar with the views entertained by him?—A. I don't think that I ever discussed that particular subject with Gen. Crowder. He was much engaged with the work of the Provost Marshal General's Office.

Q. Are you familiar with the four cases of death sentences in France which have been so thoroughly advertised?—A. Very familiar, General.

Q. I wish you would state briefly your knowledge as to the procedure in those cases, step by step, and the part played by different officers in the disposal of those cases.—A. The cases are so familiar to everybody concerned that it is unnecessary to go into the details in regard to the case. The records in the four death cases from France reached the office of the Judge Advocate General in Washington along about February 26–27, 1918. They were sent to Maj. Rand, a well-known criminal lawyer of New York, then stationed in Washington, for review. Maj. Rand reviewed the four cases, wrote a review in each case in which he found that the proceedings were regular, the verdict sustained by the evidence, and recommended that the sentences be carried into effect. The records, with the reviews, then went to the desk of Col. Davis, chief of the section, and from his desk went to Gen. Ansell and Col. Mayes, who were officing together. In the preparation of his reviews Maj. Rand had incorporated in but one of them the text of a communication or indorsement from Gen. Pershing recommending that the death sentences be confirmed and carried into execution. In the other three reviews he had referred only to the memorandum from Gen. Pershing. The reviews thus prepared by Maj. Rand were returned through Col. Davis to Maj. Rand from the office of Gen. Ansell,

with the suggestion that there should be incorporated in all four reviews rather than in only one the full text of the recommendation of Gen. Pershing. The reviews were rewritten conformably to the suggestion and were returned through Col. Davis to Gen. Ansell and Col. Mayes. From there they must have gone to the desk of Gen. Crowder. Up to that time I had understood that the office was to recommend the execution of these sentences. Prior to this time I had discussed the cases with Maj. Rand and perhaps one or two other officers and had expressed my dissent from the conclusion that the sentences should be carried into execution. The records found their way to the desk of Gen. Crowder for his approval and signature, after having passed through the hands of Gen. Ansell and Col. Mayes with the recommendation that the sentences be carried into effect. It was on this point, and some time after the middle of March, 1918, that Gen. Crowder called me into his office and stated, among other things, in substance, that these records had come to him for his approval, that he was disturbed about the cases, and he requested me to take the records, make a careful study of them, and write reviews amplifying the statement of facts with a view to setting forth a complete history of each case in the review. He also requested me to study the records in similar cases coming in from the same and other divisions in France with the view of determining whether or not the sentences imposed in other and like cases bore any relation to the sentences upon which the office was then about to act. I prepared a full review in each case, concluding with the statement that there was some evidence which, if believed by the court, would support the verdict of conviction and that there were no jurisdictional errors. The reviews prepared by me did not contain any recommendation as to action to be taken. They were submitted to Gen. Crowder about April 10. At the same time I submitted a lengthy memorandum discussing these four cases and giving the history of a number of similar cases arising in France, and concluding with a strong expression of my views as to the disposition to be made of the cases, viz, that the death sentences should not be carried into effect. About the time these reviews and this memorandum were handed to Gen. Crowder, I think on the same morning, I had my last talk with Gen. Ansell concerning these cases. He asked me, in substance, "I understand that you are not in favor of carrying the death sentences into effect upon these men convicted in France," and I told him that I most emphatically was not and that I was satisfied that if he would take the reviews which I had prepared for Gen. Crowder and the supplemental memorandum and study the whole situation carefully that he would agree with me that these sentences should not be carried into effect. This occurred about a month and a half after the records came into the office and at least a month after Maj. Rand had prepared his reviews recommending that the sentences be carried into execution. A few days later, I understand, Gen. Ansell was requested by Gen. Crowder to submit his views to the latter upon the cases, and he prepared a written memorandum for Gen. Crowder. All of the facts that he sets forth in his memorandum, both concerning the death cases and other like cases, the character of the convicted men, etc., were taken entirely from the memorandum which I had laid before Gen. Crowder on April 10. I understand that there was a formal recommendation added to the reviews prepared by me. The exact character of that recommendation I do not know, as I never saw the reviews after they left my desk. Under date of April 16 Gen. Crowder, in connection with the records and reviews, transmitted to Secretary Baker a long memorandum. I have seen a copy of that memorandum. It embodied in very large part the text of the memorandum which I had submitted to him under date of April 10, and in addition amplified views of his own. It likewise embodied, in substance, the views which Gen. Ansell had expressed in his memorandum to Gen. Crowder under date of April 15. This memorandum, signed by Gen. Crowder, went to Mr. Secretary Baker with the records and reviews, and in very large measure furnished the basis for the communication which Mr. Secretary Baker wrote about two weeks later to the President, transmitting the records and the reviews, and which, after a presentation of the facts and the history of each case, recommended that the death sentences be not executed.

Q. During the interview which you had with Gen. Ansell on this occasion did Gen. Ansell give expression to his views as to whether or not the death sentence should be executed?—A. Not upon this occasion.

Q. Did you upon any occasion hear him express his views upon this subject?—A. Yes, sir.

Q. State definitely what they were.—A. I would not be able to give the time or the exact language used. Probably the cases came to me from Gen. Crowder for further study and report, because I had been very outspoken against recommending that the death sentences be carried into effect. In fact, I had a number of arguments with Maj. Rand and other officers in which I very strongly opposed what I understood at the time was the settled decision of the acting head of the office to recommend that the sentences be carried into effect. I say I understand that that was the settled decision of the office for two reasons—first, reviews prepared by Maj. Rand and so recommended had gone across the desk of Col. Davis to Gen. Ansell and Col. Mayes and had been returned not for the purpose of changing the character of the reviews or of the recommendations but merely for the inclusion in three of the reviews of the full text of Gen. Pershing's memorandum, and with this inclusion they had been returned and had gone to Gen. Crowder's desk for his signature. The second reason is that I had talked with Maj. Rand, who was conferring with Col. Mayes and Gen. Ansell, about the cases, and I had talked with Col. Mayes and with Gen. Ansell and had taken occasion, although the cases were not then in my hands for review, to express the settled conviction that it would be a great mistake and an injustice to carry those sentences into effect. At that time these officers did not agree with me, but were of the opinion that the views of Gen. Pershing with respect to the propriety and the expediency of carrying these sentences into effect should be followed. While these cases were under consideration in the office and before the records came to me from Gen. Crowder for review, as I have just stated, I discussed them with Gen. Ansell and other officers on more than one occasion, and Gen. Ansell had stated to me during those discussions that he thought the sentences should be carried into effect.

Q. During the period that you were acting Chief of the Division of Military Justice what was the routing of courts-martial cases at the time they arrived in the office until they left or went to the permanent files, and what connection had Gen. Ansell with and responsibility for the administration of that division?—A. First, all opinions of a general nature, dealing with the administration of military justice, were routed over his desk. Second, all opinions dealing with particular cases where the communication was addressed to the Secretary of War, or to the President through the Secretary of War, or to The Adjutant General. This second class would involve all cases where sentence had been published, so that they had become effective before the record reached the Office of the Judge Advocate General, and involved a considerable percentage of all the cases coming from the office. Third, after General Order No. 7 went into effect it will be noted that the records came direct then to the Office of the Judge Advocate General for review before sentence was finally published, and the Judge Advocate General's Office had established the practice of sending them back direct to the reviewing authorities with a statement as to the legality or illegality of the proceedings and such recommendations as it was deemed proper to make. Col. Davis was then the head of the section. The practice grew up for him to sign the opinions, returning the records, and in such cases the records would not be routed over by Gen. Ansell. The reason this practice grew up was that Gen. Ansell and Col. Mayes were opposed to the practice of returning the records with a distinct recommendation by the Judge Advocate General as to the quantity of punishment to be imposed, the general policy with respect to sentences in different classes of cases, the place of confinement, and the like. When I was acting head of the section for a short time in March I followed the practice of signing these opinions, returning the records in accordance with the practice that Col. Davis had established. Everything was routed over Gen. Ansell's desk except the opinions returning records under General Order No. 7.

Q. Was everything in the way of recommendations, reviews, etc., going to higher authority, routed over his desk?—A. Yes, sir; everything that went up to higher authority, to The Adjutant General, the Chief of Staff, the President, or the Secretary of War, was routed through him and over his desk.

Q. Do you know of any orders, verbal or otherwise, which in any way curtailed the activities or responsibilities of Gen. Ansell with respect to the administration of military justice during the period November, 1917, to the time he left for Europe, April, 1918?—A. I do not.

Q. What knowledge have you relative to the establishment of a branch office in France; any knowledge except what would be of record?—A. I think none. It was a matter of general discussion in the office, but the ultimate result was embodied in the order.

Q. The records show that in the case of the Fort Bliss mutineers Gen. Ansell in his review actually put into effect the powers which his interpretation of section 1199 gave to the Judge Advocate General?—A. Yes, sir.

Q. These were the first cases in which this action appears. It also appears that similar action was taken by him in a considerable number of cases subsequent to this. Do you recall any discussions or conversations in the office regarding that act?—A. Yes, sir. The first cases in which action was taken by the Acting Judge Advocate General under his assumed powers of revisions were, I believe, the Narber case, and the case of the seven or eight noncommissioned officers of the Artillery Battery. The action taken in each of these cases was simply to reverse and set aside the sentence, or words to that effect. It was my recollection that these cases, with the action of the Judge Advocate General thereon, went up in the usual routine to The Adjutant General for formal order, and that about that time, or very shortly thereafter, Gen. Ansell prepared a memorandum in support of the power which he had sought to exercise. In the meantime, and before this memorandum was submitted, a number of other cases were disposed of in like manner. The purpose of so doing while the matter was pending before the War Department I do not know.

Q. Have you any knowledge of a conversation which took place in connection with and at the time that you were directed to prepare a review of the four France cases in which Gen. Ansell is said to have expressed affirmatively his views relative to the execution of the sentences as imposed?—A. I did not personally ever hear any such conversation between Gen. Ansell and any other officer. However, some time after the records in the death cases from France came to me from Gen. Crowder for further study, Col Davis informed me of a conversation which he had just had; I mean by that a conversation he had shortly before he spoke to me about it. Col. Davis stated in substance that Gen. Ansell had used some profanely forcible language in connection with these cases. I would not undertake to give the language of the conversation, but my recollection of its effect or substance is that he objected to or resented the fact that the sentences were not being promptly carried into effect in accordance with the recommendations contained in Maj. Rand's reviews, instead of which they had been returned to me for further study and report by Gen. Crowder.

Q. What effect did these various controversies, which took place in November, 1917, and subsequently, have upon the morale of the office or upon the efficiency of the work of the Division of Military Justice?—A. For a time, say in the latter part of November, and a considerable part of December, it left the force in doubt and uncertainty as to the policies to be followed. However, it may be said that in the main the officers in that section were trained and seasoned lawyers from civil life or men of like training and experience in the Military Establishment. They continued to do their work with zeal and efficiency, affected somewhat perhaps by the uncertainty in which the force was left for a month or six weeks.

Q. To what extent, if any, did this controversy affect the personal relations of officers in the office in so far as same became apparent?—On the surface the relations between all of the officers remained pleasant and cordial, and such as permitted of personal contact and personal conference and discussion without the embarrassment of any personal animosities being manifested themselves. Of course, there was always this factor in the situation: For several months following November, 1917, whenever an officer went to Gen. Ansell to discuss any proposed action in a court-martial case the discussion was almost certain, before it was finished, to resolve itself into an argument on his part in support of his construction of the word "revise," so that that question was intruded in almost every legal discussion.

EXHIBIT 25.

WASHINGTON, D. C., *March 25, 1919.*

Maj. Stevens Heckscher, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, and testified as follows:

Q. State your name, rank, and organization.—A. Stevens Heckscher; major; Judge Advocate.

Q. You are a member of the so-called clemency board?—A. Not of the recently created clemency board, but I am head of the clemency section of the Military Justice Division. I ought to add, sir, that I was for a short time one of the original three members of the clemency board, but I was relieved by Gen. Crowder in order to go back to my old clemency section.

Q. Who are the members of the clemency board at the present time?—A. Lieut. Col. Ansell, Col. Easby-Smith, Maj. Conner, Maj. G. Rogers, Maj. Ashman, Lieut. Tittman, and I think one additional major whose name I do not know.

Q. State briefly the procedure in the case of the clemency board.—A. With regard to the prisoners in the three disciplinary barracks a memorandum is filled out by the commandant of the barracks in question, giving the material facts that would be relevent upon the question of clemency, together with the commandant's recommendation as to clemency. That memorandum is sent directly from the barracks to the Judge Advocate General's Office, is attached to the record of trial, and together with any other papers in the case is referred to one of the 10 or 11 officers, who reviews the case, in the first instance for the clemency board, makes a short summary of the facts attending the offense as shown by the record of trial, and also makes his own tentative recommendation as to clemency. The board then goes over this case, approves or amends the tentative recommendation of clemency, and the case then goes in to the Judge Advocate General for his approval.

In addition to this procedure there was appointed by Gen. Crowder, after I had been relieved from the clemency board, a special board of review, of three officers, of which Maj. Sannur is the head, whose duty it is to review any cases from the clemency board where the reviewing officer has indicated that the evidence is weak or not convincing or not sufficient to sustain the findings of the court. This special board reports on such cases whether in its opinion the evidence is sufficient or is convincing. I do not think it has yet been definitely decided in what way, if any, the findings of this special board are incorporated in the clemency review that goes from the Judge Advocate General's Office to the Secretary of War.

So far as my information goes, heretofore the findings of the special board have merely been set on a slip of paper, which is placed among the papers of the case, and which, of course, is the basis for the recommendation of the clemency board, but it has not been incorporated in the clemency review that goes to the Secretary of War. I understand that the question of incorporating the findings of the special board as to the evidence into the clemency review is now being taken up by Gen. Kreger.

Q. Can you give me any definite idea as to what percentage of the cases which go before the clemency board are such as to require their being sent on to this special board?—A. I really, sir, have no information upon which I could even hazard an approximation on that. The difference between the present clemency section, which is a part of the Military Justice Division, and the clemency board is that the clemency section handles all applications, letters, and petitions for clemency made by the prisoners themselves or by anyone on their behalf, while the clemency board handles cases, as it were, on their own motion which come direct from the barracks or from the penitentiaries with the momoranda as to facts that I have heretofore referred to.

Q. Who determines whether or not those cases shall actually go to the clemency board?—A. That question is determined by the record room upstairs because they see at once where a case has an application or letter or petition asking for clemency such case shall go to the clemency section, whereas the memoranda from the barracks or a list of prisoners from the penitentiary will go to the clemency board.

Q. The clemency board is not, then, under you as chief of the clemency division?—A. No, sir; I have actually nothing whatever to do with the clemency board except to try to keep in liaison with it.

Q. How long have you been on duty in the Department of Military Justice?—A. Since the latter part of 1918.

Q. As a result of your experience in the Division of Military Justice, and as a result of your observation, what are your conclusions as to the working of the system of military justice in the Army as now applied?—A. I would say that the rights of every accused are scrupulously protected in this office. First, the records are carefully examined to see that during the trial his substantial rights have been protected, and secondly, after he has been legally convicted of the offenses in question both the prisoner himself and anyone

n his behalf can make and do make applications for clemency and leniency, nd I can say from my own positive knowledge that in the exercise of clemency, ven during the period of the war, while I was in this office a fair and liberal ttitude was exercised toward prisoners, and of course since the return of onditions approximating those of peace a more liberal attitude has naturally een adopted.

Q. In your judgment, how does this protection compare with the protection hich accused prisoners get in the civil courts?—A. I would say on the whole hat the prisoner is afforded as careful protection of his substantial rights hen his case has finally passed through the Judge Advocate General's Office the Secretary of War or the President as afforded him in the civil criminal ourts of this country. I do not mean by this answer to intimate that no changes hatever should be made in our court-martial procedure. For instance, I elieve that the presence of a Judge Advocate learned in the law at each eneral court-martial trial would be advisable and that his duty would be milar to that of the judge in the criminal case who would charge the court s the criminal judge charges the jury, as to the law applicable in the case nd that the law as so laid down by the Judge Advocate must be accepted r the court. Again I feel that perhaps the power of the reviewing authority to econvene a court and send back the case for reconsideration after the court has quitted the accused is one that is of doubtful expediency and perhaps ubject to some abuse.

Q. What, in your opinion, has been the effect, if any, upon the morale of e office of the Judge Advocate General of this controversy which has been oing on in the public press?—A. Of course, I think that the so-called controersy has had a somewhat unsettling and disturbing effect upon the members the Judge Advocate General's Office. I think as a whole the men have felt at the work under Lieut. Col. Ansell, as well as under Gen. Crowder and en. Kreger, has been well done by an exceptionally able staff of lawyers, I may be permitted to say so, and they further feel that perhaps not intionally but none the less inevitable the public has received a wholly wrong upression of military justice as administered under the Judge Advocate eneral.

EXHIBIT 26.

MARCH 26, 1919.

Q. Give your full name, rank, and present duties.—A. Col. William S. Weeks; dge advocate; executive officer, Judge Advocate General's Department.

Q. How long have you been on duty?—A. About the 1st of August, 1918—mewhere between the 1st and middle of August.

Q. At the time the question of amendment of General Order No. 7 was under nsideration in the office, did you have any part in the discussions or in the eparation of this amendment?—A. No, sir.

Q. Were you present at any of the discussions pertaining to that amendent?—A. I think not, sir; I have no recollection of having been present at y discussion of that matter at all. It was all taken up in the Division of illtary Justice and was discussed by those officers. I have nothing to do th that work.

Q. Explain definitely what has been the status of Gen. Ansell in the office of e Judge Advocate General since you became executive officer and up to the esent time?—A. When I first went to the office I acted as assistant to Col. orrow. At that time Col. Mayes was senior assistant, under Gen. Crowder, d Col. Morrow was executive officer. That lasted for about a month. Durg that time Gen. Crowder was in charge of all matters pertaining to departents and personnel, and went over all the important cases. After Gen. nsell's return to the office Col. Mayes was ordered to France and, as I reember, that was about the last of August, or 1st of September. Shortly thereter Col. Morrow was also ordered to France. After Gen. Ansell's return e running of the office remained about the same as when Col. Mayes was in arge. Gen. Crowder, as I understood it, retained charge of the appointment all officers. I know that all recommendations were approved by him and it as my understanding that matters of policy were referred to him. That conued, in a general way, up to sometime about the middle of January, when en. Crowder came back and took charge of the office.

Q. Upon the return of Gen. Crowder to the office what changes were made as to the duties of Gen. Ansell with respect to the administration of military justice?—A. Shortly after his return to the office Gen. Crodwer issued a memorandum changing the routing of certain classes of papers, as I remember. (Memorandum herewith.)

Q. To what extent have you been associated with the Division of Military Justice in the Judge Advocate General's Office?—A. When I was first ordered to duty in the Judge Advocate General's Department I was assigned to the Division of Military Justice, under Col. Read. I remained on that duty for about three weeks. During that time I reviewed some records, but my principal duty was preparing indorsements to letters pertaining to military justice and acting as a sort of executive officer to that division—assigning rooms, desks, checking up the record room, etc.

Q. So far as you have observed in your capacity as executive officer, what has been the effect, if any, upon the morale and efficiency of the office of this controversy which is going on, with respect to the administration of military justice?—A. So far as affecting the morale of the office I noticed no particular change. There have been several officers from the office and some officers assigned from the Provost Marshal General's Office on some special duty, whose functions I know nothing about. Prior to the time that this discussion arose I gained the impression from talking to officers from civil life on duty in the department that they believed that changes in the court-martial manual and in the Articles of War, should be made. Since this controversy arose I have not taken occasion to express any views, nor to receive any.

Q. Explain fully what disposition was made of Gen. Ansell's report of his European trip?—A. Along about the last of August, I can't be sure of these dates, but I know it occurred before we moved into this building, Gen. Ansell gave a lecture to all of the officers of the department on his trip abroad; this was shortly after his return. As I remember the circumstances he went through the executive office into Gen. Crowder's office and got that report from Gen. Crowder's desk, and then went on through into the library, where the lecture was given.

Q. Was that the original or a copy of the report?—A. That was the original. After we moved into the office over here he gave another lecture on that report to the officers who had come in since that time. When Col. Morrow and Col. Power went abroad they asked me to get that report and have copies made. I had those copies made one Sunday morning, and as I remember I had four of them made by Mr. O'Neil, a stenographer in the office, who came to work Saturday night and Sunday morning as they were leaving on Sunday afternoon. I furnished each with a copy and I kept two copies, one for myself and one I attached to the original. I found that that report had never been put on file, and later on, some one else who was going abroad (I think it was Col. Goff), asked for a copy. In the meantime I thought that Gen. Ansell had the report in his file, and I suggested that he had better put it in the files of the office—and that was done. I furnished Col. Goff a copy, I think I gave him my copy.

Q. You don't know when this report came into the hands of Gen. Crowder?—A. No, sir; I do not.

Q. When was the report, if at all, forwarded to the War Department?—A. It never was forwarded so far as I know. The last I saw of it was in the files of the office.

Q. In that report Gen. Ansell calls attention to the liabilities which are liable to grow out of the presence of our Army in France, and urged steps be taken to gather and record facts with a view to forehanded preparation against unjust claims and excessive damages for the just ones. Do you know whether any action was ever taken along those lines?—A. None so far as I know.

Q. You don't know what is being done along those lines in France?—A. I don't know, sir.

Q. Have any steps been taken by the office of the Judge Advocate General in Washington to bring about any such action?—A. None; so far as I know. It may have been taken and gone out direct from the Judge Advocate General's office without my knowing it.

Q. Is it probable that in matters of that kind that correspondence would go out without passing over your desk?—A. It could go out without passing over my desk. Does not necessarily pass through me. Ordinarily I would hear something about it, but it is not necessary.

Q. Going back to the memorandum of January, 1919, changing the routing of work in the office, do you recall what effect that had upon Gen. Ansell's duties,

with respect to military justice?—A. As I remember that memorandum it read something like this: "Until further orders all matters, except those pertaining to military justice, shall be routed through Gen. Ansell. Those pertaining to military justice shall go direct to Gen. Crowder."

Q. Did this take place before or after Gen. Ansell appeared before the Senate committee?—A. This I could not say.

Q. Do you know why this change was made by Gen. Crowder?—A. No; I do not know why he made the change. I think he said something about expediting the business of the office.

EXHIBIT 27.

WASHINGTON, D. C., *March 26, 1919.*

Lieut. Col. Samuel T. Ansell, Judge Advocate General's Department, being first duly sworn, was interrogated by Maj. Gen. J. L. Chamberlain, Inspector General, as follows:

Q. The draft of the order of November, 1917, designating you as Acting Judge Advocate General contains this statement: "The verbal orders of the Secretary of War under date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell," etc. Can you tell me anything about those verbal orders?—A. General, I feel that as a matter of self-protection I have the right to decline, and I ought to decline, and I therefore do decline to answer this question or any other question asked me by the Inspector General in this investigation, inasmuch as I believe the purpose of it is to lay the foundation for disciplinary action against me.

EXHIBIT 28.

MARCH 31, 1919.

Q. Give your full name and rank.—A. Maj. Andrew J. Copp, jr.; Judge Advocate General's Department.

Q. State briefly the duties upon which you have been engaged since you have been in the Judge Advocate General's Department.—A. My commission is dated July 30, 1918. My first assignment to duty was at Camp Dix, N. J., as camp judge advocate; on duty there one week; then transferred to the office of the Judge Advocate General's Department, at Washington, D. C., and was on duty there for one month, reviewing records of trial by general court-martial. The six months following I was camp judge advocate at Camp Sheridan, Ala., and on March 5 I was transferred again to the office of the Judge Advocate General and have served as a member of the special board of review.

Q. As a result of your experience, what are your views as to the protection given to the accused by the military code, as it is administered at the present time?—A. I consider the administration of military justice entirely adequate to meet the needs of the Army in times of both war and peace, and it is entirely adequate, in my opinion, to afford the accused protection at every stage of the proceedings, but because of its flexibility there is the possibility that the accused may be not afforded the protection he is entitled to. It is like any other machine which is capable of being operated either for good or for bad. There is one criticism, however, I think I wish to make, and I know that my views are concurred in by many of the officers at Camp Sheridan, with whom I was in close touch during my tour of duty there, and that is that there is frequently too long a delay between the time of confinement of the accused, and the final disposition of his case; that is, the action of the reviewing authority. Under the seventieth article of war, it is required that the charges be served upon the accused within 8 days after confinement or arrest, and trial 10 days thereafter, meaning 10 days after his confinement or arrest; or if that is impracticable that he be brought to trial not more than 30 days after those 10 days, making 40 days in all as the maximum period of confinement. It frequently occurs that this period is exceeded and there seems to be no remedy for it under the code as it now exists. I believe the remedy can be found in making the seventieth article of war a penal article, and so that an officer who causes the arrest or confinement of an accused under charges may be brought to a trial for his neglect if he allows those limits to be exceeded, but I believe the code in other respects is entirely adequate, if properly handled, and I am convinced that it should be flexible in order to enable a commanding general or reviewing authority considerable latitude in maintaining the discipline of his command. From my experience at Camp Sheridan as judge advocate I concluded that the accused was amply protected at every stage of the proceedings,

particularly in view of the fact that the charges are, or should be, thoroughly investigated before he was brought to trial. From my experience on the present board of review I feel that if there is evidence of any want of protection or of any miscarriage of justice in any case that it is possible to detect by this office. There are certain standards by which a case may be determined; whether it was poorly or well tried. A well-tried case is one in which the prosecution made at least a prima facia case and counsel has done for his client all that it appears could be done under the circumstances. This appears from every record of trial as it comes to the Judge Advocate General's Office, and I believe that if the convening authority in the first instance is discreet I don't see how a serious error involving the protection of the accused could happen. There are only three elements to a well-tried case, if the court proposes to sustain the findings that is apparent from the face of the record. If the court neglects to duly advise the accused of his rights, the effect of his plea of guilty, or makes erroneous rulings in other respects; if counsel for the accused does not give protection to the client, it may or may not be discovered from the record. It is not discovered if certain facts were not brought out, as for insance, the history of the accused, or possibly the immediate cause of his committing the offense; the matter of humanity, and if that is not developed to advise the court properly why the accused committed the offense, it might not be discovered here. This office can not read anything not in the record. That would be an error of omission rather than commission on the part of the accused.

EXHIBIT 29.

Q. What is your name?—A. John S. Lyon.

Q. And your duties?—A. I am in charge of the General Court-Martial Section of the Judge Advocate General's Office.

Q. I have here a copy of an office memorandum dated April 10, 1918, giving an office organization. Can you tell me whether this circular simply confirms an organization which was in existence at the time of its issue or whether it puts into effect a new organization? This question has reference, particularly, to subparagraph A, paragraph 11.—A. I think I have seen this or something similar to this a time ago. I think it was run off, of course after the office began to increase in volume of work. They did get up a memorandum of this kind with instructions as to how to be handled. I think that that carries about the usual way of the work now as since the war commenced. That one particular section is all that I am speaking about.

Q. You doubtless are familiar with the facts connected with the controversy which is going on with respect to the Judge Advocate General's Office?—A. Well, I have seen a little in the papers and heard of it; yes.

Q. Were you on duty in the Division of Military Justice between the period November, 1917, and April, 1918?—A. Yes, sir.

Q. And prior to November?—A. Yes, sir; have been in this office 17 or 18 years.

Q. Was there any material difference in the character of the duties performed by the senior assistant in the office subsequent to November, 1917, and prior to that date?—A. Well, I can not say about that part of it myself.

Q. You handled the papers?—A. I know they went through the office and I am under the impression that he signed them during that time, but I could not be positive whether or not they went to him. I would look at the last paragraph which would give me all the information I wanted, and I am under the impression that Gen. Ansell signed them.

Q. Had there been at that time—November, 1917—any radical change in the system of handling these papers? Would it not probably have impressed you?—A. Well, if there had been any radical change I should have noticed it.

Q. You are not cognizant of any radical change?—A. No, sir.

EXHIBIT 30.

WASHINGTON, D. C., *April 21, 1919.*

Col. James J. Mayes, Judge Advocate General's Department, appeared before Maj. Gen. J. L. Chamberlain, Inspector General, and being duly sworn, testified as follows:

Q. How long were you on duty in the office of the Judge Advocate General?—A. I came on the 3d of April, 1914, and remained until the 10th of August, 1918.

Q. What was your status in the office?—A. Until the war came on I was an ordinary assistant in the office. Then I went with the division and in November, 1917, came back and was a sort of a special assistant to the Acting Judge Advocate General, Gen. Ansell, and then when he went to Europe I was practically in the same position that Gen. Ansell had been; that is, I signed myself as Acting Judge Advocate General. Of course, that was a mere administrative title.

Q. You were senior assistant and as such in the absence of the Judge Advocate General was the Acting Judge Advocate General?—Yes, sir; that was my position.

Q. And you continued in this status until Gen. Ansell's return from Europe?—A. Yes, sir; and then I went to Europe.

Q. You are familiar with General Orders, No. 7, of 1918, are you not?—A. Yes.

Q. What was the policy of the office relative to the application of General Orders, No. 7, prior to the time that Gen. Ansell went to Europe?—A. I can answer that only by what I found was going out of the office. When I took charge of the office upon Gen. Ansell's departure I insisted, since I was responsible, that everything pass over my desk. In that way I found what had been going on. The disciplinary division had not been sending its matter through us except, I might say, occasionally. I found that they were advising reviewing authorities with reference to matters clearly under the law, and under that order within the discretion of the reviewing authority. General Orders, No. 7, gives no room for such advice, neither does the law where punishments are discretionary and where the law has not been vided. The discretion as to the amount of punishment is in the court and the reviewing authority. I directed that such advices be stopped and the application of General Orders, No. 7, be limited to its stated purpose. The assumption of an authority to advise a reviewing authority that a sentence is too heavy carries with it the necessary corollary that this office could advise a reviewing authority that the sentence was too light and that would be unspeakable. It was for this reason that I directed that that be stopped.

Q. I understand you to state that you found the policy of the disciplinary division had been to make such recommendations?—A. Yes. They had gotten into the habit of signing their reviews themselves. Col. Davis signed them and sent them to the reviewing department. The great majority of them we never saw in our part of the office, Gen. Ansell and I. They had a direct connection with Gen. Crowder.

Q. You are referring now to the cases which came under General Orders, No. 7?—A. Yes.

Q. You are not referring to cases which were reviewed and went forward?—A. Not to the cases that go to the President; no. I can not vouch for absolute accuracy, but I think this statement will cover it, that those cases which were forwarded by reviewing authorities having authority to take final action on them were forwarded to The Judge Advocate General merely for the review and advice directed by General Orders, No. 7, concerning which a letter would go back to the reviewing authority, advising him as to the result of the examination, and upon which the reviewing authority would then take final action. All these cases, with some exceptions—there were some of them sent through our desks—were acted upon by the disciplinary division and a letter sent to the reviewing authority by the disciplinary divison. All cases requiring the action of the President were, I am quite sure, passed over our desks. There may have been exceptions to that rule.

Q. Was it your understanding during that period that Gen. Ansell was relieved from all responsibility with respect to the administration of military justice and all matters pertaining to courts-martial?—A. I have to answer that question practically. There was no order relieving him, but the disciplinary division took things directly to Gen. Crowder and assumed to send out these letters, whether by Gen. Crowder's knowledge or not I do not know. The effect was to practically leave us out of the disciplinary cases except as they went up to the President.

Q. As I understand from what you say, it practically left you out in so far as pertained to the cases which came under General Orders, No. 7?—A. Yes, sir.

Q. Do you know why that condition of affairs existed?—A. No, sir. The letter that caused us so much trouble with respect to joint trials went out in that same way. We never saw it until long after it had gone out.

Q. Which letter was that?—A. It was a letter which advised concerning joint trials and made reference to cases properly joined, urged more joint trials, and said that joint trials should be had in all cases where accused were jointly charged or where charges were properly joined. That letter seemed to have induced a number of errors. We never saw that letter at the time. Gen. Crowder signed that letter.

Q. About when did that letter go out?—A. I don't know. That letter played a part, I think, in the Camp Grant cases.

Q. From the correspondence and from the testimony that has been taken it appears that Gen. Ansell was very much opposed to General Orders, No. 7, and to its provisions; that is correct, is it not?—A. I know that he never thought very much of the ethics of General Orders, 7; as to active opposition I never heard him say much.

Q. Did you ever connect that fact up with the fact that the cases under General Orders, No. 7, never went through your office? The fact that he was not friendly to the order—did that question ever come up for discussion at all?—A. No, sir.

Q. Now, in matters generally affecting administration of military justice outside of General Orders, No. 7, did they or did they not come under the supervision of your office?—A. You mean Gen. Ansell's office?

Q. Yes; you were his principal assistant at that time.—A. I can hardly answer that question. I know many of them did and I know some of them did not. For instance, the letter I just spoke of and numerous letters of advice were sent out from the Judge Advocate General's Office that we had not seen but I suppose most of them are all right. I do not believe this question is susceptible of answering.

Q. During the period that Gen. Ansell was absent in Europe and you were senior assistant you gave to General Orders, No. 7, the strict legal interpretation? Upon the return of Gen. Ansell from Europe what occurred, respectively?—A. I was not here.

Q. Did you leave immediately upon his return?—A. Yes, sir.

Q. You are not familiar then with the changes which he made in the application of that order?—A. No, sir. I would like to say in connection with my application of General Orders, No. 7, that I realized there were many sentences being imposed which were excessively heavy, what you may call sentences produced by war hysteria, but I considered the reduction of a sentence an attribute of the pardoning power and as not being a function of our office in advising upon the legality of the sentence. However heavy those sentences were, they were in all cases that we let them stand within the legal authority. I appreciated that all sentences ought to be coordinated, that there should be a determination of what was the adequate punishment for an offense, and that the sentences that had been imposed for that offense should be cut down so as to bring them within reasonable limits of what we determined was an adequate punishment for that offense. With that end in view I was establishing, with Gen. Crowder's concurrence, what is known as the disciplinary section of the disciplinary division. I believe that has now grown to considerable proportions. My idea being that that section should take of its own initiative an examination of cases and recommend to the Secretary of War that such sentences as were excessive should be relicted down to the proper measure of punishment, I realized when I was doing this, instead of making recommendations as the cases came along, that men in some cases would be resting under heavier sentences than should be imposed upon them for some time but the sentences had already been imposed, the ignominy of the heavy sentence was already upon the man and I did not consider it any great injustice to let the sentence stand for a sufficient time to allow such an accumulation of cases, such a study as would enable the proper measure of punishment to be arrived at, especially in view of the fact that all these men truly deserved a year's punishment; where a man had been given a sentence of say, 15 or 20 years, there is no reason to believe after his case is reviewed and found to be sustained that his sentence should be reduced below a year. Of course where I found a case which demanded immediate action, I did take action by recommending reduction of a sentence through the mitigating power of the President but not through the reviewing authority

Q. You stated that when you became senior assistant and believing that all matters pertaining to the disciplinary division should pass over your desk, you gave instructions to that effect and after that they did pass over your desk?—A. Yes, sir.

Q. Have you any reason to believe that that same result could not have been accomplished if Gen. Ansell had so desired?—A. No; I don't know of any reason. In fact, I don't know how the other system grew up. I felt that if I would be charged with the responsibility of the office I should know what went out of it, therefore I permitted nothing to go out expressing the opinion of the office except over my signature or in important cases, Gen. Crowder's signature.

Q. There was no objection made to that when you made the proposition?—A. No; Gen. Crowder was at that time occupied at the Provost Marshal General's Office so that he did not have very much time to be at the Judge Advocate General's Office.

Q. Upon the return of Gen. Ansell from Europe, did he automatically assume the duties of senior assistant, or did he receive any special orders so far as you know?—A. So far as I know he automatically assumed his duties.

Q. You do not know of any specific instructions which he received relative to the scope of his duties?—A. No; I probably would not know unless he told me and I do not remember him saying anything about it.

Q. Do you recall the cases of Ledoyen, Fishback, Sebastian, and Cook of the American Expeditionary Forces, known as the four death cases of France?—A. I remember those cases; yes, sir.

Q. Do you recall the circumstances connected with the review of those cases in the office of the Judge Advocate General?—A. They were reviewed and the death penalty was sustained as I remember. I am speaking of the original review.

Q. The cases were originally reviewed—I am speaking now of what the evidence shows and the examination of records—by Maj. Rand and then they passed over the desk of the chief of the division, who was Maj. Davis, to your office (Gen. Ansell's office) and finally to the Judge Advocate General, and then from the Judge Advocate General there were a lot of ramifications, there was a memorandum submitted by Col. Clark, and finally went to Gen. Ansell, etc. Do you recall what action was taken in Gen. Ansell's office on those papers when they originally passed from the division of military justice to Gen. Crowder?—A. I believe that my recollection is clear to this extent: Gen. Ansell was not there when those reviews came in and I passed those records to Gen. Crowder concurring in the reviews. The reviews I think recommended the execution of the death penalty. I concurred in that view. Then when Gen. Ansell came back Gen. Crowder asked him to review it. Gen. Ansell read the reviews and did not concur. Now, as to whether he disagreed in all the cases I am not sure, but the memorandum he filed at that time would show what his holding was.

Q. Do you recall whether or not, prior to being called upon by Gen. Crowder to review these cases, he had expressed himself verbally regarding the advisability of carrying out these sentences?—A. I am quite sure there was no change of view. I base that conclusion upon this: Gen. Ansell and I were in the same office and when these cases were turned over to him to read he immediately took the view that he afterwards maintained. I do not believe there was any change in his views. That idea may have grown up from the fact that they were sent to Gen. Crowder by me concurring in the imposition of those death sentences. Ansell and I differed on those cases and I am sure that Ansell was not here when they were passed to Gen. Crowder. I would like to say there that I approved the death penalties in those cases in view of the law as it now stands. I may say that I doubt the necessity of permitting the death penalty be imposed in all such cases; however, I was charged with the administration of the law as I found it and I therefore favored the execution of the sentences believing that they were flagrant cases such as was contemplated by the statute in authorizing the death penalty,

Q. I think you stated that Gen. Ansell was called upon to review those cases after they had gone up and that was what led to his view?—A. Yes, sir.

Q. How long were you in the office after Gen. Ansell returned from Europe?—A. Not over a week because I went on leave and then departed immediately.

Q. Have you any knowledge or do you recall anything with regard to the report which he submitted on his trip to Europe?—A. No; I don't think that it had been submitted when I ceased to have an interest in the office because I

divorced myself from the office when I found I was going to Europe. Of course, I talked with him, but I never read the report. I had no time nor opportunity.

Q. During the period that you were on duty in the office with Gen. Ansell do you recall any recommendations of an important nature made by him with respect to the administration of military justice which were not adopted? I except now all recommendations pertaining to the interpretation of section 1199, Revised Statutes.—A. I do not recall any. Of course, in an office of the sort there are a great many recommendations and discussions that are hard to isolate. I don't recall anything particular now. There may have been.

Q. In France you have been in the office of the judge advocate of the American Expeditionary Forces?—A. Yes, sir.

MAY 7, 1919.

Q. Referring to the question of the four death cases in France can you tell me in a general way what Gen. Ansell's views were with respect to men who would go to sleep on post in the face of the enemy?—A. I can not affirmatively state that he ever told me what his views were, but I think it is quite possible that he may have. I base this statement upon the fact that I have held to the view that where a soldier was found sleeping on sentry duty in the front line he should receive the most severe penalty authorized for that offense, which is death unless there was some very mitigating explanation of his conduct. I have held to this view because a sentinel in such position holds the lives of his comrades in his hands. Having stated my opinions I will say that I do not remember of Gen. Ansell ever disagreeing from that view. His disagreement on the four cases from France was upon the sufficiency of those cases and not upon the principle. I can not say that Gen. Ansell ever said anything to me about this, but it is very probable, in fact extremely probable, that we have discussed the abstract proposition as I have outlined above.

Q. Was Gen. Ansell in the habit of expressing his views on subjects generally, freely and forcibly?—A. He was.

EXHIBIT 31.

APRIL 29, 1919.

Referring to this matter, Mr. Earle L. Brown, who at the time was stenographer in Gen. Ansell's office, states:

"You ask me if I can recall any discussion on the four death cases in France. I can't recall any definite discussion. I do think, though, that when those cases were first discussed that Gen. Ansell, before reviewing the cases at all, had really expressed himself that the conviction ought to be sustained, but I know that after he reviewed the cases and found the circumstances of them, or rather when the circumstances showed those men had, as I recall it, been exposed to so much fatigue and long duty, that on that ground his opinion was altered. I can't say anything definite, but that is my impression."

MAY 5, 1919.

Q. Do you recall that when Gen. Ansell returned from Europe he wrote a report of his observations over there? Did you write that report for him?—A. Yes, sir.

Q. Do you know what disposition was made of the original of that report?—A. In the first place it was written coming over on the boat, and I don't know what became of it, but I know it was turned into Gen. Crowder, and my understanding was that report was made, through Gen. Crowder, to the Secretary of War.

Q. Do you know for certain that the original report was given to Gen. Crowder, or is that merely a presumption?—A. It is a presumption strong enough to satisfy me, but I can't say I saw him hand it to Gen. Crowder; but I think Gen. Ansell submitted it with a supplemental report of his personal observations, and I believe I can say with certainty that Gen. Crowder discussed that with him.

Q. Did you write that supplemental report also?—A. Yes, sir.

Q. Was that written coming over on the boat or after your arrival?—A. I think it was written on the boat.

Q. Do you recall anything as to the length or character of that report—I am speaking now of the supplemental report?—A. It was nearly as long as the other.

Q. Did it differ materially from the other in character?—A. Yes, sir. I think the longer report was more of a technical discussion of the questions surrounding points which interested the Judge Advocate General's office. It was a formal report and the supplemental was, I would say, of the character of an unofficial report in that it was outside the questions common to the Judge Advocate General's Office, and it was more about his opinions as to the standing of the armies and what his observations had been as to the military situation generally.

Q. Did you at any time in the office, after your return, hear Gen. Ansell refer to the fact that his formal report had never been acted upon or submitted to higher authority?—A. No, sir. I never heard that discussed.

EXHIBIT 32.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 10, 1917.

Memorandum for the Secretary of War.
(For his personal consideration).

Subject: Authority vested in the Judge Advocate General of the Army by section 1199, Revised Statutes, to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

1. It is my duty to bring to your attention and present to you my views upon a long-existing situation which arose out of an ill-considered and erroneous change of attitude upon the part of this office that occurred within a score of years after the close of the Civil War—a situation which has endured ever since in the face of the law and in spite of attending difficulties but without reexamination, and which has profoundly affected the administration of military justice in our Army. I refer to the practice of this office, adopted it seems, in the early eighties, to the effect that errors of law appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review. This nonuser of power which Congress authorized and required this office to exercise has, in numberless instances of court-martial of members of our Military Establishment, resulted in a denial of simple justice guaranteed them by law. Under the rule concededly illegal and unjust court-martial sentences, when once approved and ordered executed by the authorities below, pass beyond all corrective power here and can never be remedied in the slightest degree or modified except by an exercise of Executive clemency—an utterly inadequate remedy, in that it must proceed upon the predicate of legality, can operate only on unexecuted punishment, and, besides, has no restorative powers.

2. The last and most flagrant case of the many recent ones which have moved me to exercise an authority of this office which has long lain dormant, perhaps denied, in respect of which I address you this memorandum, was the recent case of the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A, of the Eighteenth Field Artillery, resulting in sentencing them to dishonorable discharge and long terms of imprisonment. Those men did not commit mutiny. They were driven into the situation which served as the basis of the charge by the unwarranted and capricious conduct of a young officer commanding the battery who had been out of the Military Academy but two years. Notwithstanding the offense was not at all made out by the evidence of record, notwithstanding the oppressive and tyrannical conduct of the battery commander, notwithstanding the unfair and unjust attitude of the judge advocate, which also appeared on the record, these noncommissioned officers were expelled from the Army in dishonor and sentenced to terms of imprisonment ranging from seven to three years. The court had jurisdiction and its judgment and sentence for that reason could not be pronounced null and void, but its conduct of the trial involved the commission of many errors of law

which appeared upon the face of the record and justified, upon revision, a reversal of that judgment. That case showed the extreme and urgent necessity of a reexamination of my powers in such cases, and, after thorough consideration and with the concurrence of all my office associates, I took action in that case and concluded my review as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

Since this involves a departure from long-established peace-time administration of this office, I deem it my duty to acquaint you with the reasons therefor.

3. You, Mr. Secretary, and your immediate military advisers, can never appreciate, I think, the full extent of the injustice that has been done our men through the operation of this rule. Officers of our Army, howsoever sympathetic, can not approach a proper appreciation of the depth, extent, and generality of the injustice done, unless, through service in this office, they have seen the thing in the aggregate. A proper sense of the injustice can be felt only by those who exercise immediately the authority of this office. Indeed, those thus experienced can gather the full impression of the wrong done only by a complete mental inclusion of that vast number of cases where concededly corrective power ought to have been, but was not, exercised in each year of the past forty-odd years. My entire service, during all of which I have been keenly sensible and morally certain that the office practice was wrong, my six years' service in this very office during which I have borne witness to hundreds of instances of conceded and uncorrected injustice—all of this has never served to impress me with the full sense of the wrong done to the individual and to the service so much as has the experience of my present brief incumbency of this office during this war. What is true in my case is true, so they advise me, of my associates. During the past three months, in scores, if not hundreds of cases carrying sentences of dishonorable expulsion from the Army, with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice has been able to do no more than point out the error and recommend Executive clemency. All this, of course, has been utterly inadequate. It has not righted the wrong. It has not made amends to the injured man. It has not restored him, and could not restore him, to his honorable position in the service. It could do no more than grant pardon for any portion of the sentence not yet executed. Such a situation commands me to say, with all the emphasis in my power, that it must be changed and changed without delay. This office must go back to the law as it stands so clearly written, and, in the interest of right and justice, exercise that authority which the law of Congress has commanded it to exercise.

4. The Judge Advocate General of the Army is to revise all courts-martial proceedings for prejudicial error and correct the same. The law as it exists to-day is to be found in section 1199, Revised Statutes, wherein it is provided that "the Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

The word "revise," whether used in its legal or ordinary sense, for both are the same, can have but one meaning. It signifies an examination of the record for errors of law upon the face of the record and the correction of such errors as may be found. "Revise," or its exact synonym "review," is a word so frequently found in the law and so familiar to all lawyers that its meaning can never be mistaken. When used in connection with judicial proceedings it can involve no ambiguity. I am justified in entering upon a construction of the word only by the fact that this office for so long a time has ignored its meaning.

The word "revise," by the Standard Dictionary is defined thus:

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

And the word "review," given therein as a synonym for "revise," is defined as:

"To go over and examine again; to consider or examine again (as something done or adjudged by a lower court) with a view to passing upon its legality or

correctness; reconsider with a view to correction; as, the court of appeals reviewed the judgment; the judge reviewed and retaxed the bill of costs; to see or look over again; a literal meaning now rare."

In 34 Cyc., at page 1723, the word "revise" is defined as:

"To review or reexamine for corrections; to review, alter, or amend. See also 'revision.'"

And the word "revision" is therein defined as:

"The act of reexamination to correct, review, alter, or amend."

And in Black's Law Dictionary "revise" is defined as:

"To review, to reexamine for correction; to go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it."

And "review" is therein defined as:

"A reconsideration; second view or examination; revision; consideration for purpose of correction. Used especially of the examination of a cause by an appellate court."

And in Anderson's Law Dictionary the word "revise" is defined as:

"To reexamine and amend; as, to revise a judgment, a code, laws, statutes, reports, accounts. Compare 'review.'"

And the word "review" is defined in the same dictionary as—

"Viewing again; a second consideration; revisement, reconsideration, reexamination to correct, if necessary, a previous examination."

And in the same dictionary a "court of review" is defined to mean—

"A court whose distinctive function is to pass upon (confirming or reversing) the final decisions of another or other courts."

And in Words and Phrases (vol. 7) the word "revise" is defined as follows:

"To revise is to review or reexamine for correction, and when applied to a statute contemplates the reexamination of the same subject matter contained in a prior statute and the substitution of a new and what is believed to be a still more perfect rule." Citing Casey *v.* Harned, 5 Iowa (5 Clerk), 1, 12.

"Revise as contained in the constitution, Article XV, section 11, providing that 'three persons learned in the law shall be appointed to revise and rearrange the statute laws of the State,' means to review, alter, and amend, and does not signify an act of absolute origination. It relates to something already in existence." Citing Visart *v.* Knopps (27 Ark., 266–272.)

"A law is revised when it is in whole or in part permitted to remain and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect or to fit it better to accomplish the object or purpose for which it was made, or some other object or purpose." Citing Falconer *v.* Robinson (46 Ala., 340, 348.)

5. I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, Thirtieth Statutes, 553 (bankruptcy law), provides in part as follows:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction."

The word "revise" as used in the bankruptcy act is universally held to be something broader than the power to review by writ of error. In In re Cole (163 Fed., 180, 181; C. C. A., first circuit), a case typical of all, the court, after adverting to the usual limitations upon the power to review by way of writ of error, contracted that method with the statutory power to revise, as conferred by that act, saying—

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And the court then said:

"We feel safe to adopt the broader view, and it is our present opinion that it is our right so to do."

And concluded that, upon revision—

"We can revise any question of law as to which we may justly infer that the district court reached a conclusion, whether formally expressed or not and whether or not formally presented."

The language of that statute is the very language of this, except that the revision there is expressly limited to matters of law. Inasmuch as in the statute before us there is no such express limitation, it could hardly be held that the revisory power of this office is less than the revisory power conferred by

the bankruptcy act. The word "revise," as used in the bankruptcy statute, has always been held to signify power to reexamine all matters of law imported by or into the proceedings of the case, and a very liberal view has been taken of what constitutes the record and proceedings of such matters. (See the many cases cited in Federal Reporter Digest, "Bankruptcy," vol. 5, from secs. 349 to 448). The revisory power there conferred is something broader than that invoked by writ of error, though, of course, not so broad as to justify a reexamination of mere controversies or questions of fact. Doubtless, in any view of the case, the question whether the evidence sustains the verdict—that is, whether there is any substantial evidence at all upon which the verdict may rest—is a question of law which may be reviewed under this power, and such at least must be the power of this office.

6. The history of the legislation, the early execution given it, its historic place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word "revise" in the present instance. It is not necessary now to say whether such revisory power existed in the judge advocate in the early days of our Army, though, especially in view of the English military law, this seems to have been so; nor to advert to the fact that after the War of 1812, and also after the Mexican War, the duty of the Corps of Judge Advocates seems to have been primarily that of military prosecutors. Nor is it necessary, except to indicate the proper setting, to say that military prosecutiton had ceased to be the primary function of the Corps of Judge Advocates at the beginning of the Civil War, if not before. Nor is it more than suggestive that the Judge Advocate General of the Army has always presided over both the Corps of Judge Advocates and the Bureau of Military Justice, and that this corps and this bureau were consolidated by the act of 1884 (23 Stats., 113) into what is now the Judge Advocate General's Department. It is important to note that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War and expressly invested its head, the Judge Advocate General of the Army, with this revisory power; and it is important to note that Congress redeclared this power in 1864 (13 Stats., 145) and in 1866 (14 Stats., 334), and again in section 1199, Revised Statutes, of which the former acts were the antecedents. Now, taking up these antecedents, in the act of July 17, 1862 (12 Stats., 598), which was an act "calling forth the militia to execute the laws of the Union, to suppress insurrection," etc., it was provided—

"That the President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with the rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned, for revision, all records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

This provision speaks very plainly. It not only directs the Judge Advocate General to revise the records and proceedings of courts-martial, but it further directs that officer to keep a record of "all proceedings had thereupon"; that is, upon the revision. It is clear that this intended something more than a perfuctory scrutiny of such records, and that it in fact vested this office with power to make any correction of errors of law found to be necessary in the administration of justice. The records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated.

The next legislative expression is found in the act of June 20, 1864 (13 Stat., 145), of which sections 5 and 6 are as follows:

"Sec. 5. There shall be attached to and made a part of the War Department, during the continuance of the present Rebellion, a bureau to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and in which a record shall be kept of all proceedings had thereupon.

"Sec. 6. That the President shall appoint, by and with the advice and consent of the Senate, as the head of said bureau, a Judge Advocate General with the rank, pay, and allowances of a brigadier generl, and an Assistnt Judge Advocate General with the rank, pay, and allowances of a colonel of cavalry. And the said Judge Advocate General and his assistant shall receive, revise, and have recorded all proceedings of courts-martial, courts of inquiry, and military commissions of the Armies of the United States, and perform such other duties as have heretofore been performed by the Judge Advocate General of the Armies of the United States."

Just as the title of the judge advocate is in itself significant in this connection, is the title of the bureau thus created—the Bureau of Military Justice. will be noticed that this act preserves all the requirements of the act of ly 17, 1862, supra, concerning the duty of the Judge Advocate General in matter of revising the records of general courts-martial, and keeping a ord of "all proceedings had thereupon," meaning, of course, proceedings n such records in revision. And at the close of the war, in the legislation king to the peace establishment, Congress enacted the act of July 28, 1866 Stat., 334), the same being "An act to increase and fix the military peace ablishment of the United States," in section 12 whereof it was provided—

"That the Bureau of Military Justice shall hereafter consist of one Judge vocate General with the rank, pay, and emoluments of a brigadier general, one Assistant Judge Advocate General with the rank, pay, and emoluments of a colonel of cavalry; and the said Judge Advocate General shall re-ve, revise, and have recorded the proceedings of all courts-martial, courts inquiry, and military commissions, and shall perform such other duties have been heretofore performed by the Judge Advocate General of the ny * * *."

This act does not change the duties of the Judge Advocate General with erence to the revision of records of courts-martial. It omits the phrase nd in the two acts immediately preceding to the effect that "a record ll be kept of all proceedings had thereupon," but introduces for the first e the direction that in addition to revising and recording the proceedings all courts-martial the Judge Advocate General shall "perform such other ies as have been performed heretofore by the Judge Advocate General of Army." It will be observed that this last cited expression, as carried into tion 1199 of the Revised Statutes as quoted above, still remains the law the subject. In referring to the duties "heretofore performed by the lge Advocate General of the Army," the statute included, inter alia, the ies prescribed by the statute, for the presumption is that the duties thus scribed were in fact performed. It follows that included within this direc-n is the mandate that a record be kept of all proceedings had in the revision courts-martial proceedings in the office of the Judge Advocate General, and force of this mandate must be added to the ordinary meaning of the word vise" in determining the scope of the duties of the Judge Advocate General now defined by law.

The legislative history of all the antecedent acts, brought forward as 1199, vised Statutes, shows that the word "revise" has the meaning here indicated. to the act of 1862, see Congressional Globe, part 4, second session, Seven-nth Congress, pages 3320, 3321. This was especially true of the debates n the act of 1866, of which there was considerable, owing to the objection en to the legislative recognition contained in that bill of military com-ssions. An effort was made to strike out and otherwise defeat the entire vision for a bureau of military justice during peace, and the strongest ument made in support of its retention was found in the fact that it had, had freely and satisfactorily exercised this revisory power. The whole or of the debate clearly shows what Congress understood had been the isory power of the Judge Advocate General of the Army since the act of 2. It is said by one Senator (Mr. Lane of Indiana):

It is utterly impossible for the President in the multiplicity of his duties look into all these cases; it is physically impossible for the Secretary of r to do so; and to facilitate the administration of criminal justice it s found necessary to establish this bureau."

And another Senator (Mr. Hendricks) said:

"I am not prepared to vote to abolish the court of military justice. If that rt be properly constituted and discharges its duties legitimately within jurisdiction as the court was organized under the act of two or three rs ago, it will be a blessing, and I will not vote to abolish the court because such wrong decisions that it may have made."

And further on the same Senator referred to the case of one officer in om he was interested in which there had been an erroneous conviction, I said in that connection:

"I went with him to see the Judge Advocate General. The case was called before the Judge Advocate General and reviewed, and at once he decided that testimony was not sufficient, and restored the young man to his position the Army."

Further on, referring to this power, the same Senator said:

"I think it is a protection to the military men of the country to have such a court. It will come to be, when the hour of passion to which my colleague has referred shall have passed away, a court deliberate in its proceedings, and, I hope and have no doubt, wise in its adjudication. Then it will be a blessing to the country and a protection to our military men. Necessarily, when our Army shall come to be 50,000 strong, there will be many military trials for military offenses of military men. There ought to be a court of appeal, and this is intended to be a court of appeal, a court in which the judgment of the courts-martial may be reviewed and if improper revised. Such a court, it seems to me, ought to be in the Army." (See Cong. Globe, pt. 4, 39th Cong., 1st sess., 1866, pp. 3672–3676, et passim.)

It was these legislative antecedents that were brought forward, without substantial change of language, as the existing law (sec. 1199, R. S.) now under discussion.

8. This office, while ignoring its right and duty to revise for prejudicial other than jurisdictional error, has with strange inconsistency been quick to assert its power to declare a judgment and sentence null and voil on the ground that the proceedings were, in its judgment, coram non judice. After the large armies of the Civil War had been demobilized and their activities were no longer a matter of immediate concern to this department, and the Army had become, in point of size, but a small national police force, this office, for reasons unexpressed and unknown, restricted itself to the correction of such jurisdictional error alone. The practice seems to have been adopted without thoughtful consideration of the law or policy involved or the resulting injustice. The opinions of this office, beginning with the early eighties, assume, without argument or reason, that the office was so limited. It can not fairly be said that upon this specific question the office has ever fairly and thoughtfully expressed itself. Extracts from two of the opinions, typical of all, will be sufficient to show the general character and nature of these holdings.

In an opinion under date of August 10, 1885, approved by the Secretary of War, the Acting Judge Advocate General Lieber held as follows:

"As the whole matter is understood to be recommitted to this office for examination, including the letter referred to, I beg to remark that in acting upon the sentence of a court-martial the reviewing authority acts partly in a judicial and partly in a ministerial capacity. He 'decides' and 'orders' (Army Regs., par. 918). Without his decision the sentence is incomplete. His decision is an exercise of judicial functions, and is as much beyond the control of other constituted authority as the findings of the court are beyond his. He can not be ordered to revoke it, and if it be adhered to, the sentence can be removed in no other way than by the President in the exercise of his pardoning power (or set aside by the President when void by reason of a want of jurisdiction)."

In the case of Lieut. J. N. Glass, tried by general court-martial, this office, in a review under date of July 20, 1886, signed by Acting Judge Advocate General Lieber, concluded as follows:

"The proceedings, findings, and sentence in this case having been approved by the reviewing officer in the exercise of his proper functions, they are beyond any power of revision on the part of higher authority, but the President by the virtue of his pardoning power may remit the unexecuted part of the sentence. The latter course is respectfully recommended by this office."

In the opinion first above cited, which is a fair example of the many that have followed, the then acting Judge Advocate General took the view that the proceedings of a general court-martial could be set aside for a want of jurisdiction. But whence came that power? In declaring it to be competent to declare the proceedings of a general court-martial void for want of jurisdiction he evidently overlooked the fact that in declaring a trial void for want of jurisdiction some functionary must sit in an appellate capacity for which there must be some statutory or common law authority. As a matter of fact, no statutory or other authority can be found for the exercise of the power to declare a trial void for want of jurisdiction unless it can be found in that provision of section 1199 which confers a general revisory power upon the Judge Advocate General. If the power to revise includes the power to declare proceedings void for want of jurisdiction, it must also by any fair construction include the power to declare a judgment wrong as a matter of law and reverse it. If this office has the one power it necessarily has the other, and if it has not the latter power, it has not the former. By the plain language of the statute this office has both.

9. Nor has the power here contended for ever been questioned by the civil courts or other civil authority. To be sure, there are many expressions in adjudicated cases to the effect that the duly approved sentence of a court-martial, when the court has proceeded within its jurisdiction and the rules governing its procedure is as final and unassailable as a decision of a civil court of last resort. But it must be remembered, of course, that in each of these cases the court was speaking of collateral attack in the civil courts on the proceedings of a court-martial and did not have in view the power of the department itself to correct court-martial judgment by way of direct revision of it. I have also examined many expressions of opinion by the Attorney General and find that these expressions have had to do generally with cases in which the final approval has been by the President himself and go only to the question of whether such cases can be reopened by the President or his successor for the purpose of undoing what he has once legally done. I have not found that any authority has ever questioned the revisory power of this office to correct errors of law in court-martial procedure when they amount to a denial of justice. And I may be permitted to say that should I find such holdings by any authority other than the highest court of the land, I should not hesitate to question the soundness of the decision.

In this connection, I may say that it was suggested to me by the present Judge Advocate General himself that the finality attributed by the article of war to the power of the several reviewing authorities might be thought to militate against or negative the view I advance. This could hardly be true. The statutory power of the Judge Advocate General of the Army conferred by 1199, Revised Statutes, stands unaffected by anything said in the law as to the power of appointing authorities. Indeed, the statutes are not in pari materia. They exist for entirely different purposes. They establish different functions, all of which have independent spheres. The general powers of correction conferred upon appointing authorities by the Articles of War existed prior to the enactment of the statutes now brought forward in 1199, Revised Statutes, and also concurrently with them, without thought of conflict. There is, of course, a field of operation for each. The concept of finality referred to is the finality within the system, the finality with which all lawyers are familiar, and which must exist in order that there may be a review at all. A judgment of an inferior court must be a final judgment before it can be subjected to review in an appellate court. The action of the appointing or confirming authority directly giving effect to the judgment of the court itself gives finality to that judgment, that is, that completeness and integrity without which there would be nothing for this or any other authority to review. Such judgments are operative as final until and unless revised upon review. This concept of finality is so familiar to lawyers as to require no further discussion.

10. Such is the law, and there is a pressing necessity at this time that we go back to it, revive it, and act under it. Daily this office reviews records which show that in the trial some substantial rights of persons standing before courts-martial accused of crime have been flagrantly violated or that convictions have been secured on wholly insufficient evidence. Others show that charges and specifications are sometimes laid under the ninety-sixth (the general) article of war for acts that are not properly to be regarded as military offenses at all. And quite as frequently cases are encountered in which men have been convicted of serious offenses where upon the evidence the offense committed was not the offense charged or for which they were tried. Officers of the Army, even of the Regular Army, are persons unlearned in the law, and, as fallible beings, may be expected from time to time to commit such errors in court-martial procedure as operate to deny the accused right and justice and result in his unlawful punishment, and such errors are even more to be expected now, as our Army is expanding and thousands of new officers are brought into the service who have had no military training and no familiarity with military law and the customs of the service. For this reason alone there should be the closest supervision.

But the situation may also be viewed from another aspect. As an American institution, our Army must be maintained under law. Our Army can never be the most successful Army it is capable of becoming except it have the highest regard for the rights of the enlisted men, as those rights are established by law. Indeed, the higher regard for those rights the greater will be the popular confidence in the Army. For the first time in the history of this country we have in fact a truly democratic and popular Army. It has come from the people. Tens of thousands of homes have been affected. In the welfare of the Army millions are concerned directly and the entire public interested generally. Ex-

pediency, in the highest sense of the term, as well as law, requires that the Army itself be quick to see that justice be maintained within it. The men now drafted from all walks of life and placed, whether they will or not, in the military service of the country are wholly without previous military training and it is only natural to expect many transgressions against discipline, certainly in the early days of their service. They are entitled to justice as established by law, and those who are giving them up to the service of the country have the right to feel, to know, that they will not be lightly charged with military offenses nor branded while in the service of their country as criminals except after a fair and impartial trial and on proof which can meet the legal test.

11. There is a revisory power here which must be exercised. It will, of course, be exercised with all due regard for the proceedings and strictly within the limitations of the law.

G. T. ANSELL,
Acting Judge Advocate General.

NOVEMBER 10.

Inasmuch as this opinion is the result of long and thorough conference with my associates in this office, I would prefer that each of them read it and, for the benefit of the record, express his concurrence or dissent.

G. T. ANSELL,
Acting Judge Advocate General.

Concurring: James J. Mayes, lieutenant colonel, judge advocate; George S. Wallace, major, judge advocate, United States Reserve; Guy D. Goff, major, judge advocate, Officers' Reserve Corps; William O. Gilbert, major, judge advocate, Officers' Reserve Corps; Lewis W. Call, major, judge advocate, United States Army; Edward S. Bailey, major, judge advocate, Officers' Reserve Corps; William B. Pistole, major, judge advocate, Officers' Reserve Corps; E. M. Morgan, major, judge advocate, Officers' Reserve Corps; Eugene Wambaugh, major, judge advocate, Officers' Reserve Corps; E. G. Davis, major, judge advocate, Officers' Reserve Corps; Alfred E. Clark, judge advocate, Officers' Reserve Corps; P. K. Zilles, judge advocate, Officers' Reserve Corps; Herbert A. White, lieutenant colonel, judge advocate.

Dissenting: ———.

EXHIBIT 33.

NOVEMBER 12, 1917.

Memorandum for Gen. Ansell:

I hardly feel like giving an unqualified concurrence to your opinion of even date regarding the authority of the Judge Advocate General to revise proceedings of all courts-martial. While I am satisfied with the logic of the opinion and willing to agree that statutory power can hardly be lost by nonuse, yet I think settled procedure should be departed from only after due consideration. The legal questions in this case are fully considered in your opinion. But I feel that one reading the opinion might easily form the conclusion that errors of courts-martial leading to miscarriages of justice are rather frequent. It has been my experience that very little injustice has arisen heretofore in the service through our courts-martial procedure. It has been considered settled for some 30 or 40 years that the reviewing authority's action (a division or department commander) completely closes a case, with the exception that errors jurisdictional might be corrected; somewhat illogical reasoning, I must admit. Under the section of the Revised Statutes considered by you in this opinion, if the office of the Judge Advocate General had the machinery available to constitute itself a court of review, by which I mean a court of last resort, and the proper officers were available to constitute this court at all times, probably only beneficial results could arise from the office taking full revisory power. But I doubt if we can be continuously assured of that peculiar ability in our officers sufficient to constitute such a court of review. For it must be remembered that this court of review, even though it consists of the Judge Advocate General himself and some of the best-known officers, would be jealously regarded by department and division commanders, since they would consider that their disciplinary powers, now practically unlimited, were hampered by reference to central power. I apprehend, speaking more from the administrative standpoint than from the legal, that the destruction of a division commander's initiative in

regard to the discipline of his command might lead to more disastrous results than an occasional miscarriage of justice, which in any instance will largely be individual in character. If it can be assured that this power is to be used by the Judge Advocate General, whoever he may be, only in the clearest cases, and that it will not become such an engine as to lead division commanders to believe that the ultimate power of discipline is removed from their hands, then, of course, there is little objection. Whether this can be done is, of course, not a matter of law, but a matter of administration. I desire to emphasize these points, since, as stated at the beginning of this brief memorandum, the disturbance of settled conditions should be decided upon only after a consideration of all points that may be brought forward by one familiar with the subject.

HERBERT A. WHITE,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

EXHIBIT 34.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 27, 1917.

Memorandum for the Secretary of War:

On November 10, 1917, there was presented for your personal consideration by Gen. Ansell, Acting Judge Advocate General, a memorandum brief in support of his action on the trial and conviction for mutiny of 12 or 15 noncommissioned officers of Battery A of the Eighteenth Field Artillery. In the discussion of the record of the case itself Gen. Ansell had come to the conclusion that the evidence did not warrant a conviction of the offense of mutiny; that many errors of law appeared on the face of the record, and that, while the court had jurisdiction and "its judgment and sentence for that reason could not be pronounced null and void," errors in law and the unfairness of the trial "justify, upon revision, a reversal of that judgment." Gen. Ansell, first inviting attention to section 1199, Revised Statutes, providing that "the Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army," concludes his review of the case as follows:

"In the exercise of the power of revision conferred upon me by section 1199, Revised Statutes of the United States, I hereby set aside the judgment of conviction and the sentence in the case of each of these several defendants and recommend that the necessary orders be issued restoring each of them to duty."

I shall not address myself, for the present, to the merits of the case, or to the proper administrative action that should be taken in respect of it, but rather to the statement of Gen. Ansell in his memorandum brief that an ill-considered and erroneous change of attitude on the part of the Judge Advocate General's office that occurred within a score of years after the close of the Civil War has profoundly and adversely affected the administration of military justice in our Army; that "errors of law, appearing on the record, occurring in the procedure of courts-martial having jurisdiction, however grave and prejudicial such errors may be, are absolutely beyond all power of review"; that you and your immediate military advisers can never appreciate the full extent of injustice that has resulted to our soldiers through the operation of this rule; that a proper sense of the injustice can be felt only by those who exercise immediately the authority of the Judge Advocate General's office; and that even those thus experienced can gather a full impression of the wrong done only by complete mental inclusion of that vast number of cases where concededly corrective power ought to have been but was not exercised in each year of the past forty-odd years. Gen. Ansell adds:

"During the past three months, in scores, if not hundreds, of cases carrying sentence of dishonorable expulsion from the Army with the usual imprisonment, this office has emphatically remarked the most prejudicial error of law in the proceedings leading to the judgment of conviction, but impelled by the long-established practice, has been able to do no more than point out the error and recommend Executive clemency."

In handling the memorandum brief to me for my study you asked my attention to these statements and expressed your surprise that such a situation as is

here depicted could have existed in the face of an express grant of power to the Judge Advocate General, which Gen. Ansell finds in section 1199, Revised Statutes, to modify or reverse the approved proceedings of courts-martial. You directed me to examine the brief and make a report thereon. I have had a limited time in which the do this, but the results of my study, which I think is complete enough to answer the main propositions, follow.

The logic of Gen. Ansell's brief converges to its conclusion in these distinct channels:

1. That the single word "revise," as used in section 1199, Revised Statutes, by ordinary construction so clear as to abate any precedent or accepted meaning, confers upon the Judge Advocate General not only the power to examine, analyze, and review courts-martial proceedings, but also invests the Judge Advocate General with the power to modify or reverse the same.

2. That the history of the legislation discloses that the statute was originally intended to confer this power upon the Judge Advocate General.

3. That the administrative history of the department discloses that the power was actually utilized during the Civil War period and apparently until the early eighties.

4. That the power has never been questioned by the civil courts or other civil authority.

5. That the power is, and for a long time has been, vested in the judge advocate general of the British Army.

Since the brief concededly purports to overturn the authorized practice of over one-third of a century and to advance a doctrine as to which there is little or no previous expression or any authority or opinion outside of the brief itself, it will be well to follow the outline of discussion upon which the brief is built and to address ourselves first to the contention that the word "revise," in section 1199, Revised Statutes, confers upon the Judge Advocate General the power to review and then to modify or reverse the approved proceedings and sentences of courts-martial.

1. MEANING OF THE WORD "REVISE."

Practically the whole fabric of Gen. Ansell's argument is built upon an interpretation of the meaning of this single word "revise." In support of the broad meaning whcih he gives this word, his brief collates definitions of the word by lexicographers and jurists. On the authority of the Standard Dictionary, which defines the word "revise" as:

"To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions, or changes; reexamine; review. Hence, to change or correct anything as for the better or by authority; alter or reform."

He classifies the word "review" as a synonym of the word "revise;" and upon this justification indiscriminate definitions of the words "revise" and "review" are quoted throughout the brief. I think the deductions he makes in this part of his brief are unauthorized.

In essential etymology the word "revise" means "to look over." It has acquired a special meaning going to the purpose of the "looking over," and imparts a purpose of suggesting, or making amendments. Thus a proof reader revises copy and suggests changes. But he does not effect changes. Special committees of men learned in the law revise statutes and codes by special legislative commission, but their revisions do not give legal life to the result of their labors. The legislature must enact the revision as a law. In the same sense the "looking over," the "reexamination" of the proceedings of an inferior tribunal by an appellate court is not the reversal or the modification of the judgment, albeit the revision is for the purpose of making such a change. All this is most significant, since in the statutory grant of so wide a power as that contended for we should expect, by all the analogies of grants of appellate power, to find something more than authority "to look over," or "to examine." Such brief survey of the field of statutes conferring appellate power on the various tribunals of the several States and of the United States as I have been able to make in the limited time I have had to prepare this paper, fails to disclose a single instance in which the power to modify or reverse the judgment of inferior courts is deduced from the words "review" or "revise," without the addition of apt words specifically conferring the power to reverse or modify.

Gen. Ansell's brief purports to find one such statute, which he describes as analogous with section 1199, Revised Statutes, granting the power to modify or reverse by the use of the single word revise. Gen. Ansell says, in part:

"I find the word used in another Federal statute in quite an analogous way. Section 24 of the act of July 1, 1898, chapter 541, 30 Statutes at Large, 553 (bankruptcy law), provides in part as follows:

"'The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within that jurisdiction.'"

Gen. Ansell's brief then proceeds to cite a case interpreting the bankruptcy statute (In re Cole, 163, Fed., 180, 181, C. C. A., 1st Circuit), which he describes as "a case typical of all," in which the court says:

"On a petition to revise like that before us we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the district court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered."

And from this quotation it is inferred that the court was finding in the word "revise" a broader power to "modify or reverse" the procedure of the lower court. This legislative precedent, as judicially applied, would, if it were properly and accurately set forth in the brief, be most persuasive, and for this reason I have had recourse to the statute itself. I find that the quotation of the bankruptcy act of July 1, 1898, in the brief is incomplete, being a quotation of only a portion of the section conferring appellate jurisdiction on the Supreme Court and the circuit courts of appeal and the supreme courts of the Territories. The portion quoted is from the latter part of the section, the earlier part of the section having conferred general appellate jurisdiction; the words quoted by Gen. Ansell, "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law," follow that part of the section which confers general appellate jurisdiction. In order that you may be fully advised in the premises, I quote the entire section:

"SEC. 24. *Jurisdiction of appellate courts.*—(*a*) The Supreme Court of the United States, the Circuit Court of Appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, *are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.* The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

"(*b*) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The concluding paragraph, marked "(*b*)," quoted by Gen. Ansell, follows the underscored language which invests the courts with appellate jurisdiction in express terms. There was no necessity for the court to deduce appellate power out of that part of the section designated above "(*b*)," for it had this appellate power by express grant. The discussion of the court in in re Cole should, I think, be so understood.

I do not think this part of the reply would be complete without some reference to the manner in which appellate jurisdiction has generally been conferred by statute, exemplified in the following:

(*a*) The act of February 9, 1893, establishing the court of appeals for the District of Columbia provides:

"SEC. 7. That any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia * * * may appeal therefrom to the court of appeals * * * and * * * the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just."

(*b*) The judicial code of March 3, 1911, provides for the exercise of appellate jurisdiction in the following sections:

"SEC. 128. The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error decision in the District courts," etc.

"SEC. 130. The circuit courts of appeals shall have the appellate jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy, etc.'

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision could be had, where is drawn in question, etc., may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error.

"SEC. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: * * *

"SEC. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy, etc."

In the light of what has been said, I think it will be perfectly apparent to you that the court, in In re Cole, was in no sense discussing its power to give effect to its conclusion upon revision. It was discussing only the scope of the matters that could be inquired into upon the petition, and found the definition of that scope in the words "revise in matters of law the proceedings of the several inferior courts of bankruptcy." It becomes, therefore, quite impossible to follow the brief we are here reviewing in its assertion that—

"The language of that statute (bankruptcy act) is the very language of this (sec. 1199, R. S.), except that the revision there is expressly limited to matters of law."

There is not even a shadow of analogy between the words of the Federal bankruptcy act investing the circuit courts with specific appellate jurisdiction and the words of section 1199, Revised Statutes, relied upon to invest the Judge Advocate General with appellate jurisdiction.

But I can not conclude this part of the brief without inviting your attention to the definitions which are quoted from Words and Phrases, volume 7. It seems to me that not a single one of the definitions quoted in the brief was addressed to grants of appellate power to courts, but that all are addressed to grants of legislative power to revise statutes, or to the scope of the authority granted to special commissions to revise codes, where it goes without saying the power to revise confers no power whatever to give effect to the revision. There was, however, one definition of the word "revise" on that cited page of Words and Phrases that does go to the meaning of a grant of power carried to a court by the word "revise"; but I do not find that this definition is in Gen. Ansell's brief. It is as follows:

"Revision, as used in a statute authorizing the entering of an appeal, after the expiration of the time limited for such appeal, when the court is satisfied that justice required a revision of the decree appealed from, does not mean reversal or modification, but simply review, reexamination, or looking at again."

I may add, in closing this part of my memorandum, that a rather complete survey of statutes vesting appellate power in tribunals, administrative as well as judicial, fails to disclose a single case where the power to modify and reverse is left to be deduced from such an inapt and single word as the word "revise," without the addition of appellate power granted in specific and unequivocal terms.

2. HISTORY OF THE LEGISLATION.

Gen. Ansell's brief asserts that "the history of the legislation, the early execution given it, its historical place in the body of the law of which it is a part, all clearly show that this must be the meaning assigned to the word 'revise' in the present instance."

It is said that Congress established the Bureau of Military Justice in the light of the necessities of the Civil War, and expressly invested its head, the Judge Advocate General of the Army, with this revisory power. Gen. Ansell's reference here is to the original statute, the act of July 17, 1862 (12 Stats., 598), in which it was provided that:

"The President shall appoint, by and with the advice and consent of the Senate, a Judge Advocate General, with rank, pay, and emoluments of a colonel of Cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The same words were carried forward in the act of June 20, 1864, and no further grant of power is found in the later statute. In the act of July 28, 1866 (14 Stats., 324), the granting word is still "revise," the only change being the omission of the words found in the earlier statutes, "a record shall be

kept of all proceedings had thereupon"; and so the same words were carried forward in section 1199, Revised Statutes, where they remain to base the ground of this contention.

I find nothing in the legislative development that is even worthy of remark in this connection. The word revise (or revision) is the only granting word now as it was in the beginning. There is precisely the same power, no greater and no less. If history is to be invoked, therefore, we must look to the administrative and not to the legislative history of the statute. And this brings us to—

3. ADMINISTRATIVE HISTORY OF THE DEPARTMENTAL PRACTICE.

This administrative history has been appealed to in Gen. Ansell's brief to the extent that it is asserted that "the records of this office indicate that Judge Holt, the Judge Advocate General of the Army during the Civil War period, did revise proceedings in the sense here indicated."

Judge Advocate Gen. Holt was Secretary of War before he was Judge Advocate General. His position at the bar of the United States was an enviable one. If this statement of his construction of the law is accurate it would be most persuasive upon me, as I think it would be upon you. Gen. Ansell, however, cites no instance from the records of the Judge Advocate General's office where Judge Holt has indicated such a view, and such examination of the records of Judge Holt's action upon courts-martial proceedings during the Civil War period as I have been able to make does not disclose a single instance of the kind mentioned. Candor compels me to state that in the limited time that I have had to prepare this memorandum no systematic search of the hundreds of records bearing the stamp of Judge Holt's action could be made, and therefore the positive assertion that there exists no single instance of this kind would not be warranted. However, there was revealed from these old and interesting books very significant circumstances most emphatically indicating that Judge Holt never contended for nor exercised the power that Gen. Ansell says was vested in him by the statute, exemplified in the following reference to Judge Holt's opinions:

(*a*) I find on page 269 of Volume II of the Records of the Bureau of Military Justice (Dec. 16, 1864) over Judge Holt's own signature a short review of the case of Pvt. Hiram Greenland, who was tried by a court-martial convened by Gen. Howe. The record failed to show the date of the trial or whether there was present a quorum of the court. If Judge Holt had been exercising an indigenous power, such as it is contended he could exercise, he would have taken the action attempted to be taken in the instant case that raises the present contention, and would have reversed the judgment. Instead of doing so, his indorsement "To the President" reads:

"There are fatal irregularities invalidating the whole proceedings and rendering the sentence inoperative, and it is recommended that it be so declared by the President."

(*b*) Again, I find Judge Holt writing to Col. W. N. Dunn, Assistant Judge Advocate General, under the caption, "Bureau of Military Justice," and under date December 27, 1864, in reference to the case of James Scott, corporal, Ninth Michigan Cavalry, in which the record was fatally irregular in that the arraignment of the prisoner and the reception of his plea had been accomplished prior to the administration of the oath to the court. Instead of reversing the judgment, as he of course would have done had he deemed that the power was in him to do so, he writes as follows:

"In similar cases returned from this office, to the officer charged with the duty of revision or executing of the sentence, it has been found advisable to direct his attention to the fact that a proper course to pursue with irregularities of proceedings which can not be corrected, rendering the sentence inoperative, is to revoke the order of execution and, if the parties are not liable to be subjected to another trial, to release them."

(*c*) In the case of W. H. Shipman, in which the charge had been drawn under the general article of war for an offense clearly cognizable under a specific article, Judge Holt expressed the opinion that such an irregularity rendered the sentence void, but instead of reversing the judgment or attempting to give inherent effect to his own opinion, he addressed the Secretary of War, under date December 22, 1864, in part as follows:

"If this opinion is concurred in, the pleadings in the case must be held to be fatally defective and the sentence inoperative."

In no single case of perhaps 100 consecutive cases examined by me has there been found an instance in which Judge Holt ever attempted to reverse the judgment of a court-martial. Other cases similar to those quoted from were found in abundance.

Gen. Ansell's brief asserts that the power contended for was utilized during the Civil War period and beyond the Civil War period until the early eighties, when it was abandoned without apparent cause, argument, or reason. A rather hasty examination of the records from 1864 to 1882 fails to disclose a single instance of the exercise of such power. I shall not prolong this brief by citing the cases that I have examined. They cover the administration of Judge Advocate General Dunn and Judge Advocate General Swaim.

4. RULINGS OF CIVIL COURTS.

This brings us to the culmination of the whole argument in a refutation of the statement in the brief that, "Nor has the power here contended for been questioned by the civil courts or other civil authority." This statement evinces a failure to make a thorough search of the records and precedents. In his Military Law and Precedents, the leading work on the subject, Winthrop, for many years in the office of the Judge Advocate General, and for a time Acting Judge Advocate General during the incumbency of Judge Holt in the Civil War period, and hence familiar with any course of procedure followed by him, says:

"The accused always has an appeal from the conviction and sentence by court-martial to the President (or Secretary of War), but, in entertaining and determining such appeal, he is assisted and advised by the Judge Advocate General of the Army. Thus, as the tribunal is an executive agency, the appeal therefrom is to a superior executive authority."

And a footnote on page 51 adds that—

"The Judge Advocate General, under the authority vested in him by section 1199, Revised Statutes, to receive, revise, etc., the proceedings of courts-martial has, of course, no power to reverse a finding and sentence, was held in Mason's case, United States Circuit Court, Northern District of New York, October, 1882."

Mason's case still stands as the undisturbed pronouncement of the Federal courts upon the precise point at issue. Mason, a sergeant, had been convicted by a general court-martial of discharging his musket with intent to kill Charles J. Guiteau, the assassin of President Garfield. The findings and sentence were approved by Maj. Gen. Hancock, the reviewing authority, and the Secretary of War designated as the place of confinement the Albany County Penitentiary. In his review of the case the Judge Advocate General came to the conclusion that the court was without jurisdiction and that the sentence was therefore void. It is important to note that in communicating this conclusion to the Secretary of War, the Judge Advocate General did not (as it is here contended that he had the power to do) reverse the decision of the court, but he recommended that the Secretary of War should revoke the order for execution of the sentence.

In this case, however, the Secretary of War declined so to do and apparently adhered to the opinion that the court was not without jurisdiction and the sentence was valid—an opinion that was substantiated by the decision of the United States Supreme Court on a writ of habeas corpus addressed to the jurisdiction of the court. The prisoner, it seems, was not at the end of his resources. After being delivered to the warden of the penitentiary he sued out a new writ of habeas corpus based on other grounds. His contention was precisely the contention made in Gen. Ansell's brief; that is, that the Judge Advocate General is vested with an appellate power and that his decision against the validity of the proceedings of a court-martial has the effect of reversing the judgment.

His petition alleged among other things:

"Fifth. That the Judge Advocate General of the Army recently reviewed the evidence adduced on the trial before said court-martial, and on or about August 28, 1882, transmitted to the Secretary of War his report on the said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"1. No jurisdiction in a court-martial.

"2. Employment of the prisoner illegal.

"3. No evidence of guilt, but, on the contrary, proof of innocence.

"Sixth. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to 'receive, revise, and cause to be recorded the proceedings of all courts-martial; and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, or reverse or affirm the findings and sentences of all courts-martial, and that his decision is the ultimate judicial judgment in all such cases.'

"That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings of said court-martial the further imprisonment of the petitioner is unlawful and wrongful.

"Further, that his conviction and sentence, and the orders carrying the same into execution, are, each and all, annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General reversing the findings and sentence of said court-martial."

In addressing itself to the contention thus made, the opinion of the court proceeds as follows:

"The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might rest our decision here, but as it has been strenuously contended by the counsel for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that because the statute makes it the duty of that officer to 'receive, revise, and cause to be recorded the proceedings of all courts-martial,' that the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word 'revise.' Applying the rule 'noscitur a sociis,' the word 'revise' is to be read in connection with the words that precede and follow it, and thus read the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the preexisting functions of the officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses, the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

"It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

"The rule is discharged and the application for a writ of habeas corpus is denied."

I think this memorandum might well close here and with the statement that both civil and military opinion sustain the view that the appellate power in the Judge Advocate General contended for in Gen. Ansell's brief does not, in fact, exist. However, I have noted a further statement which constitutes part 5 of this memorandum, to wit:

5. THE APPELLATE POWER OF THE JUDGE ADVOCATE GENERAL OF THE BRITISH ARMY.

The jurisdiction of the judge advocate general of the British Army in such matters is so obscurely stated in the books which I have examined that I am not entirely clear that I understand his precise relation to the administration of military justice. It appears to be true from the authorities I have examined that under the British system this official has the power to reverse and modify the proceedings of courts-martial, but that he does not find that power in any specific statute, but rather in his relations as a member of the ministry of the British Government. Such authority as he exercises in this regard seems to be not a grant of executive authority to an administrative official, but to arise out of an executive power of the Sovereign himself, delegated in this instance to a member of the ministry.

You are aware, of course, of the power you have by statute law to grant upon proper application an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you. I shall continue my study of the general subject to see whether this power of appellate review can not be found in the President himself as the constitutional Commander in Chief; so that instead of issuing a simple order of restoration, you may by direction of the President modify or disapprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are that the court-martial jurisdiction is, and always has been, an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given to subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision. Immediate relief, however, should not await the completion of a study of this kind, or the concurrence of the Attorney General, which, I think, you would wish in view of the consideration his office has heretofore given the general subject.

E. H. CROWDER,
Judge Advocate General.

NOVEMBER 27, 1917.

As a convenient mode of doing justice exists in the instant cases I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it. Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes with settled practical construction is unwise. A frank appeal to the legislature for added power is wiser.

BAKER.

EXHIBIT 35.

DECEMBER 6, 1917.

Memorandum for the Secretary of War.

1. In a memorandum submitted to you under date of November 27, on the general subject of the revisory power of the Judge Advocate General under the authority of section 1199 Revised Statutes, I concluded as follows:

"I shall continue my studies of the general subject to see whether this power of appellate review can not be found in the President himself, as the constitutional Commander in Chief; so that, instead of issuing a simple order of restoration, you may, by direction of the President, modify or disprove the findings and sentence. It will take some little time to do this. The essentials of the proposition one would have to maintain are, that the court-martial jurisdiction is, and always has been, an attribute of command; that the President would have had this power in the absence of any statute law, and that such recognition as has been given subordinate members of the military hierarchy in the matter of convening courts-martial and reviewing their proceedings, has in no way divested him (the President) of the revisory power which is clearly his in the absence of statutory provision."

2. In passing upon that memorandum you indicated it as your opinion that it would be unwise at the present time to attempt to deduce too wide an authority from the provisions of section 1199 Revised Statutes, since the power in the broad extent which has now been proposed to assert it has never been used. You suggested, moreover, that in your opinion it would be better at this time to frankly ask for such new legislation as may be found necessary to vest in the President such revisory powers as are necessary in order to assure the correct and orderly administration of military justice. As a result of the special study I have made of this matter, I have reached the firm conclusion that no additional legislation is necessary, but that an ample grant of statutory power already exists for the immediate establishment of a system of military procedure, the practical results of which will be to obviate the objections which have heretofore been made to the errors and injustice which sometimes results from regarding the duly approved sentence of a court-martial as beyond the corrective power of any authority so long as the court acted with jurisdiction of the person and subject matter tried, and did not violate any statutory rules prescribed to govern its procedure.

3. Under the views which I now entertain it is unnecessary to study the entire military system for the purpose of deducing in the President, as Commander in Chief, the power of appellate review, since, as has been indicated, it will be shown that this power has been conferred by statutory grant and it will be necessary only, in so far as concerns the President, to recognize and distinguish the place in the military hierarchy which he occupies by reason of the fact that he is the Commander in Chief.

It will be noted as a significant fact that until 1830 the President was not specifically vested by the Articles of War with power to convene general courts-martial. As a matter of fact, however, this power has frequently been exercised by the various Presidents in important cases, upon the principle that although the Constitution has vested in Congress the power to legislate for the regulaions and government of the Army, this provision can not rightly be regarded as per se militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which has been atached to that function by the previously existing law and by usage. Washington, for instance, as Commander in Chief, prior to the adoption of the Constitution, frequently convened general courts-martial, although his authority to do so was rested upon no express grant, but was apparently derived mainly by implication from the terms of his commission by which he was vested with "full power and authority to act as he should see fit for the good and welfare of the service," and enjoined to cause "strict discipline and order to be observed in the Army." The precedent thus established has been followed from time to time by them in peace and war down to the present, and some of the most important military cases, such as those of Brig. Gen. Hull, Maj. Gens. Wilkinson and Gaines, Gens. Talcott and Twiggs, and Brig. Gens. Hammond, Gordon, and Paine, were all convened by Presidents who ordered courts-martial by virtue of their power as Commanders in Chief and not by reason of any express statutory grant.

The power of the President in this matter was made the subject of a special investigation by the Senate Judiciary Committee in 1885, and that committee in Senate Report No. 1337, Forty-eighth Congress, second session, after reviewing the history of this power, made the following observation:

"In this state of the history of legislation and practice, and in consideration of the nature of the office of Commander in Chief of the Armies of the United States, the committee is of the opinion that the acts of Congress which have authorized the constitution of general courts-martial by an officer commanding an army, deparment, etc., are, instead of being restrictive of the power of the Commander in Chief, separate acts of legislation, and merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the Commander in Chief of the Army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

In the celebrated case of Swaim (formerly Judge Advocate General) versus the United States, Twenty-eighth Court of Claims, 173, it was contended that the President had no power to function in court-martial proceedings except as that power was especially conferred upon him by statute. The court which tried Gen. Swaim was ordered by the President, and in an effort to avoid its judgment, the plaintiff deemed it necessary to assert a lack of authority in him to appoint a general court-martial under the circumstances of that case. The matter was very ably considered in an opinion written by Judge Nott, from which the following extracts are taken:

"It seems evidence, then, to the court that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not be invested with greater authority by Congress than the Commander in Chief and a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President. The power to command depends upon discipline, and disclipine depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress, by the simple expedient of exclusively granting the authority to appoint courts-martial and approve sentence to a few officers of the Army and tacitly ignor-

ing the President, and practically defeat the express declaration of the Constitution and strip the office of Commander in Chief of all real power of command." * * *. (P. 221.)

"There can be no standing Army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant colonel, a major, or any other officer; but when Congress so enact they, without words to that effect, likewise place the command in the Commander in Chief. His name is to be understood as written in every statute which confers upon a military office military authority." (P. 224.)

This case was carried on appeal to the Supreme Court of the United States and the doctrines announced by Judge Nott were confirmed. The court considered and discussed many points that had been raised in the court below, but at the close of its opinion made the following statement:

"We have felt constrained to, at least briefly, consider the several propositions urged upon us with so much zeal and ability on behalf of the appellant, though we might well have contented ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott." (165 U. S., p. 566.)

It may then be taken as established law that the President as Commander in Chief exercises every statutory power conferred upon any subordinate commander, and indeed it will be seen on closer analysis that his power is more far-reaching and important than was indicated in the able opinion of Judge Nott, to which I have just referred. The eighth article of war as it now exists reads in part as follows:

"The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an Army, an Army Corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops, may appoint general courts-martial." * * *

This is the first time in the development of the Articles of War in which the President has been specially designated by the statute as one having authority to convene a general court-martial. As shown, however, by the statement of the Judge Advocate General before the House Military Committee at the time the present article was under consideration, the inclusion of the Commander in Chief as one having this authority was made only because the authority had been denied in the Swaim case, referred to above, although reference was made to the fact that the Supreme Court had decided that this authority was "inherent in the President as Commander in Chief, and that he could always convene a court-martial when necessary."

The command exercised by the President is all inclusive. It relates both to territorial and to tactical commands, while that of the other officers designated in the eighth article of war is in some cases territorial and in others tactical. In any case, however, the power to convene a court-martial is, strictly speaking, an attribute of "command" and not of rank or office. In our system as well as in the British, the prototype of our own, courts-martial have always been considered as "instrumentalities of the executive power." Winthrop, our best-known writer on military law, after so designating them, remarks that they are "provided by Congress for the President, as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives" (vol. 1, p. 53), and he cites from Clode (2 M. F., 361), as follows:

"It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the army."

It can not be too forcibly emphasized that the eighth article of war, which designates the officers who may convene general courts-martial, does not of itself bring a single court-martial into existence or place a single officer designated therein, other than the President (unless it be the Superintendent of the Military Academy), in position where he may convene the court-martial. The President's power of command is derived from the Constitution, and, by virtue of the fact that he is the Commander in Chief, he has full authority, at all times and wherever the forces of the United States may be serving, either to convene courts-martial himself or by appropriate orders, creating "command" for subordinate officers, to place those who are made eligible under the eighth article of war in position to exercise the authority conferred upon them by statute. Before a commanding officer of a Territorial department can convene a court-martial a department must be created of which he is given command;

and before the commanding officer of a division or army or army corps or separate brigade, or the commanding officer of any other forces or body of troops, when empowered by the President, can convene a court-martial, the designated tactical or other command must be organized and the commanding officer in question be placed at its head. It follows, therefore, that both in theory and in fact the exercise of military jurisdiction is vested in the President, who may under the authority of the statute regulate or control participation therein by the various officers authorized by the eighth article of war to convene courts-martial whenever the proper antecedent jurisdictional facts exist. It thus appears that the eighth article of war does not confer "command," and hence its attribute, the power to convene courts-martial, upon a single officer, with the exceptions noted above. In every case except that of the President, who derives his power of command from the Constitution, orders creating or conferring command must issue from the President, or under his authority, before these designated officers can be clothed with power to convene courts-martial. These orders may, in legal effect, therefore, be considered a delegation of a part of the President's power to use these "executive instrumentalities" for the enforcement of discipline in the particular command over which the officer is placed.

4. This being the general situation and an outline of the military hierarchy in so far as the enforcement of discipline is concerned, it is necessary now to inquire as to the particular limitations, if any, which exist upon the power of the President to participate in the proceedings of courts-martial which by proper orders conferring "command" he has authorized subordinate commanders to convene. As indicated in the brief prepared by Gen. Ansell on this subject under date of November 10, 1917, the President, upon the advice of the Judge Advocate General, has always asserted and exercised the right to declare the proceedings of a court-martial convened by a subordinate commander void for want of jurisdiction, although the power to correct procedural errors affecting the substantial rights of the accused has been denied. In that brief the statement was made that no clear authority exists for the exercise of the one power and the nonexercise of the other, and it was indicated that in any event some officer must sit in an appellate capacity to determine the existence or nonexistence of jurisdiction on the part of the court-martial. The position of the department in this matter, I find on careful examination, has been determined under the advice of the Attorney General of the United States. As early as 1854 the then Attorney General—Mr. Cushing—laid down the following doctrine:

"The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject matter. There is one, and but one, legal question which would be competent in this case after the final decision of the President upon it; namely, that of nullity of the proceedings, as being, for instance, coram non judice, or for other causes, absolutely void ab initio." (See 6 Op. Att. Gen., 370–371).

In the case just cited, the final decision was made by the President himself, but in later cases the doctrine there announced was followed and extended to cases in which the original confirmation had been by a commanding officer subordinate to the President. In the case of Capt. Howe, the court had been ordered and its proceedings confirmed by a commanding general and a memorial was later presented to the President, praying that Capt. Howe be restored "to his pay and emoluments, as captain of the Second Regiment of dragoons." The opinion of the Attorney General was requested upon the authority of the President to grant the relief prayed for in this case, and, among other things, it was held that—

"The decision of the court-martial upon the case of Capt. Howe was within its proper jurisdiction and rightful cognizance; and even if the point had been erroneously decided, it would have been an erroneous decision only, not a void judgment. The error would have been subject to be reviewed and corrected only by the commanding general. As the general in command affirmed the sentence, and it has been carried into execution, there is no longer any power competent to review and reverse that sentence."

This decision is dated June 3, 1854. (See 6, Op. Att. Gen., p. 514).

In Ryan's case (10 Op. Att. Gen., p. 66) Attorney General Bates, after discussing the rule that a case which had been finally acted upon could not be later reversed or set aside, remarked as follows:

"Nor is the rule confined to cases in which, by the Articles of War, the sentence of the court is required to be approved by the President, for in Maj.

Howe's case (6 Op., 514), where the sentence was approved by the commanding officer, as in the present case, Attorney General Cushing held that having been approved and executed by the President, a succeeding President could not revise it. He says (and here follows the quotation from Attorney General Cushing, 6 Op. Att. Gen., 371, supra). This opinion then proceeds:

"These authorities are certainly conclusive against your power to grant the prayer of the petitioner, unless indeed the record should show that from some cause the proceedings are absolutely null and void; for, in Devlin's case (6 Op., 371), and in the case of Capt. Downing (7 Op., 98), Mr. Cushing suggests that the only ground on which the President could interfere, would be, that of a nullity of proceedings, as being for instance, coram non judice, or, for other cause, absolutely void ab initio."

This opinion was rendered in June, 1861, and it will be noticed that it, like preceding opinions in which it has been held that the President had no power of revision, was decided prior to the passage of the act, the provisions of which are now embodied in section 1199, Revised Statutes. But even subsequent to the enactment of this statute, I find the doctrine first announced by Attorney General Cushing followed, and repeated it in the opinions of the Attorney General, in which no reference is made, however, to the revisory power conferred by section 1199. Thus, in the case of Fitz John Porter, decided in March, 1882, I find Attorney General Brewster, after referring to the preceding opinion, holding as follows:

"These opinions of my predecessors and of the Supreme Court, and also the decisions last above mentioned, all go to establish this proposition: That where the sentence of a legally constituted court-martial in a case within its jurisdiction has been approved by the reviewing authority and carried into execution, it can not afterwards, under the present state of the law, be revised and set aside. The proceedings are then at an end, and the action thus had upon the sentence is in contemplation of the law final * * *. It follows from this view that the President can confer the applicant no relief through a revision of the sentence in his case. That sentence involved immediate dismissal from the Army and disability to hold office thereafter. The dismissal is an accomplished fact and so far the sentence is completely executed." * * * (See 17, Op. Att. Gen., 303.)

The opinion of the Attorney General was to the same effect in the case of Maj. Benjamin F. Runkle, decided in 1877. (See 15 Op. Att. Gen., p. 290.)

In an early case (decided in 1 Op., 234) the following doctrine was announced:

"By the Constitution, the President is made Commander in Chief of the Army and Navy of the United States. But, in a Government limited like ours, it would not be safe to draw from this provision inferential powers by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the Constitution the President is the National and proper depository of the final appellate power, in all judicial matters touching the police of the Army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the Constitution."

THE POWER OF THE PRESIDENT UNDER EXISTING LAW.

5. Having thus surveyed the situation with reference to the place and power of the President in the military hierarchy, I now proceed to show that under existing law the President has ample authority, through the office of the Judge Advocate General, to make any revision of the proceedings of courts-martial which may be necessary to accomplish the correct and orderly administration of justice.

The thirty-eighth article of war reads:

"*The President may prescribe rules.*—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance with this article shall be laid before the Congress annually."

This article was introduced into the revision contained in the act of August 29, 1916 (39 Stat., 650–670). It was the subject of some discussion before the

Committee on Military Affairs of the Senate, from which the following is quoted:

"Gen. CROWDER. I come now to two articles which I think will claim the special attention of the committee. They are new. Article 38 deals with rules to be prescribed by the President regulating the mode of proof and the procedure of courts-martial. I have followed section 862 of the Revised Statutes in drafting that article, which provides that 'the mode of proof in cases of equity, of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court except as herein specially provided.' The President is our supreme court in trials by courts-martial, and I have undertaken to paraphrase that and give him the corresponding power in respect to courts-martial."

The discussion which followed indicated clearly that the purpose of article 38 was to confer upon the President of the United States the same broad power with respect to making rules of procedure for cases tried by courts-martial as is possessed and exercised by the Supreme Court of the United States in cases of equity and admiralty.

Rules of procedure may be described as those rules which direct and control the conduct of a case from its beginning until its termination, including the review, satisfaction, or enforcement of any judgment rendered. The following is quoted from Clark's Criminal Procedure, pages 1 and 2:

"Criminal procedure is a method fixed by law for the apprehension and prosecution of a person who is supposed to have committed a crime, and for his punishment if convicted. * * * It is that division of legal things under which are regulated steps by which a legal right is vindicated or a wrong punished. The term 'criminal procedure' includes pleading, evidence, and practice. * * * The term 'practice' is usually employed as excluding both pleading and evidence, and the designating of all the incidental acts and steps in the course of bringing matters pleaded to trial and proof, and procuring and enforcing judgments on them. As applied to criminal procedure, the term includes the rules which direct the course of procedure by which the accused is brought before the court, the conduct of the court, and the proceedings after trial."

Mr. Bishop defines procedure thus (1 Bishop Cr. Pro., sec. 1):

"In the nature of things there is a difference between a right and the means by which it is enforced; an obligation and the legal steps by which the delinquent is made to atone for its violation; the law defining the crime and the course of the court in punishing it. Out of this distinction grows the law of judicial procedure. It is that division of legal things under which are regulated the steps by which a legal right is vindicated or a wrong punished."

The following definition is quoted from Bouviers Law Dictionary, page 2729, third revision:

"*The methods of conducting litigation and judicial proceedings.*—'Practice,' like 'Procedure,' which is used in the judicature acts, denotes the mode of proceeding by which a legal act is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is administered; the machinery as distinguished from its product."

The Supreme Court of the United States in Kring *v.* Missouri (107 U. S., 231) state:

"The word 'procedure' as a law term is not well understood, and is not found at all in Bouviers Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes, Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says (sec. 2): 'The term "procedure" is so broad in its significance that it is seldom used in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms pleading, evidence, and practice.' In defining practice in this sense he says, 'The word means those legal rules which direct the course of proceeding to bring parties into the court, and in the course of the court after they are brought in.' An evidence, he says, as part of the procedure 'signifies those rules of law whereby we determine what evidence is to be admitted and what rejected in each case and what is the weight to be given to the testimony admitted.'"

It may be interesting to note that the revision of Bouviers Law Dictionary, following this opinion, adopted the definition of procedure contained in Bishop's Criminal Procedure, and in the foregoing excerpt from the Supreme Court. In Thirty-second Cyclopedia, page 405, procedure is stated to be—

"A general term, including pleading, process, evidence, and practice—in fact, every step that may be taken from the beginning to the end of a case." All

law writers, speaking of the question, agree that procedure is a much broader term than practice and includes the latter. In Thirty-first Cyclopedia, page 1153, practice is stated to be "the mode of proceedings by means of which a legal right is enforced; that which regulates the formal steps in an action or other judicial proceeding; the course of procedure in courts; the form, manner, and order in which proceedings have been and are accustomed to be had; the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, etc."

See also State *v.* Caruthers, 98 Pacific, 478 (Okla.); Downs *v.* Board of County Commissioners, 124 Pacific, 383 (Colo.); Morris *v.* City of Newark, 62 Atlantic, 1005–1006 (N. J.); Clark *v.* Baxter, 108 Northwestern, 838 (Minn.).

Attention has been called to the fact, in the discussion of the thirty-eighth article of war before the Senate Military Committee, the powers sought to be conferred on the President were likened to those exercised by the Supreme Court in prescribing rules of procedure for the courts of the United States in causes in equity and admiralty. The whole course of proceedings in such causes is prescribed by rules promulgated by the Supreme Court. These rules have all the force of law, and they control and direct the proceedings in the cause from its beginning up to and including the trial and thereafter.

The case of Bremena *v.* Card, 38 Federal, 144, illustrates the extent to which such rules may go. Under the early admiralty rules a person might be imprisoned for debt on process issued in an admiralty cause. Later on the forty-seventh rule abolished imprisonment for debt on admiralty process in all cases where, by law of the State where the court is held, imprisonment for debt has been abolished in similar cases. Thus it will be seen that by a rule of procedure prescribed by the Supreme Court a person might be imprisoned for debt in an admiralty cause. Prior to the decision referred to this modification of the rules had been accomplished and rule 2 promulgated, dealing in a measure with the same subject. The court said:

"It will be noted that these rules of practice are made by the Supreme Court under the authority of the act of Congress 8th May, 1792 (1 Stat. L., 276), and that they have the force of law; that rule 2 makes provisions for a warrant of arrest of a person and is the authority for issuing such a warrant; that it deals with this subject only; and that in so dealing with it it provides for an attachment in the case of the issuance of the warrant of arrest and the inability to serve it because the defendant can not be found. In other words, the attachment calls for this predicate, the issuance of the warrant for arrest, and the failure to find the defendant."

In Bailey *v.* Sundberg, 49 Federal, 583–585, decision by the circuit court of appeals, second circuit, it was said:

"The Supreme Court, by authority of the laws of the United States, prescribes and regulates the mode of procedure in suits in admirality by promulgating rules therefor." (R. S. U. S., secs. 913, 917.)

Admiralty rule 9 requires process in admiralty to be served not only by arresting the property, but by giving notice by publication of the arrest, of the time assigned for the return of the process and the hearing of the cause. Under this rule the notice is as indispensable as the order to confer jurisdiction upon the court to adjudicate upon the right of those interested in the property, and those who do not appear are not bound by the decree. (Cooley Const. Lin., 403.) The rule has the force of a law of Congress, and in effect declares that publication as well as seizure is as essential to constructive notice of the proceedings to all those who have the right to be heard.

It follows that the power of the President conferred by the thirty-eighth article of war, considered in connection with the provisions of section 1199, Revised Statutes, is broad enough to establish a system of revision and correction which would reach all errors affecting the substantial rights of military defendants.

6. Section 1199, Revised Statutes, reads:

"The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army."

This statute when enacted contemplated the revision of the proceedings of all courts-martial, courts of inquiry, and military commissions, and did in effect provide for a statutory appeal of all such cases. These provisions and the articles of war relate to the same subject matter, and must be construed together. Article of war 83 requires each general court-martial to keep a sepa-

rate record of its proceedings in the trial of each case, and such record shall be authenticated by the signatures of the president and the judge advocate.

Article of war 34 requires each special court-martial and each summary court-martial to keep a record of its proceedings, which shall contain such matter and be authenticated in such manner as may be required by regulations prescribed by the President. Article of war 35 provides that the judge advocate of each general court-martial shall forward the original trial record to the appointing authority or his successor in command, and when the appointing authority or the officer commanding for the time being has acted upon the record it shall be transmitted to the Judge Advocate General of the Army. Article of war 36 provides that the record of each special court-martial or summary court-martial shall be transmitted to such general headquarters as the President may designate by regulation, there to be filed in the office of the Judge Advocate.

The evident legislative intent was to limit the automatic statutory appeal to general courts-martial trials. The mandate of article of war 35 that all records of the proceedings of general courts-martial, after being acted upon by the appointing authority, shall be transmitted to the Judge Advocate General of the Army, is a complement to section 1199, Revised Statutes, and at the same time a limitation upon the cases which, by force of the statute, go to the Judge Advocate General for revision. General courts-martial or military courts of general jurisdiction having power to try all claims of military offenses and to impose any degree of punishment up to and including death. Special and summary courts are limited in their jurisdiction as to persons, offenses, and the punishments that may be inflicted. In the main, they deal with minor offenses and bear somewhat the same relation to the military judicial system as justice courts and municipal courts bear to the civil system. With respect to all cases tried by general court-martial, the right of revision is protected by statute and can not be taken away or impaired by any regulation. As to cases tried by special or summary courts the provisions of the Articles of War so far modify section 1199 that these cases are no longer automatically transmitted to the Judge Advocate General for revision. The right of appeal is not annexed to cases of minor consequence. This is in harmony with the tendency in the States generally to limit the right of appeal on controversies in the civil courts, or rather to deny the right of appeal in respect to trivial cases, both civil and criminal. In most of the States it is provided that there shall be no right of appeal in civil cases where the judgment does not exceed a specified amount, or in criminal cases where the fine does not exceed a certain amount, or the imprisonment is not more than a certain number of days—with this exception generally recognized, that if the case involves the assertion of some constitutional right, or the consideration of some tax statute, or other question in which the public is concerned, jurisdiction may be taken by the appellate court upon application. The argument by which this limitation of the right to appeal is sustained is that society is interested in having controversies settled and that it is better for the individual member of society to occasionally suffer some slight injustice, resulting from a denial of the right to appeal, than that society should be put to the expense, trouble, and confusion which the animosities of a multitude of trivial cases would cause. Now, in the present Articles of War the statutory right of appeal is limited to cases tried by general courts-martial. In this we see an analogy with the growing practice in the civil courts. The analogy may be carried further. The President may make regulations designating the headquarters where record of special and summary courts may be filed. Under the authority to make rules of procedure the President has authority to provide that any or all of these records of these courts shall be transmitted and filed with the Judge Advocate General, in which event they would fall within the revisory powers conferred by section 1199, Revised Statutes. Thus provision may be made by regulations to be established by the President to bring before the Judge Advocate General for revision such cases tried by a special or summary court as the Commander in Chief should deem it expedient should be so revised, just as upon application the appellate court in the civil judicial structure may hear such cases as the public interest requires it should hear, even from among those cases concerning which the right of appeal is denied. Of course, as to cases tried before a general court-martial the statutory right of appeal remains unimpaired, as the President has no authority to prescribe a rule of procedure in direct conflict with the statute.

It follows, I think, that existing legislation affords the means of establishing a complete and orderly system for the disposition of a trial by courts-martial

from its beginning up to the final termination thereof, including suspension of the execution of sentence until revision by the Judge Advocate General, and the final steps necessary to make effective the law as declared by the Judge Advocate General. When a sentence of a court-martial has been approved by the appointing authority, or the officer in command for the time being, it is ripe for revision. The Articles of War do not provide for the suspension of the execution of sentences pending revision, and a revision which resulted in the setting aside of a sentence would be more or less ineffective in any case where the sentence had been wholly executed before revision. The question is, May the President, under the authority of the thirty-eighth article of war, establish a rule of procedure that would suspend the execution of a sentence of general court-martial until the case had been revised and action taken upon such revision, affirming or setting aside the sentence? There is no prohibition in the Articles of War against such rule, although it may be argued that article 46, by implication, denies to the President the power to make such rule. This article reads:

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court, or by the officer commanding for the time being."

The utmost effect of this article is to negative the power to carry any sentence into effect until approved by the appointing authority. There is, of course, a finality about the sentence of a court-marital when approved by the convening authority. There would be no completed judgment of conviction without this element of finality. It is a final judgment so far as that court or that department of the military judicial system is concerned. Until there is a judgment having the element of finality, there is nothing to execute. Clearly this article can not mean that a sentence once approved by the appointing authority must be executed, and that it is not subject to review or revision by any other authority. It may be helpful to draw an analogy from the civil judicial structure commonly found among the States, as well as in the Nation. When a case is tried in a nisi prius court, if it be an action at law, it is usually tried by jury in a court presided over by a judge. The verdict of the jury in a civil case fixes the amount of recovery; or in a criminal case, the guilt or innocence of the accused. There is no final judgment in the case until the verdict has been crystalized into a judgment pronounced and entered by the court, which, for the purposes of that court and that trial, is the officer having authority to approve, or in a proper case to disapprove, the findings of the jury. It would be wholly accurate to say that no verdict or sentence of a nisi prius court shall be carried into execution until approved by the presiding judge and the entry of final judgment. The judgment of any civil tribunal is final so far as that tribunal is concerned, and that judgment may be carried into execution unless set aside upon appeal. Indeed, the judgments of subordinate civil courts possess such a degree of finality that they may be pleaded in bar as a former adjudication in any other litigation, notwithstanding an appeal is pending. Likewise, they may be carried into execution during pendency of an appeal, unless some statute or rule of procedure suspends the right of enforcement until an appeal, if one be taken, has been heard and disposed of. The findings or judgment of a court-martial do not possess any unusual or extraordinary attributes simply because the court is the judge of both the law and fact, or because in addition to passing upon the guilt or innocence of the accused it fixes the punishment upon conviction. Indeed, there are analogies in the civil courts. For a great many years in some States in certain classes of cases, notably libel, juries were judges of both law and fact. At the present time, among the States generally juries called in the justice of the peace courts are judges both of the law and fact, the justice of the peace not being authorized to instruct them as to the law. In a number of States juries in certain classes of criminal cases are empowered to fix the punishment upon verdict of guilty. As, for instance, in North Dakota. And in Federal courts juries have always been authorized to fix the punishment upon conviction of murder in the first degree, that is to say, whether the punishment should be death or life imprisonment. In all these cases there is no final judgment in the trial courts until the verdict, whatever it may be, has been approved by the presiding judge, and formal judgment entered. But it has never been contended that such judgments possessed such finality that they could not be revised upon appeal.

There is no difficulty in reaching the conclusion that it was the intention of Congress to provide for a complete and orderly system for the administration of military justice, and that there will be found within existing law all that is

necessary to give full effect to the power of revision vested in the Judge Advocate General. By rules of procedure the President may suspend the execution of sentences by general courts-martial until they have been revised by the Judge Advocate General and direct the disposition of such cases after revision. In the event the sentence is found to be lawful and is approved, it would be carried into execution as of course, and in the event it was found to be unlawful and set aside upon revision, a rule of procedure could provide that an order as of course would issue making such disposition of the case as was consonant with the principles of law. Should it be advisable to revise certain classes of cases tried by special or summary courts, rules of procedure could bring those cases to the Judge Advocate General for revision and make provision for their disposition when revision had been accomplished.

7. If it is desired to rely upon the authority here outlined, the revisory power of the President can be fully and satisfactorily exercised through the establishment of certain rules of procedure. Time has not been taken to draw these rules with that definiteness and accuracy which they must possess before they are placed in practical operation. It is sufficient to state for present purposes that the most important provision of these rules of procedure would be one requiring all reviewing authorities, before executing a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man, to withhold publication of action until the record of the case had been reviewed in the Office of the Judge Advocate General and the reviewing authority advised of the legality of the proposed action, as based upon the record in question. All other sentences could be treated exactly as at present, since it is only in cases where one of the sentences I have indicated is imposed that injustice is sometimes done which now seems beyond the corrective power of the President. The procedure here indicated would require the reviewing officer to change his proposed action whenever the same had been held to be illegal because of errors shown by the record. But even this would involve no departure from established principles, inasmuch as it has been held that the action of a reviewing officer does not become final until the same is actually published to his command. So long as he retains within his control an order which he contemplates issuing his action has not assumed that finality which places it beyond his power to change or correct.

8. It should be frankly stated that one very serious objection to the plan here proposed is the delay that would result, particularly in time of war, in the execution of sentences of courts-martial. It is desirable, as a general rule, that these should be swift and summary and not involved in such delays as characterize the trial of cases in the civil courts. In time of peace this objection would not be of great moment, except in those departments such as the Philippine Department, far removed from the seat of government. The actual delay in the execution of sentences occasioned by the installation of this system would not ordinarily exceed 30 days at the most. It may well be, however, that this matter is of sufficient moment to make it advisable to refrain from exercising the authority here outlined and to seek instead such a clear grant of legislative authority as will make the President, acting through the Office of the Judge Advocate General, a supreme court of review in all military cases, with ample authority to revise, reverse, modify, or set aside any finding or sentence of a court-martial whenever such action may be found necessary to accomplish the ends of justice. I am accordingly submitting in a separate memorandum an alternative plan, in which is outlined a proposed amendment to section 1199, Revised Statutes, which, if enacted by Congress, will remove all difficulties and confer upon the President a power which he should undoubtedly be authorized to exercise.

———— ————,
Judge Advocate General.

EXHIBIT 36.

DECEMBER 11, 1917.

Memorandum for Gen. Crowder.

1. Here is my brief, which, with his verbal permission, I file with the Secretary of War, and which I hope you will place before him at your convenience.

2. It has been prepared under circumstances which militate against literal accuracy, but it, together with the opinion, substantially and with sufficient accuracy expresses my views.

3. The subject, as I conceive it, is one of tremendous importance. I am quite sure that if the department could change its view of the law and come to concur with me a practical scheme for the exercise of such power could be established, to the great benefit of the administration of military justice.

4. I fear that this office, under the prevailing practice, is exercising too little supervisory power over courts-martial. I cite in my brief, as I mentioned to you the other day, that in the Civil War an Assistant Judge Advocate General was established independently of military command, so that as a representative of the reviewing power of this office he could pass preliminarily on proceedings and thus prevent the execution of illegal sentences. I apprehend that something like this will have to be done again.

5. If you and the Secretary of War, upon thorough reconsideration, can not accept my view of the law, and if it should be thought advisable to seek legislation establishing this power in the department, I hope its exercise will not be subjected to General Staff supervision. Such supervision, it seems to me, would necessarily destroy the judicial character of the power.

S. T. ANSELL.

EXHIBIT 37.

WAR DEPARTMENT.
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 17, 1917.

MY DEAR MR. SECRETARY: Herewith is Gen. Ansell's reply brief on the question of whether or not appellate power to revise, modify and affirm findings and sentences of courts-martial is, by the terms of section 1199, Revised Statutes, vested in the Judge Advocate General of the Army.

You will recall that on November 10 Gen. Ansell submitted, for your personal consideration, a brief which purported to find in said section this appellate power in the Judge Advocate General. His conclusion was reached on five main points of argument:

(1) That the legislative history of the statute shows that the intent of Congress was to vest the Judge Advocate General with this power:

(2) That the administrative history of the statute disclosed that the power had been actually exercised by Judge Advocates General of the Army during the Civil War, and until about 1882;

(3) That the word "revise" (which was the only word that could be considered as such a grant), as used in other statutes, specifically in the Federal bankruptcy statute, had been discussed by a United States court as having sufficient amplitude to convey appellate power:

(4) That the courts of the United States had never passed upon the power; and

(5) That the judge advocate general of the Britsh Army is vested with an analogous power.

You passed Gen. Ansell's brief to me and asked me to submit to you my views.

I replied to each one of the foregoing propositions, in substance, as follows:

(1) That the legislative history of the statute was without significant incident.

(2) That the records of the Judge Advocate General's Office showed no exercise of this power by Judge Advocates General; but, on the contrary, disclosed many instances where such power, if it existed, would have inevitably been exercised had it been contended for, but which was not exercised.

(3) That Mr. John Tweedale, chief clerk of the War Department in 1882, had made an affidavit for use in the case of In re Mason, to the effect that he, as chief clerk, knew of no instance where the Judge Advocate General of the Army had in any official communication or report relative to the proceedings of general courts-martial, proceeded to act as an appellate judicial authority; but that his action was only to revise; in other words, to examine and make recommendations, either to the General of the Army, when that officer had appointed the court, or otherwise to the Secretary of War.

(4) That the word "revise" was not relied upon in the Federal bankruptcy act to confer appellate power, which power was granted in express terms elsewhere in the same section cited in Gen. Ansell's brief, and that in its commonly accepted definition the word "revise" did not import such a grant.

(5) That the United States Circuit Court for the Northern District of New York had considered the question almost in the precise terms in which it was presented for your consideration, and had explicitly denied that section 1199, Revised Statutes, granted any such power to the Judge Advocate General.

(6) Finally, that a study of the organization of the British Army disclosed that the judge advocate general of his majesty's forces had not exercised such power.

Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addresses himself to the evils he would remedy. He shows that a great number of officers, not familiar with court-martial procedure, have lately been included in the Army, and that there is danger of grave error in court-martial proceedings, even when reviewed by judge advocates and approved by duly constituted reviewing authorities. He shows that the exercise of the pardoning power is often not sufficient to restore an officer or a soldier, who has been wrongfully convicted, to his full rights. He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors of courts-martial and reviewing authorities. He cites again the mutiny case, to which your attention has heretofore been called, as an example, and says, I think justly, that there are other cases, happening particularly since the outbreak of war, which demand the exercise of such corrective power; and down to this point I follow him with substantial concurrence without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes.

Gen. Ansell's argument presents about as strongly as it could be presented the necessity for an appellate power. But this question is not a new one. Whether such a power should be created and whether the service would gain or lose by such provision has been discussed in service literature since 1885, but never, so far as I can inform myself, has it been suggested in this prior discussion that this appellate power could be deduced from section 1199, Revised Statutes.

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often, and too clearly to require citation of authorities, that it is no objection to a grant of jurisdiction that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedue, if it attain its primary end, discipline, must be simple, informal and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our Armies. Such a proposition could hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be driven to the necessity of doing that very thing.

You have recently issued orders which will be corrective of some of the embarrassments referred to by Gen. Ansell, and I shall shortly submit for your consideration further orders which will, I think, carry corrective action still further and perhaps afford the measure of relief called for.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

EXHIBIT 38.

BRIEF FILED BY PERMISSION OF THE SECRETARY OF WAR IN SUPPORT OF MY RECENT OPINION CONCERNING THE REVISORY POWER OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OVER JUDGMENTS OF MILITARY COURTS.

Before the Secretary of War.

STATEMENT,

From my earliest interest in military law and the administration of military justice, and especially during my service in the office of the Judge Advocate General, I have seen the evident embarrassment of the department and its

4. I fear that this office, under the prevailing practice, is exercising too little supervisory power over courts-martial. I cite in my brief, as I mentioned to you the other day, that in the Civil War an Assistant Judge Advocate General was established independently of military command, so that as a representative of the reviewing power of this office he could pass preliminarily on proceedings and thus prevent the execution of illegal sentences. I apprehend that something like this will have to be done again.

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S. T. ANSELL.

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OFFICE OF THE JUDGE ADVOCATE GENERAL,
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Gen. Ansell now submits to you, through me, a second brief, still contending for the same proposition. He first addresses himself to the evils he would remedy. He shows that a great number of officers, not familiar with court-martial procedure, have lately been included in the Army, and that there is danger of grave error in court-martial proceedings, even when reviewed by judge advocates and approved by duly constituted reviewing authorities. He shows that the exercise of the pardoning power is often not sufficient to restore an officer or a soldier, who has been wrongfully convicted, to his full rights. He argues very strongly from these premises that it is both expedient and necessary that some corrective power should exist which shall have the effect of nullifying even approved findings and sentences of courts-martial, and that we should not be remitted solely to the pardoning power to correct fatal errors of courts-martial and reviewing authorities. He cites again the mutiny case, to which your attention has heretofore been called, as an example, and says, I think justly, that there are other cases, happening particularly since the outbreak of war, which demand the exercise of such corrective power; and down to this point I follow him with substantial concurrence without, however, being able to concur with him that this power has been granted to the Judge Advocate General by section 1199, Revised Statutes.

Gen. Ansell's argument presents about as strongly as it could be presented the necessity for an appellate power. But this question is not a new one. Whether such a power should be created and whether the service would gain or lose by such provision has been discussed in service literature since 1885, but never, so far as I can inform myself, has it been suggested in this prior discussion that this appellate power could be deduced from section 1199, Revised Statutes.

The lawyer's mind is not particularly shocked by the fact that there exists in military jurisprudence no court of appeal. The Supreme Court of the United States has held too often, and too clearly to require citation of authorities, that it is no objection to a grant of jurisdiction that the grant is original and also final; also that there is no constitutional or necessary right of appeal. There is, therefore, no fundamental reason why court-martial jurisdiction, as at present constituted, should be disturbed. The argument which has heretofore prevailed is that there are substantial reasons of expediency and good administration why it should not be disturbed. War is an emergency condition requiring a far more arbitrary control than peace. The fittest field of application for our penal code is the camp. Court-martial procedue, if it attain its primary end, discipline, must be simple, informal and prompt. If, for example, all the findings and sentences of courts-martial in France must await finality until the records be sent to Washington, we shall create a situation very embarrassing to the success of our Armies. Such a proposition could hardly be seriously advanced, and it would be very difficult to defend on principle legislation providing appeal in some cases and denying it in others. Yet if we legislate at all on this subject we shall be driven to the necessity of doing that very thing.

You have recently issued orders which will be corrective of some of the embarrassments referred to by Gen. Ansell, and I shall shortly submit for your consideration further orders which will, I think, carry corrective action still further and perhaps afford the measure of relief called for.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

EXHIBIT 38.

BRIEF FILED BY PERMISSION OF THE SECRETARY OF WAR IN SUPPORT OF MY RECENT OPINION CONCERNING THE REVISORY POWER OF THE JUDGE ADVOCATE GENERAL OF THE ARMY OVER JUDGMENTS OF MILITARY COURTS.

Before the Secretary of War.

STATEMENT,

From my earliest interest in military law and the administration of military justice, and especially during my service in the office of the Judge Advocate General, I have seen the evident embarrassment of the department and its

[illegible] according to established legal principles [illegible] imposed by the view and practice of this [illegible] had jurisdiction, no matter how flagrant [illegible] matter how bad its judgment and sentence [illegible] principles, no corrective power existed in this [illegible] From time to time the officers of [illegible] Department, have turned their minds to the [illegible] section 1199 of the Revised Statutes in the [illegible] necessary remedial authority. But since the Army [illegible] cases calling for such revision therefore have [illegible] urgent need for such a revisory power has not [illegible] manifested to make the question an all-impelling [illegible] have all accepted the practice, dissatisfied with it [illegible] to go to its bottom and overturn it. I should [illegible] been on duty in this office with me and [illegible] concurring me in the statement of this attitude.

[illegible] reasons, the revision of the proceedings of mil- [illegible] on an importance which it did not heretofore [illegible] administration of this office can be transcend- [illegible] is to be found, at least while this large [illegible] supervision over these proceedings; that is to say, [illegible] administration of military justice throughout [illegible] worth the name, it should be a revision for gross [illegible] that make a conviction bad, as well as for those [illegible] It should be done with such thoroughness as to [illegible] and to secure the respect of the Army and [illegible] It should be so expeditiously done as to make [illegible] prevent any great measure of unlawful punishment.

[illegible] to merit no allusion, our new Army must be [illegible] justice more crudely than did our small peace- [illegible] regulars. My experience in this office thus [illegible] will be, true. Many cases already have been [illegible] Maj. Davis, in charge of the Military Jus- [illegible] admitted of no doubt whatever but [illegible] justice, the judgments and sentences [illegible] revised and set aside if the power [illegible] illegal were many of these that [illegible] associates in an endeavor to dis- [illegible] means whereby in consonance with [illegible] the judgment might be modified [illegible] by wrongful conviction, to their [illegible] the passing upon such cases which [illegible] of revision in this office. We were [illegible] consideration, with a seriousness [illegible] proper construction of the statute [illegible] office associates concluded, with the [illegible] that statute does adequately confer [illegible] Army this very just and necessary [illegible]

[illegible] to indicate the exigent need of such [illegible] justice was the so-called mutiny [illegible] the views and conclusion which [illegible] alleged mutiny of the noncom- [illegible] of Field Artillery. The errors [illegible] by the proceedings in this case. [illegible] difficult for me to see how any fair- [illegible] the record could have failed to [illegible] the error and injustice. These [illegible] capricious officer was responsible [illegible] guilty of tyrannous and oppressive [illegible] were preferred, not against him for his [illegible] The charges were referred to the [illegible] rank, who ordered the court for [illegible] convicted them and sentenced them to [illegible] in [illegible] the reviewing officer approved the conviction [illegible] Where such [illegible] as this can occur there is left no room for the surprise that I otherwise should have felt at the failure of the proper

authorities to court-martial the young officer himself. I frankly confess my fear that such a failure of justice as this, under such circumstances, involving so many officers whose concern it was to see that justice was done, is symptomatic of more general deficiencies that are the usual concomitants of that institutional formalism which, in my judgment, so hinders our military development.

It was to correct such errors that the entire force of this office, including able and distinguished lawyers recently coming to us from civil life, devoted itself to a thorough study and consideration, extending over a period of more than three weeks, and reached the conclusion that the statute clearly confers upon this office revisory power necessary to do justice in such cases. Accordingly, convinced of the legality of that course and apprehending that no just objection could be taken thereto, I set aside the judgment of conviction in this and other pending cases and recommended that orders issue restoring these innocent men to their places in the Army.

Inasmuch, however, as this action was a reversal of an administrative practice in this office which had never before been thoroughly considered or examined, so far as I knew, I sent to the Secretary of War for his personal consideration a copy of the opinion, scarcely doubting that the action taken by me would merit his entire approval as well as that of the Judge Advocate General, so necessary and expedient was the authority, so clear the law, and so humane and righteous its application.

The Secretary of War having sought his advice, the Judge Advocate General has disagreed with me and finds no such power. Upon his advice, therefore, the judgment of conviction in this case is to stand, though it is proper to add quite a number of other instances in which I likewise set aside erroneous judgments have been, due to administrative methods, approved by the department and action taken accordingly.

Believing that our people who are giving up their sons to the national cause could not be content with, if they were apprised of, a system of military justice that is admittedly without power to correct conceded wrong and injustice to the most sacred rights of man and soldier; conceiving that the question is fundamental and far-reaching in its import; convinced that existing law places us in no such humiliating position, and that the action of the department was wrong beyond all question and can be shown convincingly and almost to the point of demonstration to be so; and mindful that undue deference to past peace-time views and administrative practices will defer the adoption of better methods and prove highly harmful to our new Army, in an earnest desire to be helpful to the extent of my ability and use whatever of strength I have to aid in the establishment of an adequate and efficient administration of military justice, I file, with the permission of the Secretary of War, this brief of my views:

First, as to the action taken in the Mutiny case.

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction; and the acceptance of such an act of grace by these innocent men necessary implies a confession of guilt of a crime which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of executive favor.

The Judge Advocate General, advising the Secretary of War, said:

"You are aware, of course, of the power you have by statute law to grant, upon proper application, an honorable restoration to duty to each of the men convicted of mutiny, and I shall shortly prepare an order of this kind and place it before you."

And immediately thereupon the Secretary wrote, adopting the suggested action as follows:

"As a convenient mode of doing justice exists in the instant cases, I shall be glad to act in reliance upon a usual power and leave this larger question for future consideration, informed by the further study which the Judge Advocate General is giving it."

This action can not be "a convenient means of doing justice." The Secretary, for the moment, has failed to distinguish between executive action, in the nature of a partial pardon, and judicial action, which goes to the erroneous judgment of conviction itself and modifies it, reverses it, or sets it aside. The statute under which the proposed action is to be taken is to be found in the statutes relating to the military prison and the prisoners therein, and is as follows:

"SEC. 1352, Revised Statutes. The commandant (that is, of the military prison) shall take note and make record of the good conduct of the convicts,

and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited."

And the modifying act of March 4, 1915 (38 Stat., 1074), as following:

"Whenever he shall deem such action merited the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States disciplinary barracks for confinement and detention therein, and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty, and may authorize the reenlistment of those who have been discharged or upon their written application to that end, order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment con tract for a period equal to the one not served under said contract. (Par. 7, sec. 2.)

And—

"The authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States disciplinary barracks and its branches shall be extended so that such restoration may be given to general prisoners confined elsewhere, and the Secretary of War, shall be, and he is hereby, authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe."

The action thus authorized was never intended to apply in cases of an unlawful conviction, and this the terms of the statute clearly indicate. It expressly applies to convicts and general prisoners dishonorably discharged from the service. It was enacted by Congress under its power to make rules and regulations for the government of the Army, and to prescribe the eligibility of those who enter or are in the Army and the conditions under which they serve. Looking at it from the Executive viewpoint, it is but Executive favor. As I pointed out in my former opinion, in cases of such restoration the conviction stands. The restoration itself is predicated upon a lawful conviction and a dishonorable expulsion from the Army in consequence of it. It can be taken only upon the application of him who has been thus expelled. An Executive action partaking of the nature of a pardon is not the proper remedy in a case where a man concededly has been unlawfully convicted if there be other means of doing justice. A pardon does not proceed upon the theory of justice but of mercy. The man who seeks a pardon does so upon an express or implied admission of guilt. The pardon itself conclusively implies guilt. A pardon is no remedy for wrong done the innocent.

Speaking to the present cases, these noncommisioned officers, soldiers of excellent record, were, when judged by universally recognized legal principles, erroneously unjustly condemned; they stand convicted of an offense than which none, in a soldier, can be more heinous. Restoration to the Army does not change the judgment of conviction. Restored to the Army they ought to be; not, however, as an act of grace and mercy, but as an act of right and justice. Such a restoration is but an attempt to forgive these men for an offense which none of them ever committed; and, notwithstanding such restoration, the record against them is made, and there it stands. They have been expelled from the Army; unless the judgment be reversed, they have been out of the Army since the day the sentence was executed. All rights and honors incident to their service they have lost—their records as soldiers largely ruined. In such a case the right thing to do is to set aside the conviction; to reverse the judgment of the court; to declare that these men had never been lawfully convicted; and that they have never been lawfully out of the service—a service which they had never dishonored. The power to do the right thing is, to my mind, unmistakably found in the section to be discussed. I hope and request that final action differing from that here prayed will not be taken until after this brief shall have been given the consideration which the subject of which it treats well merits.

The Secretary then continued to express the following general view with respect to the power to be deduced out of this statute:

"Ordinarily, however, the extraction of new and large grants of power by reinterpreting familiar statutes, with settled and practical construction, is unwise. A frank appeal to the legislature for added power is wiser."

I think it will be shown by this brief that the well-established general principle here enunciated has no proper application to the action taken by me under this statute. It can have no application where the statute never has been interpreted by the courts; where the practical construction is not settled, but palpably inconsistent and confused; where there is such overwhelming necessity for an exercise of the jurisdiction. That these things are so can be shown quite convincingly.

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing; they are looking backward, and taking counsel of a reactionary past whose guidance will prove harmful, if not fatal.

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

The opposing arguments follow administrative practice blindly and, for the most part, are but mere professional absolutisms developed under the conditions obtaining in our country since the broadening activities of the Civil War period passed away. I poignantly regret the concurrence of the Judge Advocate General, who habitually and constitutionally entertains far more progressive views. The reasoning that comes from the office of the Chief of Staff and Inspector General is but the apprehension of those who are counseled by their fears and who mistrust all that disturbs an absolute order of things. Opposition of that kind has manifested itself against every suggestion of progress throughout the development of institutions. Such argument proceeding on narrow military principle is adduced to the support of power, rather than to the human individual rights offended by an abuse of it. In its essentials it is this: The battery commander was a commissioned officer with the power of discipline over his battery; he exercises his power under an amenability to his superiors in the hierarchy, and they all, tacitly at least, approved of what he did; military justice was appealed to to vindicate his power through a court composed of excellent officers of experience and rank, and the court did vindicate him; all these officials were wise, experienced, and just, and therefore their judgment must not be impeached. The whole structure of government recognizes the fallibility of human administration and endeavors to minimize its evil effect by placing upon it the check to be found in the thoughtful and well-considered review of those who have been trained to the detection of these fallacies. It is only the mind of the extreme professionalist that fails to see that a man's judgment may be impeached without reflecting upon his integrity. In this case the gross misconduct of this commanding officer is conceded, and yet it is said these these men, subjects of his misconduct, must have their cases determined without reference to his oppressive and tyrannous action. The legal mind, trained to a consideration of the elements of every offense, and appreciating that mutiny must consist of an opposition to lawful authority with an intent to subvert it, could not have failed to perceive that this was not a case of opposition at all in the sense that makes mutiny, nor was there any evidence of the necessary intention to overcome and depose constituted authority. My own sense of right and justice and discipline would have impelled me to court-martial not the men but the officer himself, and I still think that that should be done. The human error that marked this case, judged according to established principles known to every lawyer, has marked, and is daily marking, others.

Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view. In any event, it is difficult to maintain that the judgment of this, the crudest of all courts, exercising such an extent of jurisdiction, is entitled to greater deference than those of the civil tribunals, the review of which, to insure correction, is fundamental in our law. So much as there is of summaries in courts-martial procedure is solely attributable to military necessities. But this Government should never take the life of any soldier or apply to him extreme penalties without the certainty of the correctness of judgment. If the judgment be sound and the punishment certain, nothing more should be demanded. This case in itself is of comparative little importance, but the questions raised and to be determined by it are fundamental in the administration of military justice.

(2) The opposing legal views are anachronistic. They are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted, but distinctly denied.

The Judge Advocate General deduces out of the power of revision which belongs to his office no substantial meaning whatever. Obviously he is lead to this restrictive, indeed extinguishing, interpretation because of his fear of obtruding judicial functions within a field of authority that, in his judgment, properly belongs to the power of command. He would prefer to believe that such revisory power does not exist; otherwise this office must sit in revision upon the judgments of convening and reviewing authorities based upon their power to command on one hand and, in turn, be controlled by the power of command of the Secretary of War and Chief of Staff upon the other. In my judgment, it is too clear for argument that, courts-martial having once been brought into being, their proceedings and judgments when properly completed, and all that is incident thereto, are not bases upon, but indeed are independent of, the power of command as such. Winthrop thought otherwise, and he has been followed blindly ever since by the War Department, though more recent decisions of the Supreme Court of the United States have exposed the fallacy of his views.

(*a*) Winthrop's theory was wrong in reason.

Winthrop, in a double-leaded heading in his work on Military Law, says that a court-martial is "not a part of the judiciary, but an agency of the executive department." This is the beginning and the cause of the difficulty. The only authority he quotes in connection with the assertion is a statement from Clode to the effect that in the British Army the power of courts-martial comes from the Crown, where, of course, differing from here, the King in theory is the fountain of justice. His text continues:

"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the Executive power provided by Congress for the President, as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

The non sequitur here is absolute and obvious. "Not belonging to the judicial branch of the Government," he says, then courts-martial must necessarily belong to the executive department, are merely instrumentalities of Executive power and utilized under his orders. Since the days of Winthrop this has been the height of orthodoxy; and we have all been steeped in the teachings that follow upon that illogical and fallacious syllogism.

It is rather surprising that an unsupported text-book statement, sustained by so little logic, should have gone so long unexamined by those in military authority, even if judicial decisions had not exposed the fallacy. To be sure, courts-martial are not part of the judicial system referred to as such in the Constitution, but this does not place them under the Executive power. They are courts all the same, with their bases deep down in the Constitution. The courts of the several Territories have never been courts of the United States in the constitutional sense, nor have they ever had any other constitutional basis than the power of Congress to make rules for the Government and disposition of the Territory of the United States.

But who would contend that they are under the Executive power? The courts, both Federal and local, of Porto Rico and Hawaii and the courts of Alaska and the Philippines, indeed the courts of the District of Columbia, the United States Courts of Customs Appeals, and the Court of Claims, are not constitutional courts of the United States in the strict sense, inasmuch as in them is deposited no part of the judicial power as defined in the Constitution; they constitute the courts, however, provided for by Congress under other grants of power. But no lawyer would contend for that reason that such courts are subject to Executive power.

(*b*) Winthrop's theory was wrong on principle and precedent.

Courts-martial as a means of military adjudicature long antedated the Constitution. They are recognized in the fifth amendment in the exception there made as to cases arising in the land and naval forces, and elsewhere in the Constitution. As they exist to-day in our land and as they have ever existed here they have been creatures of legislative enactment under the power of Congress to make rules and regulations for the government of the Army and Navy. The king as a fountain of justice, military and otherwise, finds no counterpart here in our Chief Executive except to the extent that supreme powers are conferred upon him by the Constitution. Here the fountain of justice, indeed all prerogative of sovereignty, is in the people, except where conferred by them on their representatives. Except for the pardon

power, Congress here is rather the fountain of military justice. Courts-martial are authorized by Congress. The powers that bring them into being are designated and authorized thereto by Congress. The offenses which they may try and the law which they apply are prescribed and enacted by Congress. Their procedure is regulated under the law of Congress. Their sentences and judgments must be in accordance with the law of Congress. All this has been said too frequently by the Supreme Court of the United States to be doubted. They are then tribunals created by Congress, administering the law of Congress and responsible to that law alone. It is established by an unbroken line of decisions of the Supreme Court that a court-martial is the creature of Congress, and as a tribunal it must be convened and constituted in entire conformity with the provisions of the statutes or else it is without jurisdiction. (Dynes *v.* Hoover, 20 How. 82; Keys *v.* United States, 109 U. S. 340; McClaughry *v.* Deming, 186 U. S. 62.)

(3) The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supreme Court of the United States, though this department still clings to them.

Those teachings were:

(*a*) That courts-martial were not courts at all in any proper sense of the term;

(*b*) That therefore they tried an act in its military aspects alone and not the full resultant crime recognized as such by general public law;

(*c*) That therefore judgments of courts-martial could not be pleaded by a soldier in bar of trial by a Federal court; and

(*d*) Being executive agencies they are subject to the power of command.

Those teachings are all wrong, and the sooner we abandon them the better.

(*a*) Courts-martial are courts created by Congress, sanctioned by the Constitution, and their judgments are entitled to respect as such. (Runkle *v.* United States, 122 U. S. 542, 555; McCloughry *v.* Deming, 186 U. S. 49, 68; Ex parte Reed, 100 U. S. 13, 21; Swaim *v.* United States, 165 U. S. 558; Keyes *v.* United States, 109 U. S. 336, 340; Grafton *v.* United States, 206 U. S. 333, 348; Smith *v.* Whitney, 116 U. S. 167, 178.)

(*b*) Courts-martial do not try simply for the crime in its military aspects, but for the full and complete offense as recognized by the law of the land. (Ex parte Mason, 105 U. S. 696; Carter *v.* Roberts, 177 U. S. 496; Carter *v.* McCloughry, 163 U. S. 365; Grafton *v.* United States, 333, 348.)

(*c*) The judgment of a court-martial being a complete adjudication by a competent tribunal of the offense as known to the law of the land is a bar against a second trial in any court of the United States. (Granfton *v.* United States, 206 U. S., 333, 348.)

These cases prove conclusively that a court-martial is a judicial tribunal of vast powers, whose jurisdiction extends to all who may belong to or are retained in our forces, affecting the life and liberty at the present time of millions; and that this jurisdiction extends to all conduct of such persons, without distinction between civil and military aspects. This office and the Army prior to the Grafton case had regarded it as settled law and justice and sternly opposed the contrary view that a soldier, though tried and punished by courts-martial, could again be tried and punished by Federal civil courts without infringing his constitutional rights and its rights to justice.

(*d*) The functions of courts-martial are inherently and exclusively judicial and therefore are not subject to the power of command as such, but only to judicial supervision established by Congress.

It has been said that the President has the power to establish a system of courts-martial, and that in deference to that power, therefore, courts-martial are subject to his control. This I deny. I do not say that if the Constitution had not spoken the power and necessity of the Commander in Chief to maintain discipline in the Army would have been sufficient to authorize some system of military adjudicature, and it may be that if Congress had not spoken under its power to make rules of government for the Army the President could have filled the void. But when Congress does speak out of its power the President may not speak within the same field. He may not array himself in opposition to the legislative rules governing the administration of military justice. Congress has designated what commanders subordinate to the President may convene courts-martial, and the President can not say otherwise. Congress has said what law they shall apply, and the President may not prescribe another. Congress has regulated the punishment, and the President can not prescribe different penalties. The most that can be said is, inasmuch as Congress has not endeavored to

deprive, even if it could deprive, the Commander in Chief of his power as a convening authority, the President may himself still convene a court-martial, and his name may, therefore, be added to that list of convening authorities designated by Congress. But that power is limited to him; he may convene courts-martial, but when convened they will be subject to all the law of Congress; he can not, by reason of that power, control courts-martial convened by others.

As was said in a report by the Judiciary Committee of the Senate, quoted with approval by the Supreme Court in Swain *v.* United States (165 U. S. 558), with respect to the acts of Congress authorizing the constitution of general courts-martial by officers subordinate to the President, such acts are not restrictive of the power of the Commander in Chief, but—

"* * * Merely provide for the constitution of general courts-martial by officers subordinate to the Commander in Chief, and who without such legislation would not possess that power, and that they do not in any manner control or restrain the Commander in Chief from exercising the power which the committee think in the absence of legislation expressly prohibitive resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

His power of control over the judgments of courts-martial not convened by him comes itself from Congress, and on principle he can add nothing to it.

It is fallacious reasoning to say that Congress, under its power to make rules and regulations for the government of the Army, may not confer any authority upon a subordinate official without conferring it upon the President as Commander in Chief, especially when the power conferred is inherently judicial. Such an argument was advanced by the Court of Claims, but it is to be observed that the Supreme Court did not adopt that view. On the other hand, it quoted with approval the report of the Senate Judiciary Committee, which was to the effect (1) that the subordinate authorities would not have had such judicial power without the authority of Congress, and (2) that the President did not have the power to convene a court in the absence of legislation to the contrary.

(*e*) Court-martial procedure being judicial from the beginning to the end (Runkle's Case, 122 U. S. 588, and all subsequent cases cited) the power of revision, if it exists, is also judicial and therefore not subject to the power of command.

It is a maxim of the law that judicial power can not be restrained; which means to say, it can be controlled by no power except by superior judicial authority drawing its power from the same source. This source of the judicial power of courts-martial is Congress; and only by Congress alone, or by some authority appointed by Congress, can a court-martial be controlled. A supervisory judicial authority Congress conferred upon the Judge Advocate General by the section discussed. The fact that the Judge Advocate General is in a military hierarchy and in an executive department does not subject his judicial or quasi judicial functions to the power of command. It is established by the decisions of the Supreme Court of the United States that an officer of an executive department charged by Congress with judicial or quasi judicial duty is not subject in the performance of such duty to any executive authority. Thus, the decisions of the Commissioner of Patents stand as the final judgment of the executive departments beyond the control of the Secretary of the Interior. (Butterworth *v.* United States, 112 U. S. 50.)

The supervision which a superior in an executive department may have over an officer in the same department who performs judicial or quasi judicial functions is on principle limited to administrative and executive functions, and does not relate to the quasi judicial. It may be that the legal relation between the head of the department and the officer performing judicial functions is such as to make the decisions of the latter subject to the former's judicial review, but certainly not to the review of another and nonjudicial bureau of the same department.

(*f*) Such judicial revision is not subject, therefore, to the usual General Staff supervision.

The practice which obtains in the General Staff of passing upon the opinions of this office in such matters of pure law, is obviously, as hurtful to proper administration as it is inconsistent with legal principles. From the common sense point of view alone, how futile it is to direct the attention of the General Staff, military experts presumably knowing nothing of technical law, to the control and supervision of the judicial functioning of the Judge Advocate General who presumably is thoroughly skilled in matters of law and trained to judicial functions. I can conceive a large field in the realm of military

conduct and policy—not of detailed administration—in which, as I see it, the General Staff was created to function and in which good results will be achieved only when they are thus confined and devoted to larger tasks. I address myself to a situation and not to sporadic instances of such administrations. Considerable time of that great body and also of this office is consumed in conferences and discussions required by reason of such assumed power of supervision of the decisions of the office in matters of technical law and judicial duty. I can recall distinctly my inability to get a General Staff officer to grasp the usual technical significance and the propriety of applying the legal principles usually expressed in damnum absque injuria; res inter alios acta: generalia specialibus non derogant, and like technical concepts. I can recall a recent instance of a plain case of a lack of jurisdiction in which the Chief of Staff personally functioned for a considerable part of three days in an endeavor to make up his mind whether the error was jurisdictional, rendering the judgment null and void, or was an error of law, simply requiring a reversal in my judgment. No war of any consequence can properly be conducted with such General Staff administration.

III. The whole argument on the other side is found in the contention that the word "revise" has no substantial meaning, but has reference only to clerical corrections.

One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view.

The fact is this: The word "revise" is an organic word, which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

It is true that the word "revise," as descriptive of the duty of the Judge Advocate General, is found associated in the Revised Statutes with other words that are not of an organic nature. But in construing the Revised Statutes, if there be doubt enough to justify construction, as there is not in this case, the antecedent legislation may and should be examined; and when examined it can be seen that there can be no application of the doctrine of noscitur a sociis here; indeed, because of the established meaning of the word "revise," there could have been no application of the doctrine under any circumstances.

The act of July 17, 1862 (12 Stat., 598), was an act establishing anew the office of the Judge Advocate General, and no functions were established for that office other than that enjoining that—

"To his office shall be returned for revision all record and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."

The declared purpose of having the records returned to this office was that the Judge Advocate General should revise them and make a record of his proceedings in revision.

Again, the act of 1864 (13 Stat., 145) created a separate bureau of the War Department for this special purpose in the following language:

"SEC. 5. There shall be attached to and made a part of the War Department during the continuance of the present rebellion a bureau, to be known as the Bureau of Military Justice, to which shall be returned for revision the records and proceedings of all courts-martial, courts of inquiry, and military commissions of the armies of the United States, and in which a record shall be kept of all proceedings had thereupon."

And in the following section, descriptive of the duties of the Judge Advocate General, the statute uses the words, "He shall receive, revise, and have recorded all proceedings of courts-martial," etc. These words describe his duties, but the extent of revision is, of course, to be found in the fact that it was the sole and single purpose of the creation of the bureau. The duties established for that bureau in its origin are still included within those of the office of the Judge Advocate General. Is it not opposed to common sense and reason to say that the Congress of the United States went to the great length of creating a separate bureau of this War Department for no purpose at all, or, at most, in order that some inconsequential clerical change might be made upon the record?

It is to be observed that the unreported decision in the Masons case, a case which I have been familiar with since 1902, and which for the moment and perhaps because of its utter lack of authority I had forgot, holds that upon the doctrine of noscitur a sociis the word "revise" imports but clerical duties.

All that that judge said was said without evidence of any study of the statute and without reference to antecedent legislation; and furthermore, it was the most patent dictum.

But there is another reason why the word "review" can not be applied to any substantial clerical change in the record. The record is made by the court; it can not be changed except by the court. The record can not be made elsewhere. There is, then, no field for any clerical revision.

To be guided by this line of argument would be to hold that Congress created an entire bureau whose sole duty should be to dot the "i's" that had not been dotted and cross the "t's" that had not been crossed and correct errors of spelling and perhaps of grammar, and to substitute one's personal view of correct punctuation for that which the court reporter had adopted. In other words, Congress went to the ridiculous length of establishing a bureau of the War Department where sole objection was to correct the clerical inaccuracies of a court reporter.

But Winthrop accepted this dictum without examination, and we are engaged to-day in nodding acquiescence to a proposition which, had it come less well sponsored, would have been greeted with impatience.

IV. "Revise," in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

The Judge Advocate General's brief, though concurring in the argument that the word "revise" represents purely clerical duties, does in a rather incidental and delicate way suggest that the word "revise" as here used may mean a review for the purpose of correction. If that were the acceptable view of the statute, then Congress must have contemplated that the power of correction existed somewhere. But he does not follow that definition up or rely upon it to locate the power of revision. The Judge Advocate General, so far as I can find, has no real authority for any such definition. His own illustrations fail completely. If a proof reader revises a copy, he himself changes it so as to make it conform to some standard. The committee who report a proposed revision of the law to Congress do not revise the law; Congress does it. Those were the practical examples the Judge Advocate General chose to rely upon.

(*a*) The ordinary meaning of the word "revise" is not to review for the purpose of corrections, but to perform the act of correction. Look up the word in the ordinary dictionary; look around your library at the "revised editions"; look at the "Revised Statutes" or "Revised Codes," and no doubt whatever can be entertained of its meaning. It is an active, decisive power that results in a change in modifications of the proceedings revised. Ordinarily, "revise" is a broader word than "review," especially so in the literary sense; and the two may be distinguished in that the former is active and decisive, the latter passive, informatory, and advisory. In a legal sense, "revise," while less commonly used in Anglo-American law than "review" as establishing supervising or appellate power, seems to be synonymous with it.

(*b*) In its legal sense the meaning of the word, as evidenced by a multitude of examples of its use, is unmistakable; and if the single example heretofore given of its significance when used in statutes were "persuasive" at all, those to be given now should prove absolutely convincing.

The Judge Advocate General says that such examination as he has been able to make of legislative precedents "fails to disclose a single instance in which the power to modify or reverse the judgments of inferior courts is deduced from the word 'revise' without the addition of apt words specifically conferring the power to reverse or modify." And then, after referring to the use of the word in the bankruptcy statute cited by me, he said:

"This legislative precedent as judicially applied would, if it were properly and accurately set forth in the brief, be most persuasive."

My reference and reliance upon the word "revise" as used in the bankruptcy statute was quite justified as showing that the word "revise" as there used means exactly what is here contended for—changing the proceedings of the civil inferior courts of bankruptcy so that they shall conform to law. And the appellate power thereinbefore conferred in the statute was not what challenged the attention of the court as a measure of their power over inferior proceedings, but it was the word "revise."

But I submit the following, which ought to be conclusive:

(*a*) The word "revise" is the sole word used in the constitution of Oregon to confer full appellate jurisdiction upon the supreme court of that State, and that court has given the word a fulsome meaning, even in the fact of legislation evidently designed to limit it.

(*b*) The word "review" is used by the constitution of North Carolina as the sole word for conferring full appellate power upon the supreme court of that State.

(*c*) The word "review" is used by the constitution of New York to confer full appellate power upon the Court of Appeals of that State.

(*d*) Randolph's plan for the Supreme Court of the United States was contained in the following resolution:

"*Resolved*, That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate." (Madison's Journal of Federal Convention, p. 62.)

(*e*) Section 24 of the constitution of Illinois, 1818, provided "that the general assembly may authorize judgments of inferior courts to be removed for revision, directly to the supreme court." This language is peculiarly similar to the language here discussed and none other was needed to confer appellate power upon the supreme court of that State.

(*f*) "Revise" has a meaning here contended for in constitution of California (Art. X, 1849, 1879), constitution of Alabama (sec. 3, 1819, and Art. IX, 1865), constitution of Florida (Art. XIV, 1838 and 1865).

(*g*) The Court of Customs Appeals has final appellate jurisdiction over decisions of the Board of General Appraisers, all of which is deducible out of the word "review." (Judicial Code, sec. 195.) The word as there used includes the usual appellate powers, including the reversal of the Board of General Appraisers when the court is satisfied that the findings is wholly without evidence or clearly contrary to the weight of evidence. (See United States *v.* Riebe, 1 Customs App. 19; Holbrook *v.* United States, 1 Customs App. 263; Carson *v.* United States, 2 Customs App. 105; In re Gerdau, 54 Fed. 143.)

(*h*) The decisions of the Comptroller of the Treasury over settlement of accounts by the decisions of auditors is described by the statute (act of July 31, 1894, 28 Stat., 207), as "a revision" and his decisions are referred to as "decisions upon such revision."

(*i*) Section 271, Revised Statutes, defining the power of the First Comptroller, provides as follows:

"The First Comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the First and Fifth Auditors of the Treasury forthwith to audit and settle any particular account which such officers may be authorized to audit and to report such settlement for revision and final decision by the First Comptroller."

(*j*) Section 482, Revised Statutes, defined the powers and duties of examiners in chief in the Patent Office and provided as follows:

"The examiners in chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for reissue of patents, and in interference cases; and, when required by the commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them."

(*k*) Section 4914, Revised States, defining the jurisdiction of the Supreme Court of the District of Columbia, provides:

"The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way on the evidence produced before the commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. * * *"

(*l*) "Review" is the sole appellate word used in section 330 of the Code of Arizona establishing jurisdiction upon the supreme court of that State.

(*m*) "Review" is used also to confer appellate jurisdiction upon the supreme court in section 4824, Code of Idaho.

(*n*) "Review" is thus used in section 7096, Code of Montana.

(*o*) "Review" is so used in section 654, Code of Utah.

(*p*) In State *v.* Towery (39 So. 309, Ala.), the question was as to the meaning of the word "revision" as used in a clause of the constitution requiring the legislature periodically to make provision for the revision of the statutes. The court there construes the word in the usual sense of review, alter, or amend, and said with reference to the meaning of the word, "Such changes as are admissible are within the purview of the section."

(*q*) In State *v.* King County (37 Pac. 489, 491, Wash.), the court deduced its authority to review by way of certiorari an inferior court's decision out of the word "revisory." Even the dissenting justice in that case admitted that the word "revision" included the power here contended for, but held that in this case it had reference only to those judgments which were already within the jurisdiction of the court by virtue of some other appellate power.

(*r*) The word is, apparently, habitually used as defining the power of courts over municipal corporations, taxation boards, and insolvency proceedings. (34 Cyc. 1723; and the word is used, in that publication, as indicating a revisory power over criminal sentences. 12 Cyc. 783.)

(*s*) The supreme court frequently alludes to its power "to revise judgments" of inferior courts. (See, e. g., the Dred Scott decision, 19 Horn 452, 453.)

Of course, the fact that appellate power is frequently conferred with great particularity in such terms as "revise, reverse, remand, alter, amend, and set aside" places no logical or legal restriction upon the word "revise," certainly not when it is used alone.

Eleven of the State constitutions confer full appellate power in one or two words, using none of those enumerated.

The term "revise," and "revision of proceedings" having this general significance, has been known to military law and procedure from time immemorial.

It was known to the early mutiny acts prescribing that no proceedings should be returned to be revised by the court more than twice.

In Tytler's Military Law (1806, p. 173) it is said, with reference to British military law that the King has no power of revision, but that that function belongs to the courts of justice. He further says:

"All, therefore, that it is competent for his majesty to do, if the sentence of a court-martial shall not meet with his approbation, is to order the court to review their proceedings, and even this power, as above stated, is limited, for the mutiny act declares 'That no sentence given by any court-martial and signed by the president thereof shall be liable to be revised more than once.'"

It is to be observed that even in English law the power of revision of courts martial proceedings and sentences is clearly distinguished from the Crown's power of pardon.

"Revision of proceedings" and "proceedings in revision" are terms well known to the Anglo-American military law with reference to the power of courts to reconsider and correct their own proceedings, judgments, and sentences.

In 6 Opinions of the Attorney General (203), Attorney General Cushing discussed this power of revision with great thoroughness, saying in that connection:

"It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence;"

citing for that authority Hough on Courts-martial (p. 29), McArthur on Courts-martial (p. 136), Griffith's Notes (p. 90), Kennedy on Courts-martial (p. 229, 290), Anon., Observations on Courts-martial (p. 38–65), Tytler's Military Law (p. 170–338), James's Collection (p. 556), Simmons's Practice (p. 339), De Hart on Courts-Martial (p. 203), O'Brien's Military Laws (chap. 23).

This procedure, with the word "revise" as descriptive of it, is an established part of our own military procedure, which occurs in daily practice, is treated of in all tests and is recognized by that name by all our courts.

See Macomb (1809), Duane's Military Dictionary (1810), Scott's Military Dictionary (1864), Benet's Military Law under "revision"; also all military texts.

V. The word "revised" as a matter of fact is in no sense ambiguous, and there is no room for construing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least, pronounce sentences invalid and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

The meaning of the word is not fairly questionable. Furthermore, Senators in debate referred to the power conferred as that of a court of review. Congress seems to have had no doubt about it. In such a case, practice can not govern.

In writing the opinion I went through the record books of a part of 1863, and my notes of that search reveal that Judge Holt's reviews very frequently terminated with a declaration which, by its form and tenor, indicated, so far as his office was concerned, judicial finality. It was common to conclude with the statements: "Therefore the sentence is inoperative," "Therefore this fatal de-

fect must prevent a confirmation of the record," "The sentence is fatally defective," "For error of law committed by the reviewing authority the sentence is inoperative, notwithstanding the confirmation of Maj. Gen. Hooker," "The sentence as it stands is inoperative," "The sentence is invalid and should not be enforced," "The sentence rested upon such a record should not be carried into execution," and such like expressions.

"Sentence is therefore inoperative" occurs 8 times; record is fatally defective and sentence should not, or can not, or must not, be enforced, or carried into execution, or confirmed, 16 times. The record shows that, in the administration of those days, the Judge Advocate General was regarded both by the President and the Secretary of War as the law adviser upon matters of military administration and justice, and at least no power of command stood between him and those supreme authorities. It also shows that the Judge Advocate General very frequently, indeed, one might say, habitually, returned the record direct to the reviewing authorities with instructions as to errors of law and pointing out the necessity for correction where correction could be made in order that the sentence be held operative. That the examination, if not revision, of the records might be the more expeditiously made an Assistant Judge Advocate General, representing preliminarily the Judge Advocate General, and his power, and not connected with any commander's staff, was stationed in a central situation with duty, as to proceedings, "to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commanders, that sentence may not be illegally executed." (G. O. 230, A. G. O., Aug. 16, 1864.)

VI. The judge advocate general of England certainly did have this power of revision. (I am not advised of his present authority.)

Clode (1869), volume 2, pages 359, 364, 360. While his letters patent do not clearly define his duties, it was prescribed therein:

"He exercises the powers of a supreme court of review, as regards the proceedings of all district, garrison, and general courts-martial, whatsoever and whensoever."

The following is quoted from Jones's Military Law (1882, p. 94):

"The Judge Advocate General and his deputy are always civilian lawyers, while the deputy judge advocates, who in England attend at B. C. M., are always military men.

"The judge advocate general's department forms a final court of appeals and has the power of upsetting or "quashing," as it is called, all proceedings of courts-martial and it therefore takes no part in the actual preparation, conduct, or management of prosecutions.

"The judge advocate general is a member of the privy council. He is generally chosen from among barristers who are members of Parliament, and they stand or fall with the government to which they are attached.

"All the proceedings of general courts-martial which at home must be confirmed by the sovereign are sent to the judge advocate general, and the sovereign confirms on his responsibility as a minister of the crown, and acts on his recommendation.

"The judge advocate general is responsible to Parliament, hence a prisoner, if wronged can appeal at law against him, for 'the sovereign can do no wrong.'

"The duties of the judge advocate general are confined to the examination of the proceedings as to their legality, whether the sentences are within statute laws, etc. The expediency of carrying out the sentences, or as to remission, etc., is not his province, the C. in C. advises the crown on these points." (Pp. 94–95.)

It must be remembered, too, that the civil courts of England exercise a far larger power over the judgments of courts-martial than do our own.

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

Nobody essays an answer. Doubtless, a reviewing authority, by statute, may "disapprove" a sentence because it is null and void, or because it is bad for prejudicial error of law; and I think that frequently it is said in our texts and in our practice that a sentence is "invalid" though not for jurisdictional error. The larger power, in practice, is exercised here in the department. It is extremely difficult for me to comprehend any reason that concedes to this department the larger power but denies to it the lesser one.

VIII. The necessity, in the name of justice, of locating this power in this department and preferably in this office, where logically and I think legally it belongs, must be apparent to all who are familiar with the administration of military justice.

In the first half of November, while I was in charge of the office, I set aside the judgments and sentences in the cases of 19 enlisted men, because of prejudicial other than jurisdictional error invalidating the judgment. The number in which on established principles such reviewing power should be invoked should be expected largely to increase.

Courts-martial are courts dealing with the right of life and liberty of all who are subject to their jurisdiction, a number already beyond a million, doubtless soon to pass into many millions of our citizens. They are courts of law administering the law of this land, in accordance with the law of the land, for a great national purpose. Their judgments are judgments of law. Can it be said that their judgments are beyond all legal inquiry; that though they may be arrived at in contravention of all law, if the court according to the usual narrow jurisdictional tests had jurisdiction, the judgment, though concededly wrong for error of law, is beyond all correction?

There is to-day as never before an urgent, impelling necessity for such revisory power; if not here, then elsewhere. It will not do to say that such errors of law, affecting the proceedings to the great prejudice of the accused and rendering the judgment bad because thereof, are rare and for that reason may be ignored. That doubtless was the reason why the power was permitted to remain not fully used or to drop into desuetude. But this day finds the Army increased tenfold. A few more months hence it will have been increased twentyfold, and obviously a year hence the Army of the United States must necessarily, if we are to take the part in this war that this Nation purposes to take, consist of 3,000,000 of men. The officers of that Army must necessarily be largely untrained officers, conscious, of course, of their great power, required necessarily to exercise it, and exercising it necessarily without the most enlightened judgment or consideration. It will consist of men just come from the shops, the factories, and the farms, unused to Army life with its peculiar customs and its rigorous duties, willing but uninformed. With such elements errors upon the part of the officer on the one hand exercising disciplinary authority, and on the part of the enlisted man on the other subjected to such authority, must be exceedingly numerous, and resort to the disciplinary actions through the agencies of the court-martial frequent. The triers of the case will be officers of the same class and so frequently will be the reviewing and approving authorities. Opportunity for resort to court-martial and opportunity for error in the courts-martial proceedings themselves will be largely multiplied over those that obtain in normal peace conditions. There is chance for grave error in the most enlightened legal system, but still greater chance in a legal system which necessarily must be administered by men uninformed in the law, and an immeasurably greater chance in the case of such an Army as ours must necessarily be. I must assume that no man with the interest of the Army and the country at heart and with the ordinary conception of the necessity of maintaining justice in our institutions could doubt the advisability and the necessity of establishing here or elsewhere such revisory power.

I have no shame in confessing that I feel strongly about this, and not in any contentious way. I am not impelled to file this brief because the Judge Advocate General of the Army disagrees with me, nor the Chief of Staff, nor other authority. I am entirely out of the field of contention. I feel strongly about it as a matter between a man and his fellow men, between an officer and the men whom he should protect, between a man and the Army in which he serves, between a soldier and his nation. What happened to these men can happen to me. A soldier has nothing but his service. He is honored by his professional reputation or dishonored by the lack of it. Society has established certain rules which are its law, and by which human conduct is tested. All lawyers at least understand the methods of applying those tests. If the test be not applied in accordance with the law, there has been no test. It is not sufficient to say that a system of administration of criminal justice may not be a fair and just system, though it provide for an appeal, though the fact remains that no enlightened system has ever permitted a judgment to remain as final when reached in contravention of the rules of law. The question here is whether or not, when, according to the well-understood principles of law and justice, a judgment is concededly and palpably wrong, it must remain and persist as the law of the land in condemnation of an individual while it is concededly wrong. It seems to me that a soldier, before suffering the extreme penalty of death or other serious punishment, should, on principle, be entitled to have the proceedings of his trial examined, not solely by the commander convening the court in the field, but by a separate and independent authority, who, skilled in the law, properly circumstanced, can, with the necessary deliberation and considerate-

ness, pronounce the trial free from prejudicial error. Even in the absence of statute it would be the duty of the department to endeavor to discover or provide a means whereby such a wrong could be righted. In the case that it could invoke a doubtful statute, it would be the duty of the department on all principle to resolve the doubt in favor of its jurisdiction to apply such remedy. Surely there can be no excuse for the department's not taking the remedial action which the statute clearly authorizes, indeed I think requires it to take.

Conclusion.—This revisory power should exist; and I doubt not that when exercised with judicial wisdom and discretion, as it must be if it is a judicial power at all, under proper rules and regulations, it will prove a great help, and never a hindrance, to safe and sound administration, and place military justice upon a plane that will cause it to merit and receive, more than it ever has heretofore received, the approval of the American people. I earnestly ask that this matter may be conceived to be, as doubtless it is, one of prime and fundamental importance to our Army. It is a matter affecting the relation of the Nation to its soldiery; it is a matter at the very base of military justice as an institution; it is a matter affecting justice under the law to the individual soldier. Justice under law is as necessary to the American Army as it is to any other American institution.

S. T. ANSELL.

DECEMBER 10.

EXHIBIT 39.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, December 22, 1917.

Memorandum for the Judge Advocate General.

Subject: Certain administrative measures affecting justice and discipline in the Army.

1. It is my judgment that you should give immediate consideration to the following matters:

(*a*) Regardless of your views or mine upon the question of the revisory power of this office, orderly administration as well as justice requires that sentences of death and sentences resulting, if executed, in immediate expulsion from the Army should not be executed until the proceedings may be reviewed for prejudicial error by an officer of and representing this bureau, and not of the administrative staff and representing the officer ordering the court and his power. In order that there might be no delay in such review of proceedings, reviewing authorities should be instructed to forward to the reviewing officer of this bureau all proceedings without a moment of delay.

(*b*) The above consideration would require the establishment in France of such a reviewing officer with duties as indicated. This administrative method would involve nothing of inhibited delegation of power. Assuming, as I have held, that the revisory power is in the Judge Advocate General of the Army, it is not necessary as a matter of law, as, indeed, it is not practicable as a matter of fact, that that officer function personally in each case. The function is a function of office; the statute originally establishing the Bureau of Military Justice clearly so indicated, provided for assistants, and empowered them, in effect, to perform the duty under the general supervision, of course, of the head of the office.

2. Another important matter is to be found in the most expeditious and at the same time lawful and just method of ridding the Army of inefficient officers. Among the large number of officers in our Army, considering the methods of selection and the inadequate knowledge of them upon the part of the appointing authority, must be many who ought to be eliminated, and the sooner and with the least disturbance to normal functioning the better. The number of cases involving the trial of officers is very large already and is rapidly increasing. In the great majority of cases the sentence awarded on conviction is limited to dismissal from the service. In view of the great time necessarily consumed in court-martial trial, the preparation for trial, serious question whether an officer shall be tried by court-martial when it is reasonably evident from all the circumstances that the judicial method will result only in a separation of the officer from the Army. My own view is that the summary Executive power of removal ought to be applied in such cases, and I think consideration should be given now to establishing the respective executive and military judi-

cial domains in such matters. Our commanding generals ought to be advised of the extent of jurisdiction which the Executive is to assume, in order that they may determine whether it is preferable to bring an officer to court-martial or submit the case for Executive action.

3. Another matter: You mentioned yesterday the question of promotion of officers below general rank in the additional forces. This office has given some consideration to that question, but apparently it was upon an informal submission, or it may be upon no submission at all. We did conclude, however, that the President might institute a system whereby he might exercise his power through selections made by subordinate commanders in accordance with the method by him established, and that resultant appointments would be beyond judicial inquiry or just criticism. It is my judgment that it would be highly injurious to the Army, large as it is and operating as it is, to hold that the Executive function must be exercised in each individual case by the Chief Executive in person. As Government grows, constitutional functions can not be thus personally exercised. Law must conform to such evident necessities.

4. There are other matters of policy that I shall take up with you whenever I shall have had time to formulate them.

S. T. A.

EXHIBIT 40.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 9, 1918.

Memorandum for Gen. Crowder.

Subject: Revision of court-martial proceedings.

1. I have just been advised of the step taken by the Secretary of War to prevent the execution of possibly illegal death sentences in the United States by requiring that the record be transmitted to the department and reviewed here, that its legal correctness may be assured before execution. While a step in the right direction, I deem it my duty to say that in my judgment it falls short of the requisite degree of remediality in that it is not applicable generally, nor to all those sentences which, unless stayed, mean separation of a man from the Army and placing him, in a practical sense, beyond the reach of remedial power subsequently exerted.

2. I see no reason why the same measures of relief should not be extended to dismissal and dishonorable discharge; nor do I see any reason why it should not be made applicable to our forces in France, as well as elsewhere; all of which could, with the establishment of a proper and practical system of revision, be done without evil administrative result and to the advantage of law and justice.

3. This would require the establishment in France of an office representing the functions of the Judge Advocate General, the duties of which would be practically those defined in General Order No. 230, July 16, 1864, establishing such reviewing office in Louisville. For your information, I quote that order:

"I. Col. William M. Dunn, Assistant Judge Advocate General, will take post at Louisville, Ky., at which place the office of Assistant Judge Advocate General is hereby established.

"All records or courts-martial and military commissions, which are required by regulations to be forwarded to the Judge Advocate General, will be sent, by officers ordering such courts of commissions, within the Military Departments of the Ohio, the Tennessee, the Cumberland, the Missouri, Arkansas, and Kansas, to the Assistant Judge Advocate General, at Louisville.

"With reference to records of courts and commissions, it will be the duty of the Assistant Judge Advocate General to call for such as are not forwarded in due season, to examine them, to return for correction such as are incomplete, and to give immediate notice of fatal defects to the proper commander that sentences may not be illegally executed. He will forward all complete records to the Judge Advocate General, but will not be expected to prepare reports on them unless specially instructed to that effect by the Judge Advocate General.

"II. The Assistant Judge Advocate General will be allowed the number of rooms as office and fuel therefor assigned to an Assistant Quartermaster General in paragraph 1068, General Regulations.

"By order of the Secretary of War:

"E. D. TOWNSEND,
"*Assistant Adjutant General.*"

Such an office, located conveniently to our general headquarters could give that thorough, disinterested, and judicial review of such sentences necessary to assure their correctness without considerable or injurious delay.

4. The review of all cases, including those which carry sentences separating a man entirely from the service, should be expeditious—not so much that punishment shall be swift as that injustice be not suffered. The power of revision should not be limited to approval or disapproval, but should include all powers possessed by reviewing authorities. When I wrote the original opinion upon the subject I had several of the assistants suggest regulations to govern the exercise of such power, and it was then generally agreed that—

"1. The power of revision shall not include the power to deal with the case before the officer appointing the tribunal has finally dealt with it nor the power to admit new evidence or otherwise retry the facts.

"2. It shall be confined to a review of errors of law injuriously affecting the substantial rights of the accused, and as thus confined and for the limited purpose of correcting such errors of law it shall include—

"(*a*) The power to declare a proceeding, finding, or sentence void for want of jurisdiction.

"(*b*) To disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the evidence of record requires a finding of only the lesser degree of guilt.

"(*c*) To disapprove the whole or any part of any sentence.

"(*d*) Such other revisory power, not exceeding the general scope and purpose herein prescribed, as may be found necessary for the correction of such errors.

"3. In a case in which such power is inadequate for the correction of such errors the power shall include the right to return the record to the proper authority that the tribunal may make the necessary revision, or to transmit it to the Secretary of War with a recommendation for a proper exercise of the pardoning power."

5. I think no doubt need be entertained but that such a system of revision would be workable, nor is it of more than academic interest to determmine whether the power finds its source in the inherent relation of the President to the Army, or in the statutory donation of article 38, or in the revisory functions of the Judge Advocate General established by section 1199, Revised Statutes, though, of course, I think it is clearly established in the latter section and not otherwise.

S. T. ANSELL.

EXHIBIT 41.

JANUARY 10, 1918.

Memorandum for the Secretary of War:

1. In your memorandum of December 28, 1917, relating generally to the power of revision of sentences of courts-martial, you state, after outlining to some extent your own views:

"I would be glad to have your views upon the two questions suggested here: (1) With regard to the coexistence of the power of summary execution with the power of revision in 1862 and 1864; and (2) the sort of appellate procedure involved in the power to revise, according to the views accepted by Gen. Ansell and his associates."

2. Your first suggestion may be answered briefly with the statement that at the date of the enactment of the act of July 7, 1862, and of the similar act of 1864—the acts which are the antecedents of what is now section 1199 of the Revised Statutes—the Articles of War, in so far as they relate to the power of reviewing authorities to confirm and execute sentences of general courts-martial, were the same as now. The Articles of War recently adopted made no change in this particular.

3. With reference to your second suggestion, it is my belief—in which I have no doubt Gen. Ansell fully shares—that there is no necessity whatever for an appellate review with authority to direct a trial de novo. The real need of revisory action is limited to a class of cases in which the action of the court and the reviewing authority has become final before the error or defect in the proceedings of the court has been discovered, and it is then too late to do full justice to the accused—ordinarily because of the finality of his separation from

the service. It is obvious that any remedy afforded by a pardon, mitigation, restoration to service, or authorization for reenlistment is not sufficient to reach a case where the accused has been illegally tried or erroneously convicted; and it is further obvious that the real problem before the department is to apply corrective action before it is too late.

There are three classes of cases in which this revisory action is necessary, namely: Cases involving a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man. The number of cases in which such action will be found necessary will be a very small percentage of the aggregate tried, probably less than 5 per cent. The question to be disposed of resolves itself, therefore, into one of preventing sentences of death, dismissal of an officer, or dishonorable discharge of an enlisted man, from being executed before final review of the record of trial in this office. The scope of the difficulty is very much reduced by the fact that, in the great majority of cases where dishonorable discharge is a part of the sentence, the execution of the dishonorable discharge is suspended by the reviewing authority until the soldier is released from confinement under the authority contained in the fifty-second article of war. Where this is done the correction of injustice is easy of accomplishment.

I have reached the conclusion that the problem may be easily solved by establishing rules of procedure which may be prescribed under the authority of existing legislation. The President, as Commander in Chief, has a certain power of control, through the establishment of rules of procedure, which may be deduced from the whole body of the Articles of War, but which is specifically stated in article 38, which is as follows:

"The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually."

Rules of procedure comprise pleading, evidence, and practice. They are such rules as control and direct the whole conduct of a judicial proceeding, from its inception up to and including trial and judgment. This is settled by many decisions of the courts. Under this authority to prescribe rules of procedure the action of reviewing authorities can be so controlled that, while we will not detract in any manner from the independence or finality of their action, we will suspend the execution of sentences in certain cases until the records of trial in those cases have been reviewed and the legality of the findings and sentences determined.

I recommend, therefore, that the rule of procedure heretofore authorized by you, and which has been published to the service, be revoked, and the following substituted therefor:

(1) Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

(2) Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field except as provided in rule 5.

(3) When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found

to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission or defect which has been found. If such error, omission or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise, he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

(4) Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

(5) The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules either to the Office of the Judge Advocate General, at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review before the sentence shall be finally executed.

(6) Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's Office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties directly to the Judge Advocate General.

It may be argued that the procedure here proposed will be more cumbersome than that at present in force, and will result in unnecessary delays in the execution of sentences. It is obvious, however, that such a contention is without real merit. But few officers or soldiers are sentenced to death; but few officers, considered in the aggregate, are sentenced to dismissal; and, in a majority of cases at the present time where a soldier is sentenced to dishonorable discharge the execution thereof is suspended by the reviewing authority under the fifty-second article of war. There may be cases where the execution of a sentence of death should be prompt, but there will be no case outside of the actual field of military operations where a prompt execution of a sentence is so imperative that time can not be taken for a careful review of the case in the Office of the Judge Advocate General; and in the case of a death sentence in the zone of actual military operations a branch of the Judge Advocate General's Office could review the case with such expedition that execution of the sentence need not be deferred more than a week at most. In cases where the death penalty is to be imposed the certainty that the proposed action is both just and legal, which will be assured by the existence of these rules, will more than compensate for the brief delay involved. In cases sent to this office for review, it is not anticipated that the delay in execution of a sentence involving dishonorable discharge need exceed 60 days from points outside the continental limits of the United States, and need not exceed 30 days from any point within such limits. Ordinarily it will be much less; and the establishment of a branch of this office in France would result in the expeditious review of all cases originating there. Cases are now reviewed promptly in this office, and it is expected that the office force will be increased as necessary so as not to permit this very important work to lag behind during the continuance of the war. The delay which would result in cases of enlisted men sentenced to dishonorable discharge is not important, because a sentence of dishonorable discharge is usually accompanied by a sentence of forfeiture of pay and allowances due or to become

due. The Government will thus be protected from loss, while the man will be protected from injustice by the rule which provides that the time so lost in obtaining a final review of the case shall be credited upon his term of confinement.

What is believed to be a particular merit of the plan here proposed is to be found in the fact that when a record is discovered to be insufficient, or to be tinged with such error or illegality that the finding and sentence of the court can not in justice be allowed to stand, these rules make it possible for corrective action to be taken by the reviewing authority when the errors are called to his attention. It can not be doubted that this officer is the one contemplated by the Articles of War as the proper officer to take the corrective action which the record of trial may disclose as necessary. A precedent for the procedure involved in obtaining a review of the case by the Judge Advocate General before the reviewing authority finally disposes of the case, is found in the rule which has been in operation for some time to the effect that reviewing authorities shall not send men to a penitentiary for confinement until this office has reviewed the records of trial and determined that penitentiary confinement is legal. Moreover, I have no doubt that the establishment of these rules will result in greater care being exercised in the disposition of cases by reviewing authorities and their judge advocates, and thus the existence of this revisory system will tend to prevent the occurrence of the errors it is designed to correct.

Finally, I may state that the revisory action which the Judge Advocate General would take under these rules of procedure would give full force and effect to the donation of power contained in section 1199 of the Revised Statutes, without detracting from the authority conferred by any of the Articles of War upon any other officer; and would assure, the need of which was suggested by you at the conclusion of your memorandum, the establishment of "such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protection which can be devised against either error of law, or passion, or mistake of judgment at the hands of those who try him for offenses involving either his property, his honor, or his life."

JUDGE ADVOCATE GENERAL.

From the Secretary of War.
Memorandum.
For: Gen. Crowder.

The entire plan has my approval.

Please have letters written transmitting proposed legislation to appropriate committees. Put orders in course of promulgation.

BAKER.

Assistant and Chief Clerk,
January 15, 1918, War Department.

EXHIBIT 42.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 12, 1918.

Memorandum for Gen. Crowder:

1. You want my views upon Maj. Davis's proposed rule of procedure.

(*a*) It is, if legally correct, a step—though a weak and uncertain step—in the right direction, in that it gives large partial recognition to the existence of a power somewhere which will prove helpful and salutary.

(*b*) It is faulty as a definition of revisory power in that it regards that power as having application only to that very limited number of cases in which sentences should be stayed.

(*c*) Above all, however, it is, I regret to say, fundamentally wrong as a matter of law. The theory is for the reviewing authority to approve the judgment but suspend its execution until he can be advised of the correctness of the judgment itself, and if advised of its incorrectness then to revise it himself. Having once approved the judgment, it passes beyond his power to amend, and such power of amendment, if it exists, must be found elsewhere. On the other hand, if the stay of execution affects the judgment itself and makes it conditional, or holds it in gremio legis, as it were, awaiting further action by

the reviewing authority, then it is not final and can not be revised here at all. If the reviewing authority does not take final action, there is nothing for this department to revise. If he does take final action, then the judgment passes beyond his power to revise. Take those sentences revised in this office in due course and without stay, which will constitute the great majority of cases: In such cases the action of the reviewing authority is unquestionably final, and if there is to be revision of the judgment at all it concededly must be done by some authority other than the reviewing authority. In such cases surely the department would have to exercise the power. Viewed from whatever angle, it is perfectly apparent that the source of the authority is in this department and must be exercised by this department, if exercised at all. No system can be devised whereby the convening authority revises his own judgment at the mere suggestion of this department.

(*d*) The rule, even if it were unquestioned as a matter of law, is contrary to all administrative principle. The corrections to be made are corrections of errors of law discovered upon review here. What reason can there be to require this office to review for errors of law, and then be denied the power of correction? In any system of law jurisdictions must be defined. Powers must be located, and they must be powers, not requests. If left undefined, or resting upon mere comity, the system is not likely to stand. The test would come sooner or later, after perhaps a multitude of disagreements. It adds to the administrative burden and the time required to finalize a judgment.

2. I wish I could give concurrence to something which, though less than the full power, would be satisfactory to you and the Secretary of War, and would serve, at the same time, as a partial remedy. I can not. I may be permitted to say, however, that the limitations which the rule seeks to place upon the exercise of revisory power doubtless have their origin in a fear of the consequence of a full exercise of that power. Not sharing that fear, I can not sympathize with the limitation. Even if I could agree, as I can not, that such a limitation has a basis in law, the power, if it exists at all, should be exercised in full. Otherwise it should be entirely denied. Safety lies in taking one course or the other, and not in a compromise.

3. I have given this question of revisory power the best that is in me. I see no reason whatever to hesitate at the adoption of that definition of revisory jurisdiction which is found in my recent memorandum and which was adopted after most thorough consideration upon the part of many of the assistants of this office as to what the law requires. I do not believe, as much as I should like to believe, that what Maj. Davis proposed is sound in law or will prove safe in practice. I regret, therefore, that I can not advise you to adopt it.

S. A. ANSELL.

EXHIBIT 43.

JANUARY 14, 1918.

Memorandum for the Secretary of War:

The attached papers will claim your special consideration. They are responsive to your direction of December 28 in respect of the power of revision of court-martial proceedings by the appellate procedure suggested for your consideration by Gen. Ansell.

I think the new rule of procedure issued under new article 38 will enable us to act remedially on the class of cases as to which you share with this office the view that revisory action is necessary. It could be made immediately available by your approval of these regulations; but in order that there may be no delay in the theater of war it will be necessary for you to issue the general order which you will find attached to this memorandum and which follows a Civil War precedent in establishing a branch office of the Judge Advocate General at Gen. Pershing's headquarters.

Please consider in connection with this matter a proposed amendment of section 1199, Revised Statutes, vesting in the President of the United States the revisory power which Gen. Ansell was inclined to find already vested in the Judge Advocate General by said section of the Revised Statutes. If you approve of this draft I would request to have it brought to the attention of the chairman of the two military committees, with a request for its enactment.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 44.

JANUARY 16, 1918.

From: The Office of the Judge Advocate General.
To: The Adjutant General of the Army.
Subject: General order establishing rules of procedure for courts-martial and a branch of the office of Judge Advocate General in France.

1. I transmit herewith a draft of a general order relating to the above subject, which should be published as promptly as possible, and approximately in the form indicated. The substance of this order has received the personal consideration and approval of the Secretary of War, who has directed that the same be put in course of promulgation as promptly as possible. To the end that the contents of this order may be communicated to all officers competent to convene general courts-martial before the date set for the order to take effect, I suggest that action be expedited, and that the order be transmitted by telegram or cable where this may be necessary. The order itself indicates that it is to become effective on February 1, 1918.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 45.

General Orders, No. 7.

WAR DEPARTMENT.
Washington, January , 1918.

I. General Orders, No. 169, War Department, Washington, December 29, 1917, are hereby revoked, and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

(1) Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the fifty-first article of war.

(2) Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

(3) When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise, he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

(4) Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or

imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

(5) The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

(6) Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office when so established shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the Amerian Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentences invalid or void, in whole or in part, to the end that any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

EXHIBIT 46.

JANUARY 17, 1917.

Memorandum for The Adjutant General.

Subject: Detail of an officer of this department to act as the representative of this office in the revision of cases by general courts-martial originating in our Expeditionary Forces in Europe.

1. I am handing you herewith a request for the prompt publication of a general order which has received the personal approval of the Secretary of War, who has directed that it be put in course of promulgation as promptly as possible. This order is to become effective February 1, 1918, and, of course, it will be necessary to transmit it by cable to certain of our more distant court-martial jurisdictions. It will be necessary, I assume, to so transmit it to Gen. Pershing in France, and I should like a special order issued and transmitted by cable to Gen. Pershing at the time of the transmission of the general order referred to, which special order should be phrased substantially as follows:

Until further orders Brig. Gen. Walter A. Bethel, judge advocate, will assume charge of the branch of the office of the Judge Advocate General established in France by War Department General Orders, No. —, current series, and will perform the duties of Acting Judge Advocate General indicated in the said order.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 47.

GENERAL ORDER.

There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces, in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions, originating in the said Expeditionary Forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

EXHIBIT 48.

JANUARY 19, 1918.

HON. GEORGE E. CHAMBERLAIN,
Chairman Senate Committee on Military Affairs,
Washington, D. C.

MY DEAR SENATOR: I am inclosing herewith a draft of a proposal amendment of section 1199, Revised Statutes, which has my complete approval. I hope that it will likewise meet with the approval of your committee and that an opportunity may be found of securing its early enactment into law.

The general purpose of the proposed legislation is to vest in the President revisory powers in respect to sentences of courts-martial and other military tribunals. It has been the subject of thoughtful consideration by the Judge Advocate General, and in the light of the new conditions which now confront us, it is believed to be both wise and necessary.

The proposed amendment involves three propositions, viz, (*a*) vesting in the President the power to disapprove, modify, vacate, or set aside either in whole or in part, any finding or sentence, and to direct the execution of such part of any sentence as has not been vacated or set aside; (*b*) the power to suspend execution of sentences in such classes of cases as he may designate until there has been opportunity to consider and act thereon; and (*c*) the power to return any trial record to the court through the reviewing authority for reconsideration or correction.

The first proposition finds its analogy in the civil courts, in the appellate power lodged in a supreme court. The second is a related power to suspend execution of a judgment pending appellate review, in order, when deemed advisable, to preserve the status quo. The third is to enlarge the power now exercised by the President so as to embrace cases coming to him for consideration under the provisions of the proposed amendment. At the present time the President exercises the power of returning to the court, through the reviewing authority, the record of any trial which has been forwarded to him for confirmation.

I believe that it would be wise public policy to lodge these powers in the President. He is the Commander in Chief of the Army, the supreme military authority, and bears to the Military Establishment, and to the administration of military justice, a relation analogous to that occupied by the supreme court in the structure of a civil judiciary. Upon him devolves the duty of securing efficiency and maintaining discipline in the military forces, and at the same

time so to adjust the operation of the machinery of the military courts that, so far as possible, instances of injustice to the individual soldier will be reduced to a minimum.

The present Articles of War authorize any officer, competent to convene a general court-martial, to approve and carry into execution any sentence affecting an enlisted man, including noncommissioned officers, excepting the death sentence; and in addition, the commanding general of a Territorial department, or Territorial division, or of any army in the field, in time of war, as the present, may approve and carry into execution a sentence of death in certain enumerated cases, or the dismissal of an officer below the grade of brigadier general (articles 46–48). In these cases no confirmation seems to be authorized or contemplated by the President, although the officer approving the sentence may, if he sees fit, suspend execution until the pleasure of the President is known (fifty-first article of war). In these respects the present Articles of War do not differ essentially from the prior compilations of 1806 and 1874, although in 1862, during the Civil War, it was provided by independent legislation that a sentence of death, or of imprisonment in a penitentiary, should not be carried into execution until approved by the President (sec. 5, act of July 17, 1862, 12 Stat., 598). The legislation which is now found in section 1199, Revised Statutes, originated in 1862 and thereafter went through sundry changes without affecting its essential characteristics (sec. 5, act of July 17, 1862, 12 Stat., 598; sec. 5, act of June 20, 1864, 13 Stat., 145). Throughout the whole period that this legislation has been in effect, it has been the practice for the Judge Advocate General of the Army to examine the records of trial by general courts-martial and other military courts primarily with the view of determining whether the proceedings were regular and valid, and to make report thereon through the Secretary of War to the President. During that whole time, it has been the settled construction and practice of the War Department, and its law officers, to regard as final, and beyond appellate or corrective action, the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice or for other cause void ab initio. Thus it has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority, was final and could not be revoked or set aside by the President or by any department of the Government, unless the court was without jurisdiction, or the proceedings were invalid, and that relief could be had only through the exercise of the executive power to pardon.

We are now assembling a large Army. Our young men are being drawn from the homes of the Nation and placed in military service, both in the ranks and as officers. A very large percentage of the officers of the new Army are of necessity drawn from civil life, and it is no reflection upon them to say that they have had little, if any, opportunity to acquaint themselves with the history, usages, or principles of military law, or the practice of military tribunals. In our new Army, more than ever before, it is not at all unlikely that sentences may be imposed by courts-martial and approved by the reviewing authorities which, if carried into execution, will work great injustice to the individual soldier. In practice and under existing legislation the trial records now come to the office of the Judge Advocate General for review. In that office cases may be examined with deliberation far removed from the immediate atmosphere of apparent military exigency. It is the purpose of the proposed legislation, when it appears, after such examination, that the substantial rights of the accused were disregarded upon the trial, or the evidence is insufficient, or an unnecessarily severe sentence has been imposed, or for other cause the sentence should be modified or set aside, to vest in the President clear statutory authority to disapprove, modify, vacate, or set aside any finding or sentence, in whole or in part. In order that he may have an opportunity to exercise this revisory power, it is proposed to give him authority to suspend execution of such sentences until opportunity has been had for review by the Judge Advocate General and a report thereon to him. With this power conferred and this practice established, a person found to have been erroneously convicted, or upon whom too severe a sentence has been imposed, may, in the one case, have his innocence adjudged, and, in the other, the proper sentence imposed, and not, as now, be remitted for relief to the pardoning power of the Executive, which leaves the question of guilt untouched and operates only by way of Executive clemency.

It will be noted that the proposed legislation authorizes the President to designate the classes of cases in which sentence shall be suspended until the case has been reviewed by the Judge Advocate General, and report made to the President. In a great majority of cases tried by court-martial there will be no necessity for the application of the new legislation; for instance, special and summary courts deal with minor military offenses. These courts have but a limited jurisdiction as to the sentences which may be imposed, and as to such sentences it is believed that there is no good reason why final action may not be taken by the officer appointing the court. The classes of cases intended to be reached are those which involve a sentence of death, dishonorable discharge, or dismissal. By leaving to the President the power of designating the classes of cases in which execution of sentence may be suspended, pending his action thereon, the practice to be followed may be adjusted from time to time to meet changing conditions in the military situation.

Under the ninety-sixth article of war, courts-martial are given jurisdiction to try persons subject to military law for "all crimes or offenses not capital." Under this grant of jurisdiction persons in the military service are now frequently tried for the commission of civil crimes, and it is obvious that the trial of these offenses by military courts, unlearned in the law, adds an element of uncertainty as to the legality of the outcome which serves forcibly to emphasize the need of the revisory powers herein suggested for the protection of persons accused of crime and to safeguard the administration of military justice.

When the existing Articles of War were revised in 1916 there was introduced as new matter the thirty-eighth article of war, which authorizes the President to prescribe rules of procedure in cases before courts-martial and other military courts. Under this grant of power the President has promulgated certain rules of procedure suspending the execution of sentences of dishonorable discharge, death, and dismissal until the records of trial in such cases have been reviewed in the office of the Judge Advocate General, but it is clear, for the reasons heretofore pointed out, that the exercise of this power does not meet all the requirements of the situation. In order to place the whole matter where it will be beyond cavil or dispute, and by a clear grant of statutory power to vest in the President an authority which he should, beyond all question, be authorized to exercise, the legislation requested should be enacted into law, since its whole purpose is to protect the rights of men on trial, and to remove the possibility of being compelled to say in any case that an injustice has been done for which the statutes provide no clear or adequate remedy.

I am sure the Judge Advocate General will be glad to appear in person or by representative before your committee, should any further explanation of the proposed legislation be desired.

Very respectfully,

_____,
Secretary of War.

EXHIBIT 49.

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, *and report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, of set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentence in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall* perform such other duties as have been heretofore performed by the Judge Advocate General of the Army.

(The new matter is in italics.)

EXHIBIT 50.

JANUARY 19, 1918.

HON. S. HUBERT DENT, JR.,
Chairman House Military Affairs Committee,
Washington, D. C.

MY DEAR MR. DENT: I am inclosing herewith a draft of a proposed amendment of section 1199, Revised Statutes, which has my complete approval. I hope that it will likewise meet with the approval of your committee and that an opportunity may be found of securing its early enactment into law.

The general purpose of the proposed legislation is to vest in the President revisory powers in respect to sentences of courts-martial and other military tribunals. It has been the subject of thoughtful consideration by the Judge Advocate General, and in the light of the new conditions which now confront us, it is believed to be both wise and necessary.

The proposed amendment involves three propositions, viz: (*a*) Vesting in the President the power to disapprove, modify, vacate, or set aside, either in whole or in part, any finding or sentence, and to direct the execution of such part of any sentence as has not been vacated or set aside; (*b*) the power to suspend execution of sentences in such classes of cases as he may designate until there has been opportunity to consider and act thereon; and (*c*) the power to return any trial record to the court through the reviewing authority for reconsideration or correction.

The first proposition finds its analogy in the civil court in the appellate power lodged in a supreme court. The second is a related power to suspend execution of a judgment pending appellate review, in order, when deemed advisable, to preserve the status quo. The third is to enlarge the power now exercised by the President so as to embrace cases coming to him for consideration under the provisions of the proposed amendment. At the present time the President exercises the power of returning to the court, through the reviewing authority, the record of any trial which has been forwarded to him for confirmation.

I believe that it would be wise public policy to lodge these powers in the President. He is the Commander in Chief of the Army, the supreme military authority, and bears to the Military Establishment, and to the administration of military justice, a relation analogous to that occupied by the Supreme Court in the structure of a civil judiciary. Upon him devolves the duty of securing efficiency and maintaining discipline in the miltary forces, and at the same time so to adjust the operation of the machinery of the military courts that, so far as possible, instances of injustice to the individual soldier will be reduced to a minimum.

The present Articles of War authorize any officer, competent to convene a general court-martial, to approve and carry into execution any sentence affecting an enlisted man, including noncommissioned officers, excepting the death sentence; and in addition, the commanding general of a Territorial department, or Territorial division, or of any army in the field, in time of war, as the present, may approve and carry into execution a sentence of death in certain enumerated cases, or the dismissal of any officer below the grade of brigadier general (articles 46–48). In these cases no confirmation seems to be authorized or contemplated by the President, although the officer approving the sentence may, if he sees fit, suspend execution until the pleasure of the President is known (fifty-first article of war). In these respects the present Articles of War do not differ essentially from the prior compilations of 1806 and 1874, although in 1862, during the Civil War, it was provided by independent legislation that a sentence of death, or of imprisonment in a penitentiary, should not be carried into execution until approved by the President (sec. 5, act of July 17, 1862, 12 Stat., 598). The legislation which is now found in section 1199, Revised Statutes, originated in 1862, and thereafter went through sundry changes without affecting its essential characteristics (sec. 5, act of July 17, 1862, 12 Stat., 598; sec. 5, act of June 20, 1864, 13 Stat., 145). Throughout the whole period that this legislation has been in effect, it has been the practice for the Judge Advocate General of the Army to examine the records of trial by general courts-martial and other military courts primarily with the view of determining whether the proceedings were regular and valid, and to make report thereon through the Secretary of War to the President. During that whole time it has been the settled construction and practice of the War Department and its law officers to regard as final,

and beyond appellate or corrective action, the judgments of courts-martial when approved by the reviewing authority, except in cases where the proceedings were coram non judice or for other cause void ab initio. Thus it has been held by the Judge Advocate General in many cases that a sentence pronounced by a court-martial and approved by the proper convening authority was final and could not be revoked or set aside by the President or by any department of the Government, unless the court was without jurisdiction or the proceedings were invalid, and that relief could be had only through the exercise of the Executive power to pardon.

We are now assembling a large Army. Our young men are being drawn from the homes of the Nation and placed in military service, both in the ranks and as officers. A very large percentage of the officers of the new Army are of necessity drawn from civil life, and it is no reflection upon them to say that they have had little, if any, opportunity to acquaint themselves with the history, usages, or principles of military law, or the practice of military tribunals. In our new Army, more than ever before, it is not at all unlikely that sentences may be imposed by courts-martial and approved by the reviewing authorities which, if carried into execution, will work great injustice to the individual soldier. In practice and under existing legislation the trial records now come to the office of the Judge Advocate General for review. In that office cases may be examined with deliberation far removed from the immediate atmosphere of apparent military exigency. It is the purpose of the proposed legislation, when it appears, after such examination, that the substantial rights of the accused were disregarded upon the trial, or the evidence is insufficient, or an unnecessarily severe sentence has been imposed, or for other cause the sentence should be modified or set aside, to vest in the President clear statutory authority to disapprove, modify, vacate, or set aside any finding or sentence, in whole or in part. In order that he may have an opportunity to exercise this revisory power, it is proposed to give him authority to suspend execution of such sentences until opportunity has been had for review by the Judge Advocate General and a report thereon to him. With this power conferred and this practice established, a person found to have been erroneously convicted, or upon whom too severe a sentence has been imposed, may, in the one case, have his innocence adjudged, and in the other the proper sentence imposed, and not, as now, be remitted for relief to the pardoning power of the Executive, which leaves the question of guilt untouched and operates only by way of Executive clemency.

It will be noted that the proposed legislation authorizes the President to designate the classes of cases in which sentence shall be suspended until the case has been reviewed by the Judge Advocate General and report made to the President. In a great majority of cases tried by courts-martial there will be no necessity for the application of the new legislation—for instance, special and summary courts deal with minor military offenses. These courts have but a limited jurisdiction as to the sentences which may be imposed, and as to such sentences it is believed that there is no good reason why final action may not be taken by the officer appointing the court. The classes of cases intended to be reached are those which involve a sentence of death, dishonorable discharge, or dismissal. By leaving to the President the power of designating the classes of cases in which execution of sentence may be suspended, pending his action thereon, the practice to be followed may be adjusted from time to time to meet changing conditions in the military situation.

Under the ninety-sixth article of war courts-martial are given jurisdiction to try persons subject to military law for "all crimes or offenses not capital." Under the grant of jurisdiction persons in the military service are now frequently tried for the commission of civil crimes, and it is obvious that the trial of these offenses by military courts, unlearned in the law, adds an element of uncertainty as to the legality of the outcome which serves forcibly to emphasize the need of the revisory powers herein suggested for the protection of persons accused of crime and to safeguard the administration of military justice.

When the existing Articles of War were revised in 1916 there was introduced as new matter the thirty-eighth article of war, which authorizes the President to prescribe rules of procedure in cases before courts-martial and other military courts. Under this grant of power the President has promulgated certain rules of procedure suspending the execution of sentences of dishonorable discharge, death, and dismissal until the records of trial in such cases have been reviewed in the office of the Judge Advocate General; but it is clear, for the

reasons heretofore pointed out, that the exercise of this power does not meet all the requirements of the situation. In order to place the whole matter where it will be beyond cavil or dispute, and by a clear grant of statutory power to vest in the President authority which he should, beyond all question, be authorized to exercise, the legislation requested should be enacted into law, since its whole purpose is to protect the rights of men on trial and to remove the possibility of being compelled to say in any case that an injustice has been done for which the statutes provide no clear or adequate remedy.

I am sure the Judge Advocate General will be glad to appear in person, or by representative, before your committee should any further explanation of the proposed legislation be desired.

Very respectfully,

———— ————,
Secretary of War.

EXHIBIT 51.

PROPOSED AMENDMENT OF SECTION 1199, REVISED STATUTES.

The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, *and report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction. In addition to the duties herein enumerated to be performed by the Judge Advocate General, he shall* perform such other duties as have been heretofore performed by the Judge Advocate General of the Army.

The new matter is in italics.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MILITARY AFFAIRS,
Washington, D. C., January 22, 1918.

Hon. NEWTON D. BAKER,
Secretary of War, Washington, D. C.

DEAR MR. SECRETARY: I beg to acknowledge the receipt of your letter of the 19th instant inclosing draft of a proposed amendment to section 1199 of the Revised Statutes, which shall be given attention.

Yours, sincerely,

S. H. DENT, Jr.

EXHIBIT 52.

DECEMBER 28, 1917.

Memorandum for Maj. Gen. Enoch H. Crowder.

I have read with interest and close attention the vigorous brief of Gen. Ansell on the question as to whether or not appellate power to revise, modify, and affirm findings and sentences of courts-martial is conferred upon the Judge Advocate General of the Army by section 1199 of the Revised Statutes.

It is impossible not to admire the earnestness and eloquence with which Gen. Ansel presents his view. For the most part, however, the argument runs to the necessity of the power rather than to its existence. It may very well be that this power should exist, either in the Judge Advocate General or in the Secretary of War, advised by the Judge Advocate General; but if I were asking Congress at this time to give that power, I should feel the necessity of so limiting the language of the donation as not to paralyze the disciplinary power of the commander in chief of the American Expeditionary Forces, who, it seems to me, is in a situation where grave consequences might be entailed by inconclusive action on his part.

Generally the administration of justice is a compromise between speed and certainty. The close cases and majority-of-one decisions of our supreme

courts would justify the belief that if there were other courts more supreme in many of these cases different results might finally be obtained; and yet somewhere there has to be an end to litigation, and to that end, therefore, finality is always a question of judgment, resting in legislative discretion. There is nothing intrinsically abhorrent in the idea of finality in judgments of courts-martial approved by the reviewing authority. Whether or not, however, injustices are likely to arise from such a course which would outweigh in gravity the delays necessary to perfect a complete review on appeal is a question about which differences of opinion may well exist.

These considerations have little to do with the immediate question, which is, whether or not the use of the word "revise" is legally a donation of appellate jurisdiction. Gen. Ansell cites the act of July 17, 1862 (12 Stat. 598, p. 20 Ansell brief), as directing the return of records of courts-martial to the office of the Judge Advocate General for purposes of revision. On page 21 of his brief he cites the act of 1864 (13 Stat., 145) generally to the same effect. It would be interesting to know whether summary execution of judgments of courts-martial was at that time also contained in the laws of war. Obviously, if such summary executions were authorized, the subsequent return of the record for revision could not be held to be for appellate review, since it would be a vain thing to review the record after the execution of judgment.

If the word "revise" is to be held to confer appellate jurisdiction, as distinguished from jurisdiction in error, what provision has been made for a retrial or trial de novo, for the summoning of witnesses, and for doing what justice may require in the case. For instance, a report may come to the Judge Advocate General's Office which contains radical errors of law. Has the Judge Advocate General the right to set aside the proceedings and direct a new trial to be had before the same or a different court, or may he summon the parties before him with the necessary witnesses and become himself a court-martial, or is he remitted to a quashing of the whole proceedings and restoration of the defendants to their original status protected from subsequent prosecution by the bar of former jeopardy? In other words, just what procedure is contemplated in the cases which Gen. Ansell has in mind?

I have not the facts in the mutiny cases in my mind, but as I recall it Gen. Ansell ordered the discharge of those convicted of this mutiny, and I assume he felt himself without power to direct the trial of the officer whose misconduct caused the offense. I presume he felt equally without power to examine into such minor derelictions as may have attended the conduct of the men tried for the mutiny, who, even though they may have been guiltless of mutiny, may yet have been derelict in other ways with regard to that incident which a complete administration of justice could be in a position to take notice of.

I would be glad to have your views upon the two questions suggested here: (1) With regard to the coexistence of the power of summary execution with the power of revision in 1862 and 1864, and (2) the sort of appellate procedure involved in the power to revise, according to the view accepted by Gen. Ansell and his associates.

I am not undertaking to decide this question at this time, but I would be glad to have the further orders to which your memorandum of December 17 refers brought to my attention as early as possible, with your own recommendations as to how far we should go in this matter by Executive order, and to what extent legislative redress should be sought.

I am sure that you and I both sympathize with Gen. Ansell's main purpose, which is to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of judgment at the hands of those who try him for offenses involving either his property, his honor, or his life.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 53.

WAR DEPARTMENT,
Washington, December 29, 1917.

General Orders, No. 169.

I.—Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, the execution of

such sentence shall be deferred until the record of trial has been reviewed in the office of the Judge Advocate General and the reviewing authority has been informed by the Judge Advocate General that such review has been made and that there is no legal objection to carrying the sentence into execution. The general court-martial order publishing the result of the trial shall recite that the date for the execution of the sentence will be hereafter fixed and published in general orders; and the fixing of the date of execution and the publication thereof shall follow the receipt of advice from the Judge Advocate General that there is no legal objection to the execution of the sentence. This rule of procedure does not relate to such action as a reviewing authority may desire to take under the fifty-first article of war.

[250.47 A. G. O.]

II—1. Whenever an officer of the Regular Army holding an appointment in any other force of the Army of the United States is considered by his division or higher commander as unfit to hold such temporary commission, the division or higher commander will order the officer concerned before a board of officers, to be appointed in the same manner as is provided in section 9, act of Congress approvd May 18, 1917 (Bulletin 32, W. D., 1917). Final decision in each such case will be made by the War Department.

2. The board in each case will examine into and report upon the capacity, qualification, conduct, and efficiency of the particular officer ordered before it. In case the required number of officers senior to the officer considered unfit be not available within the division, the division commander will notify the next higher commander, who will order the necessary officers to report to the division commander for this duty. In each case the board will be composed of officers of the regular service and will, as far as practicable, be composed of officers of the arm of the service to which the officer considered unfit belongs. In cases where the approved proceedings of the board of officers find the officer examined unfit in the arm of the service in which he is holding a temporary commission, such officer will be held as unfit for temporary promotion in the Regular Army from the date of the termination of such prior temporary commission in the Army of the United States, and any vacancy to which such officer may become entitled will be filled by the promotion of the appropriate officer junior to the officer found unfit.

Just prior to the expiration of a period of six months from the date of termination of the officer's temporary commission his commanding officer will be directed to report to the War Department whether or not he has demonstrated his fitness for temporary advancement to the next higher grade in the Regular Army.

3. Paragraphs 1 and 2 of this order will not apply to officers serving with the American Expeditionary Forces, the commanding general of which will continue, under the authority heretofore granted him, to discharge, by order of the President, inefficient officers of all branches of the service below the grade of brigadier general, except those holding permanent commissions in the Regular Army or those given temporary promotion in the Regular Army.

[210.2, A. G. O.]

III—General Orders, No. 110, War Department, 1917, are rescinded and the following is substituted therefor:

1. In each National Army camp there shall be established one camp exchange, and additional exchanges will be organized by the camp commander for the organizations pertaining to the camp on the basis generally of one exchange to each regiment, or the approximate equivalent thereof, but where local conditions warrant it the camp commander may determine the number and location of the exchanges in his camp, and will assign to the exchanges organized the organizations which are to participate therein.

2. There shall be in each camp a camp exchange council, consisting of the camp exchange officer and one representattive for each exchange, selected by the camp commander from the organizations participating therein. It shall be the duty of the camp exchange council to regulate the general policy and management of the exchanges in the camp.

The camp exchange council shall select from among its members an executive committee of five members, who shall carry out the policy of the camp exchange council, supervise and direct the management of the exchanges by the camp exchange officer, and assure itself by frequent inspections of the efficient and satisfactory conduct of all the exchanges within the camp.

3. In each National Army camp there shall be a camp exchange officer, who shall be attached to the staff of the division commander, and whose duties shall be as follows:

(*a*) To establish and operate the camp exchange.

(*b*) To establish and supervise all of the exchanges pertaining to the camp.

(*c*) To establish and supervise the maintenance in each exchange of a uniform system of accounting which shall conform to the regulations pertaining to that exchange.

(*d*) To have charge of the purchase of all stock and equipment for all of the exchanges pertaining to the camp, such purchases, other than those required for the initial establishment of the exchanges, to be based on requisitions from each exchange and to be delivered to the exchanges at cost.

(*e*) Under the specific direction of the executive committee of the camp exchange council, to regulate the prices in all exchanges pertaining to the camp, with a view to establishing and maintaining a uniform price for the same article in all the exchanges.

4. There shall be appointed by the camp commander for each exchange in the camp an exchange officer, selected from an organization participating therein, who shall manage, under the supervision of the camp exchange officer, the exchange to which he pertains.

5. The purchase of initial stock and fixtures will be made on such credit terms and in such quantities as will permit a settlement in full within 60 days, after which each exchange will be conducted on a strictly cash basis.

6. The expenses of the office of the camp exchange officer shall be paid entirely from the receipts of the camp exchange.

7. The net profits of the camp exchange shall be distributed as dividends as follows: To the division headquarters fund, 10 per cent; to each brigade headquarters fund, 2½ per cent; and the remainder of any dividend declared to be distributed pro rata to organizations in the camp on the basis of their authorized strengths.

8. The camp commander shall detail one lieutenant as assistant to the camp exchange officer and such other officers and enlisted men as, in his opinion, are required for duty in the camp exchange.

9. An organization shall share in the profits of no exchange other than the camp exchange and the one in which it is participating. In each exchange dividends will be declared only upon the recommendation of the camp exchange council, approved by the camp commander. The net profits of any one of these exchanges, except the camp exchange, shall be distributed among the different organizations participating therein in proportion to their authorized strengths.

10. An organization ordered away from a camp where it has an interest in an exchange shall be paid for said interest, the value thereof being determined by a board of disinterested parties, one of whom shall be the camp exchange officer. When any body of troops is ordered relieved from duty at a camp, the procedure will depend upon whether or not such body of troops is to be replaced by other troops. If it is, the exchanges will be sold to the relieving troops at prices determined by a board of disinterested officers, one of whom shall be the camp exchange officer, who shall remain in the camp as a member of the staff of the camp commander. If it is intended not to replace the troops ordered away, and the camp is to be abandoned, then it shall be the duty of the camp exchange officer to have the business of the exchanges closed up, to sell the stock and fixtures, and to distribute the proceeds of such sales among the interested organizations.

11. The exchanges authorized in the foregoing shall be conducted in accordance with the Post Exchange Regulations, 1917 (Special Regulations No. 59), except in so far as those regulations conflict with the provisions of this order.

12. Each month the camp commander shall detail for each exchange an officer to audit, on the last day of the month, the accounts of that exchange. In each case the officer detailed shall be selected from an organization participating in the exchange, the accounts of which he is to audit.

[331.9 A. G. O.]

By order of the Secretary of War:

TASKER H. BLISS,
General, Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

EXHIBIT 54.

General Orders, No. 7.

WAR DEPARTMENT,
Washington, January 17, 1918.

I. Section I, General Orders, No. 160, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a Territorial department or a Territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the 51st Article of War.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the fifty-second article of war, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rule, either to the office of the Judge Advocte General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's Office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, de-

partment, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

[250.1, A. G. O.]

II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

[250.4, A. G. O.]

By order of the Secretary of War:

JOHN BIDDLE.
Major General, Acting Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

EXHIBIT 55.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 8, 1917.

Memorandum for Gen. Crowder:

1. I am at times considerably embarrassed, and besides the transaction of public business is, I think, somewhat impeded and confused, by the the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of the Provost Marshal General; the public conception being that you are, as you legally are, the head of both offices, as in fact you are not. On innumerable occasions I am sought for conference on matters that pertain to your office, and am not sought in matters which do pertain to this office. I suspect that you have a similar experience.

2. I think this ought to be done: I ought to be designated in orders by the Secretary of War as Acting Judge Advocate General during your practical detachment from this office. This is advisable, first, because it would lead to a better defined administration, as I have just indicated, and secondly, it would be in consonance with the actual situation. In theory of regulations I am here simply because I am the senior officer on duty and not by virtue of any designation. That situation is the one contemplated when the absence of the head of the office is both brief and definite. It contemplates that the head of the office is charged with the full responsibility for its policies and for its general administration. That is not the situation now, nor do I believe it can ever be the situation as long as you perform the duties of Provost Marshal General.

3. Furthermore, I believe that the conception which the service has of your relation to both offices has succeeded in minimizing the importance of each office, and that this has resulted already in considerable disadvantage to yourself, and has resulted in no advantage to me.

4. I submit this letter to you wholly disinterestedly, personally, but with the absolute conviction that the order ought to issue. If the suggestion should be agreeable to you I should ask you to join in the memorandum to the Secretary

of War asking its accomplishment. I defer to you in this matter absolutely, as I properly should, but at the same time frankly saying to you that I am entirely assured of the correctness of my views.

ANSELL.

EXHIBIT 56.

NOVEMBER 4, 1917.

My DEAR GEN. ANSELL: It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War, the subject matter of your letter of yesterday. For your information I would say that, since taking charge of this office, I do not recall that I have been consulted by outsiders in a single instance respecting any matter pertaining to the Judge Advocate General's Department, except in respect of appointment to the Reserve Corps, except as you yourself have consulted me.

Very truly, yours,

E. H. CROWDER,
Provost Marshal General.

EXHIBIT 57.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, Nov. 6, 1917.

Memorandum for the Chief of Staff. (For immediate consideration.)

1. Doubtless the Judge Advocate General of the Army is absent from this office in the sense of 1132 Revised Statutes, and has been so absent since I have been in charge.

2. In order that my past official action as acting head of this office may be ratified and future action legalized, I ask that the following order be published immediately:

General Orders, No —.

WAR DEPARTMENT,
Washington, Nov. —, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, Brig. Gen. Samuel T. Ansell, judge advocate, National Army, is hereby designated as Acting Judge Advocate General of the Army and empowered, as of the date of August 11, 1917, to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of war:

———
Acting Chief of Staff.

3. I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention.

(Signed) S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 58.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
November 6, 1917.

Memorandum for the Chief of Staff:

The draft of a general order substituted for that recommended in memorandum from the Acting Judge Advocate General, as indicated in memorandum for The Adjutant General herewith, is recommended.

The Acting Judge Advocate General and The Adjutant General have been consulted and concur.

R. I. REES,
Lieutenant Colonel, General Staff.

TO THE ADJUTANT GENERAL.

EXHIBIT 59.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 6, 1917.

Memorandum for The Adjutant General:

The Secretary of War directs that the following be published in General Orders:

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of War.

JOHN BIDDLE,
Major General, Acting Chief of Staff.

EXHIBIT 60.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, November 6, 1917.

Memorandum:

The following is suggested as a substitute for the general order requested in memorandum from the Acting Judge Advocate General:

General Orders No.—

WAR DEPARTMENT,
Washington, November —, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

By order of the Secretary of War.

———— ————,
Major General, Acting Chief of Staff.

EXHIBIT 61.

General Order No. —.

WAR DEPARTMENT,
Washington, November, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties.

J. F. J., *A. G.*

EXHIBIT 62.

General Orders, No. —.

WAR DEPARTMENT,
Washington, November, 1917.

By direction of the President, and in accordance with section 1132, Revised Statutes, the verbal orders of the Secretary of War of the date of August 11, 1917, designating Brig. Gen. Samuel T. Ansell, Judge Advocate, National Army, as Acting Judge Advocate General of the Army, are hereby confirmed and made of record, and he will continue to take charge of the office and perform the duties of the Judge Advocate General of the Army until further orders and during the absence of the chief of that bureau upon other duties. (201, A. G. O.)

By order of the Secretary of War:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

Official:
H. P. MCCAIN,
The Adjutant General.

EXHIBIT 63.

Col. LOTT: Herewith are the papers on which the order designating Brig. Gen. Ansell as Acting Judge Advocate General of the Army was based.

The order in question has been canceled.

November 19, 1917.

E. J. B.

Order is not to be issued, Gen. McCain personally so directed.

November, 19.

A. G. L.

EXHIBIT 64.

NOVEMBER 17, 1917.

MY DEAR GEN. CROWDER: As the time approaches for the reassembling of Congress and the consideration of many actively controverted questions of legal policy affecting the military establishment, I write you this personal note to inquire something of the present character of your burdens as Provost Marshal General.

You will recall that in our discussions on your assumption of that work I had a certain hesitancy which was due to the fact that you would necessarily be withdrawn for a substantial part of your time from the active guidance of the Judge Advocate General's office, where I have learned so confidently to rely upon you; and I then expressed the hope that after the great machine necessary for the mobilization of the selective army had been organized, it would be possible for you gradually to give it less time—to leave it under your supervision still, but demanding less of your actual presence, so that you could with justice to both offices, resume your activity in the Judge Advocate General's Department.

I am writing this note not in any way to question the wisdom of the apportionment of your time which you have so far made. The fine perfections of the results of the administration of the selective-service law could have been attained in no other way than by the sleepless vigilance with which you have applied yourself to it; but I shall be happy, when that work is so far advanced as to be more nearly automatic and to leave you free to return to your task here, and so I am making this inquiry as to your own estimate of the situation.

Cordially, yours,

NEWTON BAKER, *Secretary of War.*

Gen. E. H. CROWDER,
Provost Marshal General.

EXHIBIT 65.

NOVEMBER 18, 1917.

MY DEAR MR. SECRETARY: I am deeply appreciative of the statements in your personal letter of this date respecting my resumption at an early date of my supervision of the Judge Advocate General's Office and Department.

In response to your request that I fix a date when I could with justice to both offices—the Provost Marshal General's and the Judge Advocate General's—resume my activity of the Judge Advocate General's Department, I have to advise you as follows:

The revised regulations providing for a national classification and governing the second and subsequent draft have been printed and distributed to boards. The organization of the medical and legal advisory boards in the several States is well under way and will be completed at an early date. I may say for your information that State headquarters, district boards, and local boards have been so enthusiastic in their approval of the new scheme and have evinced such a complete understanding of it, that I do not anticipate great administrative difficulty in connection with the future administration of this department.

I feel myself free to advise you that I can resume my active supervision of the work of the Judge Advocate General's Department at once to the extent of giving at least half of my time to that office and continue at the same time an efficient adequate supervision of this office. This is my estimate of the situation.

I thank you for the terms in which you have expressed yourself in your letter of this date.

E. H. CROWDER.
Provost Marshal General.

EXHIBIT 66.

OCTOBER 18, 1917.

Memorandum for the Chief of Staff.

(For the personal consideration of Gen. Bliss.)

Subject: Proper punishment during war.

1. I am concerned about the character of punishments that should be awarded to members of the Army in time of war. A great many cases are passing over my desk carrying dishonorable discharge and long terms of confinement. For the year ending July 1, 1917, 4,121 men were dishonorably discharged from the Army, about 75 a week. Now, such discharges are running more than 100 a week. This means, of course, that such men are withdrawn from the service. This is the very thing that ought not to be, because in time of war every man should be made to serve as long as and to the extent that he is capable of serving, and because it furnishes a convenient method of getting out of the Army. As long as a man has within him the elements of service he should be made to serve, and not be permitted to choose or have mere penal servitude instead. It should be remembered that the status of a soldier is a peculiar one, in that it carries with it the power upon the part of the proper authorities to compel the performance of all the obligations of the status. That is, if a man refuses to serve, refuses to obey orders, for instance, to do his duty, the military authorities are not limited simply to court-martialing him and sentencing him to penal servitude. He may be made, by physical force if need be, to perform the duty. For some time, at least, there will be no disposition on the part of the military authorities, except in rare cases, to resort to physical compulsion instead of the usual judicial method, and yet a method of maintaining discipline which results in depriving the service of its man power in time of war is fundamentally defective.

2. There are many men in the disciplinary barracks at Leavenworth, and I am advised that the department contemplates, or did contemplate, at least, the establishment of a disciplinary battalion for each division. In any event, as a result of court-martial punishment, a great number of men will, under the existing system, be withdrawn from actual service. In my judgment, this ought not to be, and the department should now take some means of preventing, or at least controlling, discharges from the service as a result of court-martial punishment.

My own view is that these disciplinary or penal battalions ought to be organized under the control of the division commander, and to these penal bat-

talions military offenders should, except, perhaps, in rare instances, be sentenced to serve, and while therein they should be made to serve not only as soldiers but under such conditions as would involve punishment. By this means the Government would save for itself the service of the soldier and furnish him an opportunity for self-redemption. Doubtless there are rare instances where men must be taken out of the Army entirely and subjected to long-term imprisonment, but I think they must be rare. As I see it, the department has the responsibility of deciding how it can utilize the services of these soldiers and at the same time keep them within a penal condition.

3. Under the existing law the matter of dishonorable discharge is within the hands of the court and the reviewing authority. The reviewing authority may suspend the sentence of dishonorable discharge until the solider is released from confinement. If it were laid down as the policy of the War Department that the department intended to avail itself of the service of men sentenced to dishonorable discharge, except perhaps in rare instances, that policy could be so imposed upon the several reviewing authorities as to have them suspend all such sentences until the pleasure of the department should be known.

4. I think the policy of the department should be determined now. At the present time men are being dishonorably discharged for offenses which are really trivial. I think you should take immediate action. For the time being further dishonorable discharges could be stayed by a communication to the service generally to the effect that it is the desire of the Secretary of War that the authorities contemplated in the fifty-second article of war to suspend the execution of all sentences of dishonorable discharge until the further pleasure of the Secretary be made known. In the meantime, this office, if advised of your views upon the policy, could formulate the plans accordingly.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 67.

NOVEMBER 14, 1917.

Memorandum for the Chief of Staff.

Subject: Proper punishment during war.

1. In a memorandum from this office addressed to the Chief of Staff under date of October 18, 1917, on the above subject, attention was invited to the fact that men were being dishonorably discharged from the service at the rate of more than 100 a week. It was there indicated, as the views of this office, that in time of war the punishment of dishonorably discharge should be very sparingly resorted to, and the suggestion was made that any method of maintaining discipline which results in depriving the service of its man power in time of war is fundamentally defective. It was further suggested that a disciplinary battalion should be established under the control of each division commander to which military offenders should, except in rare instances, be sentenced to serve and while therein be made to serve not only as soldiers, but under such conditions as would involve punishment. The idea underlying the suggestion was that any sentence of dishonorable discharge, except in the few cases where the offenders are totally unfit for military service or their retention therein would be harmful, would be suspended or remitted by the reviewing authority for the purpose of holding the men in these discliplinary units and for military service, rather than sending them to the disciplinary barracks or to a branch thereof where they are removed entirely from military service.

2. Unfortunately, the idea sought to be conveyed by this memorandum has been confused with the plan heretofore suggested, by Maj. King, of the Medical Corps, of establishing disciplinary battalions at the various cantonments which would be, in effect, branches of the United States disciplinary barracks, the necessary construction for which has been variously estimated at from $300,000 to $1,000,000. In order to obtain the views of the commanding generals of departments and tactical divisions with reference to the advisability of establishing such disciplinary battalions in the various divisions, The Adjutant General called upon each of them for an opinion. The majority of them expressed themselves as being opposed to the establishment of disciplinary battalions at the present time. The memorandum of this office above referred to, together with all other papers bearing upon this subject, was referred to the War College for study, and a conclusion was reached which has served as a basis for a

memorandum from the Acting Chief of Staff to The Adjutant General, in which it is stated that:

"The Secretary of War directs that the papers herewith regarding the above matter (disciplinary battalions for divisional cantonments and camps) be filed without further action."

The said memorandum then recites that the Secretary of War has directed that "confidential instructions be given for the information and guidance of all department, division, and organization commanders, general courts-martial, and judge advocates," calling attention, first, to the fact that a considerable number of general courts-martial are adhering to peace-time standards of punishment and imposing sentence of dishonorable discharge with comparatively short periods of confinement for offenses committed in time of war. Second, that to continue to impose such sentences is objectionable because of the resulting tendency to encourage some men, especially among those drafted into the military service, to commit offenses in order to escape such service. Third, that organization commanders, general courts-martial, judge advocates, and reviewing authorities should give close scrutiny to all cases coming before them with a view of determining whether or not the offense was committed with the object of avoiding war service, the suggestion being made that where this fact appears, the leaning of the courts and reviewing authorities should be toward giving sentences of such severity that any tendency toward this practice will be obviated.

3. This memorandum of confidential instruction does not meet the requirements of the case. Wholly regardless of the advisability of authorizing at this time such construction as may be necessary to take care of prisoners held at division camps, and wholly regardless of whether disciplinary battalions, as that term is generally understood, should be organized at this time, the necessity of discontinuing the practice of dishonorably discharging men for light offenses is clearly manifest and calls for quick action. In a great majority of the cases now arising a dishonorable discharge is not only unnecessary but futile and inappropriate. Men sentenced to be dishonorably discharged, who have within them the elements of service, should still be made to serve, and to accomplish this end the dishonorable discharge should be remitted or suspended in their cases and they should be held for training and service with their divisions. Such sentences as it is necessary to impose upon them can ordinarily be worked out in the commands, and the cases will be few in which it is necessary to remove them from their commands and confine them in a penitentiary or the disciplinary barracks. In this view of the case it matters but little whether disciplinary battalions are organized in the various divisions at this time or not; it matters still less whether or not a uniform plan is adopted in the various divisions to take care of the military offenders therein; but it is urgently necessary that division commanders should be immediately informed—

(*a*) That the department looks to them for the maintenance of discipline in their organizations;

(*b*) That it looks to them to discourage the awarding of dishonorable discharge as a punishment, except where the same is accompanied by long periods of confinement, and then only in cases where it is entirely obvious that the man so sentenced has not within him the elements of service, or that his retention in the military service is wholly inadvisable because of criminal or degenerate tendencies;

(*c*) That it advises the suspension of any sentence of dishonorable discharge awarded by courts-martial appointed by them, except under the circumstances indicated in (*b*) above; and

(*d*) That it looks to them to exercise any and all proper means within their power to bring about a condition in their commands under which those who can be properly punished only by confinement in the penitentiary or in the disciplinary barracks be given sentences commensurate with the gravity of the offenses committed by them.

In line with the views herein expressed, it is recommended that the confidential instructions to be given to department, division, and organization commanders and to general courts-martial and judge advocates, as indicated in the memorandum for The Adjutant General from the Acting Chief of Staff, a copy of which is attached thereto, be amended to read as follows:

"The attention of the War Department is forcibly called to the fact that courts-martial throughout the service are adhering, in time of war, to peace-time standards of punishment and are imposing sentences of dishonorable dis-

charge, together with comparatively short periods of confinement, for comparatively trivial offenses. The Judge Advocate General reports that men are now being dishonorably discharged from the service at the rate of more than 100 a week, and an inspection of the record in these cases indicates that a large percentage of these men can without doubt be sufficiently disciplined and punished within their organizations while they are being trained for military service. In these cases dishonorable discharge is not only futile and inappropriate but imposes a loss of man power which should be obviated. It has also come to the attention of the War Department that in some cases, especially among those drafted into the military service, there appears to be a tendency to commit offenses in order to receive a punishment which enables the offender to escape military service, but which in itself is not of sufficient severity to discourage or prevent a commission of the offense.

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain.

"(*a*) No sentence of dishonorable discharge will be given where the offender has wihin him the capacity for military service and where any other appropriate form of punishment is sufficient to meet the requirements of the case;

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied by a long term of confinement in the penitentiary or in the Disciplinary Barracks. Where the offense is not sufficiently grave to warrant a long term of confinement it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied by a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 68.

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, December 22, 1917.

Confidential.

From: The Adjutant General of the Army.
To: Commandant Atlantic Branch United States Disciplinary Barracks, Fort Jay, N. Y.
Subject: Sentences of general courts-martial.

1. The attention of the War Department is forcibly called to the fact that courts-martial throughout the service are adhering in time of war to peace-time standards of punishment and are imposing sentences of dishonorable discharge, together with comparatively short periods of confinement, for comparatively trivial offenses. The Judge Advocate General reports that men are now being dishonorably discharged from the service at the rate of more than 100 a week, and that an inspection of the records in these cases indicates that a large percentage of these men can without doubt be sufficiently disciplined and punished within their organizations while they are being trained for military service. In these cases dishonorable discharge is not only futile and inappropriate but imposes a loss of man power which should be obviated. It has also come to the attention of the War Department that in some cases, especially among those drafted into the military service, there appears to be a tendency to commit offenses in order to receive punishment which will enable the offender to escape military service, but which in itself is not of sufficient severity to discourage or prevent a commission of such offenses.

2. Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them, with a view of being able to pass intelligently

upon them, and so to measure the punishment to the offense that the following conditions will obtain:

(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs.

3. These instructions will be communicated by you to commanding officers of regiments and separate battalions, to general courts-martial, and to judge advocates.

By order of the Secretary of War:

J. S. JONES,
Adjutant General.

EXHIBIT 69.

[Congressional Record, February 19, 1919.]

FEBRUARY 17, 1919.

Hon. JOHN L. BURNETT,
House of Representatives.

SIR: I regret to have observed in the Congressional Record of February 14 that upon that day, during the debate on the Army bill in the House you took occasion to make a bitter attack upon me, based upon your gratuitous assumption that I had made no effort to prevent or correct the prevalent injustices of courts-martial administration, and it was with even greater regret, if of greater regret I could be sensible, I observed that your attack upon me evoked the applause of your colleagues.

Despite the intemperance of your remarks and notwithstanding that you based them upon the purest assumption which the slightest investigation would have shown, even if my present attitude had not satisfactorily indicated, to be the very opposite of the truth, I shall assume, for the present at least, that you do not intend to do me a grievous wrong; that you do not wish to take advantage of your official position to my great injury; and I shall assume, in fairness to you, that the highly objectionable character of your remarks is due to the fact that you spoke out of an outraged sense of justice, and that you want to be fair, and can be fair, and will be fair even now.

If I am justified in indulging this presumption you will permit me to show you, and you will be glad to be shown and to be able to acknowledge, that your attack upon me was as baseless as it was bitter.

Your initial statement was as follows:

"Gen. Ansell, when he made the statement credited to him in the Washington Post to-day, showed that he himself was a party to the crime. Any man who would sit by as an assistant judge advocate general and see men convicted under the circumstances that Gen. Ansell detailed must either be a coward or an incompetent weakling. [Applause.]

"Now, there is no use talking about it. I think he stated facts about it, and there have been committed the enormities and atrocities by men on courts-martial which have been winked at by Crowder, and perhaps by the Secretary of War himself. These outrages are only equaled by the atrocities that the Huns themselves committed. It is infamous. The statement of Ansell shows the wickedness in the War Department among these petty officers, some of whom no doubt were men from civil life who never made $50 or $100 a month and who tried men and sent them to Leavenworth Penitentiary for years, and yet the men higher up of this department are the ones who are responsible and ought either to be impeached or court-martialed themselves."

And when reminded by another Member that you were doing me an injusice, you continued to say:

"Why did he not appeal to Gen. Crowder; why did he not appeal to the President to vindicate him; why did he go on here until he was called before a committee of the Senate to do it? Now, if he had been a brave man and an honest man he never would have held the place that he held with these atrocities and wickedness being perpetrated by men in high life. You can not get around it, gentlemen. He is a party to the crime; there is no doubt about it. * * * Those things are done, gentlemen. But who has done it? Gen. Ansell is responsible; Crowder and the whole bunch of them; Crowder, no doubt, more than any of them. Do not try to throw it on one man, but hold the whole lot of them responsible. Let the responsibility fall where it ought to fall, gentlemen, and not upon any one man."

I shall speak by the record and tell you, in part at least, of the efforts made by me since the beginning of this war to correct a situation which I believe, and which you with bitterness have proclaimed, to have produced injustice. It is not my purpose to assert that my views were right; it is my sole purpose to show you that I did not "sit back" inactive, without attempting to prevent and remedy a course of administration which is now generally conceded to have resulted in injustice to the enlisted men of the Army.

In the first place, I think I may appropriately say in this connection that throughout my service I have not been able to accept the view that our military code sufficiently establishes the rights of an enlisted man before a court-martial, or that our procedure is sufficiently protective of those rights, or that there is no reason or necessity for authoritative supervision of the procedure of courts-martial, and of revision of their judgments. Such a view I have ever rejected, as all those will attest who have been most closely associated with me in the performance of my legal duties in the Army.

In and out of season, whenever opportunity has offered, and at times with an insistence which has strained, if not transgressed, the military proprieties, I have labored to the end that courts-martial might come to be legally established and universally regarded and respected as courts administering law according to fixed and established principles of jurisprudence; that is, as courts of justice. Such was my attitude as early as 1901. Throughout my instructorship at West Point, from 1902 to 1909, I labored to that end; and the whole course of my conduct as a judge advocate has been marked by a desire to liberalize the harsh features of our military methods and subject them, to the greatest practical extent, to those guaranties that guard an accused on trial in a civil forum. When, by virtue of seniority, I came to the head of this office in September, 1917, while Marshal General, I knew that with this new and large citizen Army we should have need of the closest legal supervision of courts-martial proceedure and judgments, and I envisioned the great difficulties that must result from a continuation of our old-established methods.

At the outbreak of the war the state of the law was, as the department had for years construed it, that the judgment of a court-martial one approved by the officer in the field appointing it was final and unmodifiable; that no matter how gross and prejudicial and palpable the errors of law in the proceedings as shown upon the face of the record, there was no power in the department or elsewhere to modify, reverse, or set the judgment aside. This was the crux of the difficulty. There was no authority whatever with power to correct for prejudicial errors of law. If this were true, then, indeed, as was said by those in the department who have opposed me during this agitation, is "a military camp the fittest field of application of the military code." The camp commander's will and view become the touchstone of legality; there can be no such thing as established legal control over courts-martial and courts-martial proceedings; no means of correcting their judgments, however unlawful and however unjust. When I became the senior present for duty in the office in the early days of the war I saw, or at least I thought I saw, the necessity of breaking up such a static and intolerable legal situation, and proceeded to act accordingly. During this war I have made the following efforts, among other innumerable ones in individual cases, to that end:

(*a*) On October 18, 1917, I had the office begin a study to determine whether the power of revision of courts-martial justments and the incidental power of a close and corrective supervision over their procedure could not be found in existing law.

(*b*) On November 10 I completed and submitted to the Secretary of War for his personal consideration a formal office opinion, which held, with all my associates concurring, that such a power had been conferred upon the Judge

Advocate General of the Army by virtue of 1199, Revised Statutes of the United States.

(*c*) I immediately proceeded to revise courts-martial judgments, and on the very first day, under the opinion, I set aside several sentences on the ground of their illegality.

(*d*) I immediately took steps to establish in the office a court of revision, and to consider the drafting or regulations to govern it.

(*e*) The Judge Advocate General, who was then Provost Marshal General, and who, up to this time, had been without active connection with this office, thereupon returned to this office, wrote and filed with the Secretary of War a brief in opposition, and held that there was no such power of revision, and urged the reversal of my opinion and my action.

(*f*) The Secretary of War, for the time being at least, agreed with the Judge Advocate General, as did also the Acting Chief of Staff and the Inspector General of the Army, who apparently had been called into conference.

(*g*) Thereupon I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting the administration of military justice.

(*gg*) About this time, also, an order which had previously been issued, with the concurrence of the Judge Advocate General and the Chief of Staff, under 1132, Revised Statutes, empowering me to take full charge of the office and its policies, was revoked.

(*h*) On December 11, 1917, I asked the Secretary of War for a suspension of his decision and that I be permitted to file an extended brief in support of my views and the office opinion. This permission was granted. The brief was filed with the Secretary. As indicating its character, the following were its several points:

I. The action taken by the Secretary of War on the advice of the Judge Advocate General has been taken under very evident misapprehension. Such action is predicated upon the correctness of conviction; and the acceptance of such an act of grace by these innocent men necessarily implies a confession of guilt of a crime which, upon well-established principles of law and justice, they never committed. Justice is a matter of law and not of Executive favor.

II. It is as regrettable as it is obvious that those who oppose my views do not vision in the administration of military justice what the new Army of America will require, nor do they even see what the present is revealing; they are looking backward and taking counsel of a reactionary past whose guidance will prove harmful if not fatal.

(1) The views of the Assistant Chief of Staff and the Inspector General savor of professional absolutism.

(2) The opposing legal views are anachronistic. They are given a backward slant through undue deference to the theory of an illustrious text writer as to the nature of courts-martial, a theory which civil jurisprudence has never adopted but distinctly denied.

(3) The teachings which followed upon the premise that courts-martial are executive agencies have all been disproved by the Supreme Court of the United States, though this department still clings to them.

III. The whole argument of the other side is found in the contention that the word "revise" has no substantial meaning, but has reference only to clerical corrections.

One single fact exposes the utter fallacy of that contention, and had it been considered must have prevented an expression of that view.

That fact is this: The word "revise" is an organic word, which solely creates and defines the duties of an entire bureau. Congress went to the great length of creating an independent bureau in the War Department for the sole and declared purpose of having it "revise" the proceedings of all military courts, and made that duty of revision the sole duty of that bureau.

IV. "Revise" in its every sense—ordinary, legal, and technical military sense—means to correct, to alter, and amend.

V. The word "revise," as a matter of fact, is in no sense ambiguous, and there is no room for misconstruing it. It would have made no difference, therefore, what the administrative practice was or is. The quality of law is not impaired by nonuse. As a matter of fact, Judge Holt did, in form at least,

pronounce sentences invalid, and did not content himself simply with recommending that pronouncement was by superior authority. His views as to the validity of proceedings were expressed in terms that savor of judicial pronouncement, and the orders of the War Department so far as examined seem to respect that quality by confirmance.

VI. The judge advocate general of England certainly did have this power of revision. I am not advised of his present authority.

VII. Whence comes the established power to declare proceedings null and void for jurisdictional error? And why should not the larger power include the lesser radical one of correction of legal error?

VIII. The necessity, in the name of justice, of locating this power in this department, and preferably in this office, where logically and, I think, legally it belongs, must be apparent to all who are familiar with the administration of military justice.

(*hh*) The Judge Advocate General filed a brief in opposition to my second brief, which was to the point that the power did not exist, and to the effect that the military code should better be left to be administered by the camp commander.

(*i*) The Secretary of War again held with the Judge Advocate General that the power was not to be deduced by the existing law, and directed him, not me, to make a "study" of the situation regarding revisory powers.

(*j*) About this time 13 negro soldiers were hanged in Texas almost immediately upon the completion of their trial and without review of their cases. Indeed, the proceedings under their cases did not reach the department until probably some three months after they had been executed. I took this occasion to file a memorandum with the Judge Advocate General to show what was happening and what was always likely to happen if he and the Secretary of War adhered to their views.

(*k*) The Judge Advocate General recommended and the department finally adopted an administrative method known as General Order No. 7, which suspended certain sentences until the proceedings could be examined in this office and the commanding general advised with. This was an administrative palliative which was described by the Judge Advocate General as necessary to head off a "threatened congressional investigation" to "silence criticism," to "prevent talk about the establishment of courts of appeal," and to make it "apparent that an accused did get some kind of revision of his proceedings other than the revision at field headquarters."

(*l*) I volunteered to criticize this compromise with the law and justice and again asked that revisory power be established in this office. I recommended that if the administrative method was nevertheless to be adhered to, it should be greatly extended.

(*ll*) It was upon my voluntary recommendation that a branch of this office was established in France, to make such review as departmental administration permitted.

(*m*) Several times—three times, I think—during January, February, March, and April, 1917, I called attention to the necessity of closer supervision of courts-martial judgments and proceedings.

(*n*) Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our Allies, I filed with the Judge Advocate General a report which among other things treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War.

(*o*) In August, 1918, I reorganized the office so as to be enabled to present a more thorough presentation of the deficiencies of the courts-martial records coming to the office, and by strength and thoroughness of argument, to impel the minds of the military authorities to action in individual cases. For this purpose I created the boards of review, which still exist and perform most valuable service, but without any authority to make a modification of a judgment in any case.

(*p*) In September I ordered the boards of review to break away from the office interpretation (which, however, was probably correct) of the administrative method heretofore referred to (subpar. *k*), which had been construed to forbid this office to make any recommendation or suggestion as to clemency. And I ordered that, in a proper case, despite the order, clemency should be suggested to commanding generals.

(*q*) In September, upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice in our own forces in France, which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subject to question.

(*r*) In October the executive officer and I advocated (and the head of the office approved) the increase of the personnel of the department, so that at least the trial judge advocate should be a lawyer and could use his power as such to exert some legal control over the court.

Upon every occasion and every opportunity I have stood for an absolute legal supervision of courts-martial procedure and judgments, and even when not charged with any duty touching the administration of military justice, I have never hesitated to express my view upon any matter concerning it that might come to my attention. In certain several cases involving sentences of death, I voluntarily went to the chief of this office and opposed his recommendation for execution.

These are a part of my efforts. I hope they may serve to convince all fair-minded men that I am not a coward or weakling.

You seem to think that under these circumstances I should have gone directly to the President. Upon a little reflection you will appreciate, I am sure, the impossibility of such a course. I think, however, that, resting under the charge which you have made against me, I am justified in saying this, that on one occasion I well remember—and doubtless there are others—when four sentences of death were pending in the department for confirmation, and when this office had recommended execution, I went to the head of the office and orally presented to him my views in opposition. I then filed with him a memorandum in which I did my best to show, what seemed to me to be obvious, that these men had been most unfairly tried, had not been tried at all, and ought not to die or suffer any other punishment upon such records. Discovering that these memoranda had not been presented to the Secretary of War, and feeling justified by the fact that I had no other forum in this department, I gave a copy of the memorandum to a distinguished member of the Judiciary Committee of the House and was told by him that he could present the cases to the President himself.

I was compelled to do this—an act inconsistent with strict military propriety—by the dictates of my own conscience, by my desire to serve justice, and by my sense of duty to my God and these unprotected men that their lives might be spared.

Very respectfully, yours,

S. T. ANSELL.

WASHINGTON, *February 17, 1919.*

EXHIBIT 70.

OCTOBER 25, 1918.

Memorandum for the Chief of the Division of Military Justice.
Subject: Scope of duties of the board of review of your division.

1. I understand that this office has heretofore held, or that at least you have heretofore been instructed, that the power of this office is strictly limited in its reviews of courts-martial cases sent up under General Orders, No. 7, War Department, 1918, to the question of legality of the proceedings. With this view I am not in accord.

2. I am very familiar with the origin and purpose of that order. It was never intended to operate as a limitation upon the duties of this office. On the other hand, the order itself, while in my judgment altogether too limited in its terms, was born out of an effort then being made by this office to the end that the War Department, through its proper functionaries, exercise the requisite and necessary revisory power and control over all courts-martial proceedings.

3. The language of the order, standing alone, may, indeed, limit the powers of this office to a review for the sole purpose of determining the legality of proceedings. But for the reason just adverted to the terms of the order are not all inclusive. There are still powers, organic, statutory, and administrative, which it could not have been the purpose, nor can it be the effect, of that order to mod-

ify. The President is the source of all clemency, and that power, of course, finds no limitations in the order. Furthermore, as Commander in Chief of the Army, speaking directly or through his constitutional organ, the Secretary of War, his suggestions to convening authorities are entitled to, and will, of course, receive, the most thorough consideration. It would be the extreme case in which the views and suggestions of the Commander in Chief of the Army, concerning military punishments, could justifiably be disregarded. Also this office is the office which the President and the department must rely upon for their advice and guidance in matters affecting court-martial procedure and punishment. Moreover, and aside from the realm of administration, this office has the statutory duty of revising all court-martial proceedings, a duty which it can not disregard. In view of all this constitutional, administrative, and statutory power, this office must be assumed to have the duty, by reason of its powers and its organic relation to the authorities just mentioned, to speak beyond the strict question of legality authorized by said order.

4. The administration of this office has revealed the necessity of giving this consideration concrete application. Frequently proceedings are legal in toto and admit of no question of their legality or regularity whatever, and yet the punishment awarded is such as would justify any reviewing authority or supervisory power of any kind at least to invite attention to the punishment and to suggest a modification of it or a means of modifying it. The board of review in your division, through whose hands pass all court-martial records of the trials of the most serious offenses, and to whose attention and consideration come the most serious sentences awarded by courts-martial, are, by virtue of these facts and their position as a board of review, best able, within broad limits, to weigh the relation of punishment to discipline, and frequently of specific punishment to specific offense. Besides, while uniformity of punishment may not be a fundamental consideration, it is, in the administration of military justice, a most important one by reason of the great variation in punishments awarded by courts-martial. Such variations are more or less inherent in the system—a system which is administered by officers more or less unfamiliar with the military profession itself and always unskilled in the law and in which thousands of tribunals are exercising judicial functions unguided by their own or other precedents. In my judgment, there could be no present accomplishment that would operate to the greater good of the Army or meet with greater approbation of those of our people who are interested in the administration of military justice than the establishment in this office of an administrative procedure that would result in rendering the punishments in the Military Establishment more nearly uniform, more scientific and intelligent, and better related to justice to the individual upon the one hand and military discipline in general upon the other.

5. In view of these reasons, you and the board of review are instructed to make such recommendations in all cases passing under your supervision by virtue of General Order No. 7 as will tend toward the achievement of this result, and will no longer in such cases consider yourselves limited to the sole question of legality of procedure.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 71.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
March 11, 1919.

CASES RETURNED TO REVIEWING AUTHORITIES.

To Gen. CHAMBERLAIN:

In addition to the cases cited here, there is one other, the Peters case, in which, in France, the reviewing authority did not follow the recommendation of the branch office of the Judge Advocate General's Office. A memorandum of that case will be prepared and sent to you promptly.

Very respectfully,

W. C. RIGBY, *Major, Judge Advocate.*

APPENDIX TO MAJ. RIGBY'S REPORT.

Memorandum with regard to courts-martial cases in which the Secretary of War or the reviewing authority has failed to follow the recommendations of the office of the Judge Advocate General.

An examination has been made of records of courts-martial cases, tried since the Government of the United States entered the war, with a view to obtaining figures as to the number of cases in which recommendations of the office of the Judge Advocate General with regard to the setting aside or the modification of sentences of courts-martial have not been followed by the Secretary of War or by reviewing authorities. It is not possible to procure from available records absolutely accurate statistics, but those obtained are evidently such that they furnish information on which definite conclusions can be based. Brief abstracts of the facts in cases in which the recommendations of the office of the Judge Advocate General have not been followed are set forth below.

Recommendations have been made to the Secretary of War in approximately 279 cases. Examination of these cases discloses that in 13 of them the recommendations of this office were not followed.

In three of these cases the Secretary of War differed with the views of this office with regard to points of law involved therein (Lieut. Millard M. Green, Pvt. Dan Nona, and Pvt. Edwin E. Schonofsky).

In four cases there was merely a difference of opinion as to the propriety of a commutation of sentences (Second Lieut. John C. Ward, Maj. Henry R. Freeman, jr., Second Lieut. Louis B. Hanks, and First Lieut. John B. Sisson). This office recommended a partial commutation of the sentence in each of these cases. The Secretary of War did not concur in such recommendation. In two of these cases the President directed final action in accordance with the recommendations of this office (Maj. Henry R. Freeman, jr., and John C. Ward).

In one case this office had recommended that a sentence of dismissal be confirmed (Second Lieut. Arthur Brigham). The Secretary of War disagreeing with the view of this office recommended that the sentence be remitted, and the President took action in accordance with the Secretary's recommendation.

Five cases, all tried in France, merely involved a question, identical in each case, as to the place of confinement (Pvts. Thurston C. Reynolds, Frank Malarich, Robert M. Hughett, Charles M. Gard, and Nelson Glock). The office of the Judge Advocate General recommended confinement in the United States Disciplinary Barracks instead of at military posts in France. The Secretary of War did not concur in the recommendations made in each of these cases.

Recommendations have been made to reviewing authorities in approximately 212 cases under General Orders, No. 7, War Department, 1918; and the reviewing authorities have failed to follow the recommendations in six of them. Three of these cases arose in France and three in the United States.

The records of the three cases tried in the United States show that in one of them the reviewing authority followed the recommendations of this office in part (Pvt. Charles A. McBect); in one the reviewing authority complied with the recommendations of this office in such a way that punishment was imposed on the accused in accordance therewith, and only the record of the accused was affected by the failure of the reviewing authority strictly to follow the recommendations (Pvt. Edward C. O'Neill); in one case the recommendations of this office were disregarded in their entirety (Harvey W. Janke).

The records of the three cases tried in France show that in one case the reviewing authority complied in part with the recommendations of the office of the Judge Advocate General (Pvt. James Adio); in two cases the recommendations of the office of the Judge Advocate General were disregarded in their entirety (Pvt. Delbert L. Moss and Capt. Samuel D. Mann).

In a case tried at Camp Funston, Kans., the office of the Judge Advocate General and the Secretary of War recommended that the sentence be confirmed, and the President, differing with both, disapproved the finding and sentence (First Lieut. Charles H. Mielke).

Second Lieut. Arthur Brigham, Sixth Field Artillery. Trial by general court-martial at Douglas, Ariz., July 22, 1917. Dismissal from the service.

The accused was tried under the ninety-sixth article of war under specifications relating to the taking of a false oath in making application for appointment as provisional second lieutenant, in which application he stated falsely

that he was a single man. He was found guilty and sentenced to be dismissed from the service.

The reviewing authority approved the sentence and suspended execution thereof pending action by the President, and he recommended that the sentence of dismissal be remitted in view of the frank admission of the accused apparently made for the purpose of rectifying an error made by him, and of the exemplary reputation formerly borne by the accused in the military service.

This office being of the opinion that the false oath made by the accused showed him to be untrustworthy, recommended that the sentence of the court be confirmed.

The Secretary of War disagreeing with the view of this office, recommended to the President that sentence should be remitted, and the President took action in accordance with the Secretary's recommendation.

Second Lieut. John C. Ward. Trial by general court-martial convened at Fort McDowell, Calif., August 29, 1917. Dismissal from the service.

Lieut. John C. Ward was tried by a court composed of five captains of the Regular Army. He was arraigned under the ninety-sixth article of war on the charge of drunkenness. He was found guilty and sentenced to be dismissed from the service.

The reviewing authority, the commanding officer at Fort McDowell, approved the proceedings without comment and forwarded them by indorsement for action of the President in compliance with the forty-eighth and fifty-first articles of war.

This office recommended, in view of the man's excellent service as an enlisted man since April 26, 1906, up to the time he was commissioned, shortly before his trial, that the sentence be commuted to forfeiture of $50 per month for six months and restriction to the limits of the post to which he might be stationed for a like period.

The Secretary of War was unwilling to recommend commutation, but called the attention of the President to the recommendations of this office, which the President followed.

Lieut. Millard M. Green, Engineer Reserve Corps. Trial by general court-martial convened at Camp Dix, N. J., March 19, 1918. Dismissal.

The accused was charged with violation of the ninety-fifth and ninety-sixth articles of war. Under each specification the allegations of fact were that he had married in the month of December, 1906, one Lilian Melton Greer and that afterwards, while so married to her, he unlawfully married one Edith Elder. He was found guilty and sentenced to be dismissed from the service and to be confined at hard labor for five years.

The reviewing authority approved the sentence and forwarded the record for action under the forty-eighth article of war.

This office recommended that, there being no legally sufficient evidence to prove the offense of bigamy, the findings and sentence be disapproved, but that appropriate steps be taken looking to the discharge of the officer under the provisions of section 9 of the act of May 18, 1917.

The Secretary of War did not concur in the recommendations of this office, but recommended to the President that, the offense of bigamy not having been proved, the findings and sentence under the ninety-sixth article of war be disapproved and that the accused, having been guilty of conduct unbecoming an officer and a gentleman, the findings under the ninety-fifth article of war be approved and the officer dismissed.

Maj. Henry R. Freeman, jr., Three hundred and thirty-seventh Field Artillery. Trial by general court-martial convened at Camp Dodge, Iowa, April 3, 1918.

The accused was tried on a charge of violating the ninety-fifth article of war on a specification that he was drunk. He was found guilty and sentenced to be dismissed from the service

The reviewing authority approved the findings and sentence and forwarded the record for the action of the President under the forty-eighth article of war.

This office recommended that the findings of the court be approved, but that, in view of the previous good record of the officer, the sentence be commuted to confinement for six month, forfeiture of $100 a month, and a reprimand by the commanding general of his division. The Secretary of War did not concur in the recommendation of this office, but called the President's attention thereto,

who later directed a disposition of the case in accordance with the recommendations of this office.

Pvt. Dan Nona, One hundred and thirty-fifth Machine Gun Battalion, United States National Guard. Trial by general court-martial convened at Vrecourt, France, July 17, 1918. Hard labor, without confinement, for three years, with forfeitures.

The accused was tried for violation of the ninety-third article of war under the specifications that he "did willfully, feloniously, and unlawfully commit involuntary manslaughter."

This office pointed out that the finding of the court was void for repugnancy, since if the act was willful and felonious it was not involuntary manslaughter, and it recommended that so much of the sentence in the case as remained unexecuted be remitted.

The Secretary of War disapproved this recommendation.

Pvt. Thurston G. Reynolds, Company M, Sixtieth Infantry. Trial by general court-martial in France, April 14, 1918. Dismissed from the service, forfeitures, and confinement at hard labor for three years.

The accused was tried on a charge of violating the eighty-sixth article of war on a single specification alleging that he was found sleeping on his post while on guard as a sentinel in time of war. He pleaded guilty and was found guilty on the charge and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years.

The reviewing authority approved the sentence, suspended the dishonorable discharge, and designated the station of his company as the place of confinement of the accused.

The Office of the Judge Advocate General called attention to the policy of the War Department respecting the place of confinement to be designated on conviction by general court-martial as set out in paragraphs 396, 397, and 398, M. C. M., 1917, and pointed out that paragraph 377, specifically provides for the designation of the United States disciplinary barracks at Fort Leavenworth, Kans., or one of its branches, as the place of confinement for general prisoners who are to be confined for six months or more and who are not to be confined in a penitentiary.

The view was expressed that the interests of discipline in the Army could not best be served by retaining at military posts or camps prisoners undergoing extended periods of confinement, and it was therefore recommended that the place of confinement of the prisoner be changed to the United States disciplinary barracks.

The opinion was expressed by The Adjutant General that, in view of the fact the commanding general of the American Expeditionary Forces had been specifically authorized to retain general prisoners in France, and in view of provisions in the Army appropriation act approved July 9, 1918, relating to the remission of sentences, it was not advisable to concur in the recommendation of the Judge Advocate General's Office.

Cases of Pvt. Frank Malarich, Pvt. Robert M. Hughett, Pvt. Charles M. Gard, and Pvt. Nelson Glock, tried in France.

In the cases of Pvt. Frank Malarich, Pvt. Robert M. Hughett, Pvt. Charles M. Gard, and Pvt. Nelson Glock, all tried in France, sentences were imposed similar to that imposed in the case of Pvt. Thurston G. Reynolds, the facts in which are set forth above. The Office of the Judge Advocate General made recommendations in these cases the same as that made in the case of Pvt. Reynolds. The Office of The Adjutant General of the Army by direction of the Secretary of War did not concur in these recommendations for the same reasons as were indicated by him in the case of Pvt. Reynolds.

Second Lieut. Louis B. Hanks, Quartermaster Corps, National Army. Trial by general court-martial convened at Boston, Mass., July 22, 1918. Dismissal from the service.

The accused was tried for violation of the ninety-sixth article of war, under specifications of having appeared in civilian clothing, in violation of General Orders, No. 63, and of having been drunk in a public place. He was found guilty of both specifications and sentenced to be dismissed from the service.

The reviewing authority approved this sentence and forwarded the record for trial under the provisions of General Orders, No. 7, War Department, 1918.

This office recommended that the sentence be commuted to a reprimand, to be administered by the commanding general Northeastern Department, restrictions to the limits of the accused's post, camp, or station for three months, and forfeiture of $25 of his pay per month for a like period, unless he should be discharged from the service prior to the expiration of said period, in which event so much of said sentence as provides for such restriction and forfeiture as remains unexecuted should stand remitted.

The Secretary of War did not concur in the recommendation of this office.

First Lieut. John B. Sisson, Field Artillery, United States Army. Trial by general court-martial, Camp Jackson, S. C., October 1, 1918. Dismissal from the service.

The accused was tried on charges under the ninety-fifth article of war, under specifications of drunkenness and having liquor in his possession. He was convicted and sentenced to be dismissed from the service.

The reviewing authority approved the sentence and forwarded the record for action under the forty-eighth article of war.

This office recommended that clemency be extended to the accused and that accordingly the sentence be commuted to a reprimand, to be administered by the commanding general at Camp Jackson, restriction to the limits of the post or camp for six months, and forfeiture of $50 of his pay per month for a like period, unless he should be discharged from the service prior to the expiration of the said period, in which event so much of said sentence as provided for restriction and forfeiture as remained unexecuted should stand remitted.

The recommendations of this office were not approved by the Secretary of War.

Pvt. First Class Edwin E. Schonofsky, Battery F, Eighty-first Field Artillery, and Pvt. First Class Alfons Dalloen, Battery F, Eighty-first Field Artillery. Trial by general court-martial at Camp Fremont, Calif., June 3, 1918.

These soldiers were arraigned and jointly tried under charges of having violated the fifty-eighth and ninety-sixth articles of war, by committing the crimes of desertion and larceny. Schonofsky was sentenced to be shot and Dalloen was sentenced to be dishonorably discharged from service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 50 years.

The reviewing authority approved the sentences, but stayed their execution until the record of the trial should be reviewed in the office of the Judge Advocate General and its legality determined. The reviewing authority did not forward the record for action of the President under the forty-eighth article of war so far as the accused Schonofsky was concerned, as should have been done. The Judge Advocate General decided that the proper disposition to make of the case, so far as Schonofsky was concerned, was to recommend that the President disapprove the findings of guilty of the specifications and charges against him and the sentence imposed upon him. The Judge Advocate General, upon a review of the case, found that it was a fatal irregularity to try these men jointly upon charges not alleging that they had acted in concert and in pursuance of a common design and that accordingly the trial was contrary to law and in violation of the substantial rights of the accused.

The Secretary of War did not concur in the Judge Advocate General's recommendation. While conceding that the men had some "purely technical right to separate trials," the Secretary took the position that the procedure followed in these cases violated no substantial rights of the men.

The President, in accordance with the recommendation of the Secretary of War, commuted the sentence imposed on Schonofsky to dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years, and designated the United States military prison, at Fort Leavenworth, as the place of confinement.

CASES IN WHICH THE REVIEWING AUTHORITY HAS FAILED TO FOLLOW THE RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

Pvt. Charles A. McBect, Company H, Fifteenth Infantry. Trial by general court-martial at Fort Lawton, Wash., September 17, 1918. Five years' confinement, penitentiary.

The accused was tried for an offense under the ninety-sixth article of war. He was sentenced to be discharged from the service, with total forfeitures, and to be confined at hard labor for five years.

The reviewing authority approved the sentence, and the record was forwarded to this office for review pursuant to General Order No. 7, War Department, 1918. In view of errors in the admission of evidence and in the failure of the court to advise the accused of his rights as a witness, this office recommended that the findings and sentence be disapproved, and that the accused be released from confinement and restored to duty.

The department commander failed to follow the recommendation in its entirety, and directed that the sentence be executed except that confinement be remitted.

Pvt. Harvey W. Janke, Medical Department, United States Army. Trial by general court-martial at Fort Sheridan, Ill., November 22, 1918. Fifteen years' confinement, penitentiary.

The accused was tried and convicted (1) of desertion under the fifty-eighth article of war, and (2) of forging and uttering certain forged checks under the ninety-six article of war. The record, which was forwarded pursuant to General Order No. 7, War Department, 1918, was reviewed in this office, which reached the conclusion that the finding of guilty of desertion was not supported by the evidence, and recommended that the reviewing authority disapprove the finding of guilty of this offense and reduce to 5 years the period of confinement of 15 years, as imposed by the court, and approved by the reviewing authority. It was the opinion of this office that a charge of desertion was not proven by competent evidence.

The record was returned to the commanding general, Central Department, the reviewing authority, who declined to follow the recommendation of this office and published a general court-martial order in the case, approving the sentence as originally imposed and ordering its execution.

The sentence having been published in orders is now beyond the control of the reviewing authority to correct, but, as in the opinion of this office, it rests in part upon an illegal basis and as measured by its legal warrant, it is excessive, it was recommended by this office to the Secretary of War that the findings of guilty on the charge of desertion be set aside and that the period of confinement be reduced to five years.

Pvt. Edward C. O'Neill, alias Edward C. Joyce, Coast Artillery Corps, Eighteenth Company, Boston, Mass. Trial by general court-martial at Fort Sheridan, Ill., December 4, 1918. Twenty-five years' confinement, penitentiary.

The accused was tried for violation of the fifty-eighth and ninetieth articles of war on specifications involving, among other charges, desertion and forgery.

In view of the errors committed during the trial which injuriously affected the substantial rights of the accused and which invalidated the findings on certain charges and specifications, this office recommended that the reviewing authority revoke its approval of the findings and sentence in this case, except as concerned certain charges, and that the term of confinement of 25 years imposed by the court be reduced to 3 years. The reviewing authority reduced the sentence as recommended by this office, but did not revoke its approval of the findings on certain specifications. Only the record of the accused was therefore affected by the failure of the reviewing authority strictly to follow the recommendations of this office.

Pvt. Emmett T. Whelan, Battery D, Sixty-third Artillery, Coast Artillery Corps. Trial by general court-martial at Fort Worden, Wash., June 28, 1918. Confinement at hard labor for one year and forfeiture of pay.

The accused was tried for violation of the ninety-third article of war on a specification that he fraudulently converted to his own use certain funds belonging to other soldiers, and for a violation of the ninety-sixth article of war on a specification that he violated standing post hospital orders by retaining property received from patients for safe-keeping. He was found guilty on the second charge and sentenced to be confined at hard labor for one year and to forfeit two-thirds of his pay per month for a like period.

The reviewing authority approved the sentence and ordered the execution thereof at the station of the soldier's company. This office pointed out to The Adjutant General that it is the policy of the War Department that such long-term sentences to confinement should also include dishonorable discharge and forfeiture of pay and allowances, that where a period of confinement is for more than 6 months, and where a penitentiary is not designated as a place of confinement, a disciplinary barracks should be designated, and that it is not believed that the interests of discipline in the Army can best be served by re-

ilitary offenders should, except, perhaps, in rare instances, be sen-
serve, and while therein they should be made to serve not only as
ut under such conditions as would involve punishment. By this means
rnment would save for itself the service of the soldier and furnish
pportunity for self-redemption. Doubtless there are rare instances
n must be taken out of the Army entirely and subjected to long-term
nent, but I think they must be rare. As I see it, the department has
nsibility of deciding how it can utilize the services of these soldiers
e same time keep them within a penal condition.
er the existing law the matter of dishonorable discharge is within the
the court and the reviewing authority. The reviewing authority
end the sentence of dishonorable discharge until the solider is released
finement. If it were laid down as the policy of the War Department
department intended to avail itself of the service of men sentenced to
ble discharge, except perhaps in rare instances, that policy could be
d upon the several reviewing authorities as to have them suspend all
ences until the pleasure of the department should be known.
ink the policy of the department should be determined now. At the
ime men are being dishonorably discharged for offenses which are
vial. I think you should take immediate action. For the time being
lishonorable discharges could be stayed by a communication to the
nerally to the effect that it is the desire of the Secretary of War that
rities contemplated in the fifty-second article of war to suspend the
of all sentences of dishonorable discharge until the further pleasure
ecretary be made known. In the meantime, this office, if advised of
s upon the policy, could formulate the plans accordingly.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 67.

NOVEMBER 14, 1917.

dum for the Chief of Staff.

Proper punishment during war.

memorandum from this office addressed to the Chief of Staff under
ctober 18, 1917, on the above subject, attention was invited to the fact
were being dishonorably discharged from the service at the rate of
n 100 a week. It was there indicated, as the views of this office, that
f war the punishment of dishonorably discharge should be very spar-
rted to, and the suggestion was made that any method of maintaining
which results in depriving the service of its man power in time of
ndamentally defective. It was further suggested that a disciplinary
should be established under the control of each division commander
military offenders should, except in rare instances, be sentenced to
l while therein be made to serve not only as soldiers, but under such
s as would involve punishment. The idea underlying the suggestion
any sentence of dishonorable discharge, except in the few cases where
ders are totally unfit for military service or their retention therein
harmful, would be suspended or remitted by the reviewing authority
urpose of holding the men in these disciplinary units and for military
ather than sending them to the disciplinary barracks or to a branch
here they are removed entirely from military service.
ortunately, the idea sought to be conveyed by this memorandum has
fused with the plan heretofore suggested, by Maj. King, of the Medical
establishing disciplinary battalions at the various cantonments which
, in effect, branches of the United States disciplinary barracks, the
r construction for which has been variously estimated at from $300,000
),000. In order to obtain the views of the commanding generals of
ents and tactical divisions with reference to the advisability of estab-
uch disciplinary battalions in the various divisions, The Adjutant Gen-
ed upon each of them for an opinion. The majority of them expressed
es as being opposed to the establishment of disciplinary battalions at
ent time. The memorandum of this office above referred to, together
other papers bearing upon this subject, was referred to the War Col-
study, and a conclusion was reached which has served as a basis for a

CASE IN WHICH THE PRESIDENT FAILED TO APPROVE OF THE RECOMMENDATIONS OF THE SECRETARY OF WAR AND OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

First Lieut. Charles H. Mielke, Medical Reserve Corps. Trial at Camp Funston, Kans., November 16, 1918. Dismissal from the service.

The accused was tried for violation of the eighty-fifth article of war on the specification that he was drunk while on duty. He was convicted and sentenced to be dismissed from the service. The sentence was approved by the convening authority and the record was forwarded for action by the President under the forty-eighth article of war.

This office and the Secretary of War recommended that the sentence be confirmed. The President disapproved of the finding and sentence, and directed that the restoration to duty of the accused in view of the fact the evidence of record failed "to show the guilt of the accused beyond a reasonable doubt."

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
March 11, 1919.

Memorandum: For Gen. Chamberlain, Inspector General:

Herewith is a memorandum concerning the Noel F. Peters case, C. M. No. 118312. This is the remaining case, which I mentioned to you this morning, in which the reviewing authority did not follow the recommendation of the Paris branch office of this office.

This memorandum, with what I gave you this morning, completes the statement of cases of that character, so far as the records of the statistical division of this office show.

WILLIAM C. RIGBY,
Major, Judge Advocate.

Memorandum of a case in which the reviewing authority declined to follow the recommendation of the Paris branch office of the Judge Advocate General's Office.

C. M. No. 118312. United States *v.* Noel F. Peters, private, Four hundred and sixty-sixth Aero Squadron, S. C. (A. J. A. G. O., 201–116).

1. Pvt. Noel F. Peters was tried by general court-martial convened by command of Gen. Kernan, commanding general, headquarters Services of Supply, American Expeditionary Forces, France. The court met at Air Service Production Center No. 2, May 20, 1918. The accused was charged, under one charge, violation of the fifty-eighth article of war, and one specification, with desertion, February 24, 1918, from the Third Aviation Instruction Center, American Expeditionary Forces, and remaining absent in desertion until apprehended at Toulouse, France, on or about March 10, 1918. He pleaded not guilty to the specification and the charge, but was found guilty and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years. Gen. Kernan, as reviewing authority, on May 31, 1918, approved the sentence, "though lenient"; designated the United States Penitentiary, Leavenworth, Kans., as the place of confinement; suspended the execution of the sentence under General Order No. 7, War Department, 1918; and forwarded the record to the Paris branch office of the office of the Judge Advocate General.

2. Upon review in the Paris branch office of the Judge Advocate General's Office, the record was found not legally sufficient to support the conviction of desertion, but sufficient to support a conviction of absence without leave. It was accordingly recommended by Brig. Gen. E. A. Kregar, Acting Judge Advocate General, that the approval of the sentence and the designation of a penitentiary as the place of confinement be vacated, and that so much only of the findings of the court be approved as involved a finding of guilty of the lesser and included offense of absence without leave, in violation of the sixty-first article of war, and that appropriate action be taken with reference to the approval of the sentence, or a portion thereof, and the designation of a place of confinement under military control.

3. Upon the return of the record to Gen. Kernan, with this recommendation of the Acting Judge Advocate General, the case was referred by Gen. Kernan to his staff judge advocate, Col. J. A. Hull, judge advocate, who, in a memorandum dated July 1, 1918, disagreed with the opinion and recommendations of the

Acting Judge Advocate General, Gen. Kreger, and concluded his memorandum with:

"In this case it is submitted that if the errors are such that the trial is a nullity, disapproval of the entire proceedings is the correct action, and not merely a compromise verdict. Your orders are, therefore, requested."

4. Thereupon Gen. Kernan made the following indorsement upon Col. Hull's memorandum:

"For Col. Hull:

"I have read the entire proceedings and the several memorandums herewith analyzing the case, and I am satisfied that the original action was sound. Let it stand.

"F. J. KERNAN,
"*Major General, National Army.*

"TOURS, FRANCE, *July 4, 1918.*"

5. Thereupon, under date of July 4, 1918, General Court-Martial Order No. 112, headquarters Services of Supply, American Expeditionary Forces, was promulgated, carrying the original sentence into execution.

6. The following week, under date of July 11, 1918, Acting Judge Advocate General Kreger forwarded to the Judge Advocate General, with the record of trial, a memorandum calling attention to the case and concluding:

"My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority. That question is not discussed by the judge advocate of the trial jurisdiction in his counter-memorandum pertaining to this case, but was discussed by him in his memorandum relating to the case of Pvt. Delbert L. Moss (A. J. A. G. O., 201-92). The following extract from a letter addressed to you with reference to the Moss case is quoted as especially pertinent in connection with this case, viz:

"'It has been my belief that the purpose in view in the creation by General Order 7 of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order, and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be * * * that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision.'

"Your instructions in the premises are requested for the guidance of this office, and if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they, as well as this office, be advised to that effect.

"Being still of the opinion that the record in this case is legally insufficient to support the findings and sentence, and that the advice of this branch of the office of the Judge Advocate General with reference to the legality of a finding or sentence reviewed here should be given the same effect as if the advice had been given by the office of the Judge Advocate General of the Army, I recommend that the sentence be declared null and void and that Peters be restored to duty."

7. This case is understood to have been one of the immediate occasions of the discussions preceding the issuance of General Order No. 84, War Department, 1918 (par. IV).

WILLIAM C. RIGBY,
Major, Judge Advocate.

EXHIBIT 72.

MILITARY JUSTICE DURING THE WAR.

WASHINGTON, *March 25, 1919.*

To my fellow members of the bar in the United States:

Herewith is inclosed to you a copy of a letter sent this month to the Secretary of War by the Judge Advocate General, Maj. Gen. Enoch H. Crowder. It

was evoked by recent complaints about the system of military justice, uttered on the floor of Congress and in the press.

The principal congressional speeches on this topic appeared in the Congressional Record for January 3, January 23, February 19, February 27, and March 4; and these criticisms, together with others developed by a witness before the Senate Committee on Military Affairs during February, have been given by the daily press considerable publicity of a sensational nature, notably in the New York World of January 19 and later dates, and in the Philadelphia Public Ledger.

The testimony at the committee hearings will probably not be printed for some time to come; and it will form a large pamphlet, requiring patient study for extraction of the general features of fact. Meanwhile the lack of any publicity for the defense of those criticisms will have left the intelligent public under the impression that there is and can be no defense, although the contrary is the case. It has therefore seemed proper and necessary to give circulation to this letter.

In the Official Bulletin for March 5 and March 10 will be found two letters of Gen. Crowder, addressed in reply to a letter of request from the Secretary of War. The first letter, of date February 13, deals at great length with the specific criticisms voiced in the speech of Senator Chamberlain, published January 3. The second letter, of date March 8, surveys briefly the entire field of complaint. But the subject is too large for adequate reply in a brief letter. Moreover the intelligent public needs, as the foundation of its judgment, an educative description of the system of military judicial procedure as it actually is. This is furnished by the present letter.

I commend this letter to your careful perusal. It is to be hoped that the candid judgment of the legal profession, made after hearing both sides, will impress itself upon public opinion at large.

It would be presumptuous in me to suppose that the distinguished Judge Advocate General needs any assistance from me in securing credit for his utterances. But, so far as my name is known to the American bar, I am keenly desirous to do my part in securing a just verdict for our military system in the forum of public opinion. And that part can be contributed by urging upon my fellow members of the bar a careful study of this presentation by the Judge Advocate General.

In addressing you in this direct fashion, I am deliberately breaking through the etiquette of the military service, rigorously observed by me since my call to active duty in July, 1917. I am on the point of receiving my honorable discharge (I hope) within a few weeks, and I speak to you in this letter not merely as an officer of the Army but also as a member of the bar of 30 years' standing who has happened to have intimate observation of the methods of military justice during the war as well as of the principal personages in charge of it in Washington. Some of the court-martial records recently discussed in the public press had been submitted to my scrutiny at the time they were originally pending for action. Many of the events of 1917 and 1918 publicly discussed in Congress were the subject of personal knowledge on my part. My official duties, however, have been almost entirely in the office of the Provost Marshal General, and I have not prepared (with a single exception) any official opinion on court-martial records. I am therefore not implicated in any criticisms upon the court-martial system. I have nothing to hope and nothing to fear from the authorities of the War Department. I have always, in our civil profession, acted sympathetically and spoken frankly in the cause of the reform of justice. My record shows that I do not belong either with the reactionaries or with the Bolshevists.

These circumstances are mentioned to indicate that I have adequate grounds for a correct and untrammeled opinion, as an observer and a member of the bar, upon the comparative administration of military and civil justice, and that opinion is that the inclosed letter of the Judge Advocate General is a correct and reliable description of the facts and the spirit of American military justice during the war. I see where military justice, in the light of the war's experience, can be improved; but I will not remain silent in the presence of an unmerited attack, full of exaggeration and defamation, wholly unjust both to the system itself and to those able and faithful men who have borne the burden of its administration.

The legal profession, by its firmest traditions and daily practice, is accustomed to recognize the necessity of hearing both sides before passing final judgment. I therefore make this personal appeal to my fellow members of

the bar to peruse the inclosed letter and to give due weight to its presentation. When the entire facts shall have been brought out and the motives behind the recent press publicity become plain, you will be well satisfied that you did not allow yourselves to be carried away by first impressions gained from sensational headlines, extreme cases, and emotional epithets.

JOHN H. WIGMORE,
Colonel, Judge Advocate, United States Army.

LETTER OF THE SECRETARY OF WAR.

MARCH 1, 1919.

MY DEAR GEN. CROWDER: I have been deeply concerned, as you know, over the harsh criticisms recently uttered upon our system of military justice. During the times of peace, prior to the war, I do not recall that our system of military law ever became the subject of public attack on the ground of its structural defects. Nor during the entire war period of 1917 and 1918, while the camps and cantonments were full of men and the strain of preparation was at its highest tension, do I remember noticing any complaints either in the public press or in Congress or in the general mail arriving at this office. The recent outburst of criticism and complaint, voiced in public by a few individuals whose position entitled them to credit, and carried throughout the country by the press, has been to me a matter of surprise and sorrow. I have had most deeply at heart the interests of the Army and the welfare of the individual soldier, and I have the firmest determination that justice shall be done under military law.

I have not been made to believe, by the perusal of these complaints, that justice is not done to-day under the military law or has not been done during the war period. And my own acquaintance with the course of military justice (gathered as it is from the large number of cases which in the regular routine come to me for final action) convinces me that the conditions implied by these recent complaints do not exist and had not existed. My own personal knowledge of yourself and many of the officers in your department and in the field corroborates that conviction and makes me absolutely confident that the public apprehensions which have been created are groundless. I wish to convey to you here the assurance of my entire faith that the system of military justice, both in its structure as organized by the statutes of Congress and the President's regulations and in its operation as administered during the war, is essentially sound.

But it is not enough for me to possess this faith and this conviction. It is highly important that the public mind should receive ample reassurance on the subject. And such reassurance has become necessary, because all that the public has thus far received is the highly colored press reports of certain extreme statements, and the congressional speeches placing on record certain supposed instances of harsh and illegal treatment. The War Department and its representatives have not been in a position to make any public defense or explanation and have refrained from doing so. The opportunity recently afforded the members of your staff to appear before the Senate Committee on Military Affairs has been an ample one, and it has furnished, I hope, entire satisfaction to the members of that committee. But of the proceedings of that committee I perceived no general public notice; the testimony, when published, will be somewhat voluminous, and its publication will not take place for some time yet, and it will certainly not reach the thousands of intelligent men and women who read the original accounts. And yet it is essential that the families of all those young men who had a place in our magnificent Army should be reassured. They must not be left to believe that their men were subjected to a system that did not fully deserve the terms "law" and "justice." And this need of reassurance on the part of the people at large is equally felt, I am sure, by the Members of Congress in both Houses, who have, of course, not yet become acquainted with the proceedings before the Senate committee. It is both right and necessary that the facts should be furnished. It is indeed a simple question of furnishing the facts; for when they are furnished, I am positive that they will contain the most ample assurance.

Those facts are virtually all in your possession, on record in your office. I am aware that they are voluminous and that a complete explanation and answer to every specific complaint is impracticable. But I believe that you are in a position to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject.

I have been asked by a Member of the House of Representatives to furnish him with such a statement. And I am now calling upon you to supply it to me at your early convenience.

Faithfully, yours,

NEWTON D. BAKER,
Secretary of War.

To Maj. Gen. E. H. CROWDER,
Judge Advocate General, War Department, Washington, D. C.

LETTER OF THE JUDGE ADVOCATE GENERAL.

MARCH 10, 1919.

DEAR MR. SECRETARY: On March 1, 1919, you addressed to me a letter concerning the recent criticisms uttered upon our system of military justice, and asking me to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in the subject. On March 8 I replied to you, giving you a brief and concise survey of the field of controversy; but the limitations of that letter made it impracticable for me to deal with the subject in all its scope. The subject is one in which it needs only to set forth the facts, based on the records of my office, in order to perceive the injustice of the charges that have been made. This exposition of facts must be directed to each one of the main charges that have been voiced on the floor of Congress and in the press.

In my first letter to you, dated February 13, forwarded by you to the chairman of the Senate Committee on Military Affairs, and subsequently printed in the Official Bulletin of March 5, the six general criticisms voiced by Senator Chamberlain were dealt with at great length by statistical tables compiled from the records in my office. But these tables are, perhaps, too voluminous for ordinary perusal; and, on the other hand, the letter did not deal with a number of other specific criticisms made by other Members of Congress in the press. I have, therefore, gone over the entire subject so as to include a number of additional points of criticism, and have dealt with the specific points of Senator Chamberlain by omitting the elaborate statistical studies contained in my first letter.

It is my belief that the intelligent public, particularly the members of the legal profession and of the press, would welcome such an exposition of the facts; because the case is one in which it is necessary only to peruse the facts in order to estimate at their true value the criticisms, made in haste and based upon such imperfect and misleading data.

Before proceeding to set forth these facts, I will take a few words to indicate my own attitude toward the standards of military justice.

In 1888, while still a lieutenant of Cavalry, some years before I entered the Judge Advocate General's Department by detail, I addressed a letter to Col. G. Norman Lieber, then Acting Judge Advocate General, inviting attention to the necessity for a revision of the military code. Col. Lieber declined to take up the matter, fearing that the code might suffer in essential features by a revision which might adapt it too much to the methods and traditions of civil practice. Again in 1896, noticing that Congress had enacted a statute for the revision of all statutes, and knowing that the commission appointed under the terms of that statute would necessarily consider the Articles of War, I addressed a second letter to the then Gen. Lieber, Judge Advocate General, asking his attention to the opportunity this afforded to secure a proper revision of the Articles of War. He again declined to take up the matter, remarking that he felt that the code needed very little, if any, revision, and that if he had the entire responsibility of revising it he would limit himself to the elminating of obsolete articles and a rearrangement of the code. Again in 1903, while Chief of the First Division of the General Staff, I prepared a draft of revision of the military code and submitted it to the Secretary of War in December of that year for his recommendation to Congress. This came to nothing. In 1911, upon becoming Judge Advocate General, I renewed my efforts, which continued for the ensuing five years and through three Congresses. The revision of 1916 was the culmination of this series of proposals. This record, therefore, must be some testimony to the fact that my attitude toward the improvement of the military code has been an advanced one, at least in comparison with the attitude of others whose authority was superior to mine

ıe, and that these convictions of mine are publicly on record for a
at least 30 years past.
ew facts will indicate that I am, at any rate, not one who has been
ith anything less than the highest standards of justice for embodiment
of military law; and that my constant and urgent efforts have been
maintaining those standards and to improving their code whenever
to me to fall short of those standards. It was with this spirit that
proceeded with the administration of military justice when this
tered the Great War, and the American Army, enlarged manyfold,
n to put our system to such a test as it had never before experienced
ire history. The staff of the Judge Advocate General was gradually
rom about 30 officers to more than ten times that number; and all of
ıdge advocates were, of course, taken direct from civil practice, with
experience in the military practice of the National Guard. Thus
nce was plain that the spirit and traditions of the criminal common
all its safeguards for the accused and of its guaranties of full and
would dominate in the work of the judge advocates.
on these facts as demonstrating that it is humanly improbable that
of things, even remotely justifying some of the extreme epithets
sed in public criticism, could have existed in our Army during the
ears.
urther digress for a moment to state the extent of my own personal
ity for the administration of military justice during the last two
pointed Judge Advocate General February 15, 1911, and reappointed
xpiration of the first term of four years in 1915. I was in active charge
e of the Judge Advocate General from the outset of the war to the
7. In the meantime, on May 22, 1917, I was detailed as Provost
General and vested with the execution of the selective draft. I
time during the remainder of 1917 between the two series of duties.
ntime Brig. Gen. S. T. Aswell, as senior officer on duty in the Judge
General's Office, after August, 1917, acted upon a large share of the
without submission to myself. In February, 1918, a branch office of
Advocate General's Office was established in France and Brig. Gen.
er was appointed as Acting Judge Advocate General in that position.
er, 1917, at your request, I arranged to divide my time about equally
he Office of the Judge Advocate General and that of the Provost
eneral; but Gen. Ansell continued to have detailed supervision over
of military justice. Later, viz. during the months of May and
parts of April and July, Gen. Ansell was absent in France on inspec-
and during his absence Col. J. J. Mayes was senior officer and
all details of administration of military justice. The remainder of
July, Gen. Ansell again became senior officer in charge of that sub-
nwhile the Military Justice Division of the office had been enlarged
nprise nearly 50 officers on duty in Washington. Thus during the
rter of 1917 and the whole of 1918 the rulings upon individual court-
ses did not come to my personal attention, except in rare instances,
t usually bear my signature. Nor were the rules of the administra-
r as framed in my office during that period, personally framed or
n by myself, with a few important exceptions to which I will later

wish to make clear is that, so far as my active approval or disap-
concerned, there was no time during the latter part of 1917 and the
918 when a court-martial ruling or a rule of practice could not have
e or put into effect by the senior officer in supervisory charge of
justice, without personal submission to myself. More specifically,
of the above-named senior officers found reason sufficient to himself
e practice in any detail or to disapprove any individual court-martial
he was in a position to exercise free responsibility to do so without
oval of myself. An important exception to this statement is the rule
General Order No. 7, 1918, of which later explanation will be made.
s circumstance, that I was not personally responsible for the details
stration of military justice during the above period and that another
s thus responsible, does not, of course, alter the fact that up to the
t of 1917 I did share completely that personal responsibility. More-
tever my personal responsibility, or lack of it, for individual meas-
urt-martial rulings, I am, of course, responsible for the structure and
of military justice as they existed at the time of our entrance into

the war—responsible, that is, in so far as the Judge Advocate General's views were consulted by the Secretary of War and by Congress in the framing of the statutes and the regulations, and in so far as those statutes and regulations were enforced in the field and in my office. And it is because of that responsibility, and because of my firm belief in the merits and high standards of our system of military law, that I am now concerned in pointing out the facts which vindicate it from the recently published reproaches. Regardless of my share of responsibility during 1917 and 1918 for the operation of the system, I could not have performed the duties of that office up to that period without being vitally interested in vindicating the honor of the Army and War Department as involved in the maintenance of that system.

I propose now, first, to refer to certain individual cases recently criticised; next, to comment on the general defects alleged to exist in the system of military justice; and then to close with some recommendations.

(I) *Individual cases cited for criticism.*—In the recent speeches uttered on the floor of Congress, in the two or three press articles, and in some of the testimony given before the Senate committee and published in the press, certain individual cases of court-martial judgments are cited as notable instances of injustice.

In this letter it is virtually impossible for me to set forth the explanation that can be made for each of these cases. The majority of them are cases in which the sentence is said to be excessively severe; on this general topic of severity I will later offer what needs to be said. Other cases are supposed to be marked by some other form of injustice or illegality. To comment adequately on all these and other cases, which from time to time may be cited, would here be needless and impracticable. I have, therefore, gathered all these cases in an appendix which schedules each case thus cited and makes such explanation as our records afford; and this schedule of individual cases I will file with you for reference. In the meantime, I think that I can allay the apprehensions that have been excited by the public allusion to these cases if I take two or three of the most typical and show how groundless are the criticisms.

This first case cited in a speech in the Senate is that of a soldier at Camp Gordon (record No. 110595, tried January 24, 1918), who, while patrolling the town as military police, was found at midnight in a shop just after a burglary. Being charged with burglary, he asserted that he had entered the shop in search of the burglars. His story was disbelieved, and he was found guilty; the first finding had been not guilty, but at the commanding officer's request there was a reconsideration, and the second finding was guilty. On revision of the record no legal error could be found, but this office reached the opinion that though there was sufficient evidence to sustain the finding, the evidence did not go so far as to show his guilt beyond a reasonable doubt. In such a situation no supreme court in the United States (with three or four exceptions only) would interfere and set aside a jury's verdict. Nevertheless, this office recommended a reconsideration of the verdict by the reviewing authority. It was in fact reconsidered, but the reviewing authority adhered to the finding. But the feature for emphatic notice is that reconsideration was given, not by exercising the "arbitrary discretion of a military commander," but by referring the case to the judge advocate of the command, as legal adviser. The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of this office and recommending confirmation, and the commanding general followed this opinion of his law officer.

This case, therefore, instead of being, as the critic had been led to believe, an illustration of "the control which the military commander exercises over the administration of civil justice," illustrates exactly the opposite. For, in the first place, the confirmation of the sentence was made, not by the arbitrary military discretion of the commanding officer, but upon the legal opinion of his judge advocate; and, in the second place, the reconsideration which was actually given by the judge advocate, on the point of proof beyond a reasonable doubt, was a measure of protection which the law does not provide in any civil court in the United States for the control of a jury's verdict. The case is a good illustration of a feature in which the system of military justice sometimes does even more for the accused than the system of civil justice.

Another case cited on the floor of Congress is one of disobedience to orders to drill and of having seditious literature in possession for distribution. The offender was a conscientious objector who had not been given an opportunity for noncombatant service and who was not attempting nor intending to distribute the literature. The sentence was death; but the critic adds that it was "disapproved by the President and the prisoner discharged," and he expresses

t "the President will exercise the same clemency and show the in many other cases." Now, the facts of the record demonstrate pposite of what the critic was led to believe; because in this case 116790, tried June 17, 1918) it was not the President's clemency ed the prisoner; it was the effective operation of that very system aw which the critic supposes not to exist. What happened was ge Advocate General's Office recommended disapproval of the sen- strictly legal grounds that the order to drill was (under General 8, 1918) not a lawful command, and his disobedience was there- ffense; and that there was no evidence of the accused's intention the literature. The sentence was therefore disapproved and the harged on the legal grounds stated by my office. This case, there- n illustrating the critic's thesis, rather affords an illustration of of military law and justice in entire analogy to that of civil law

se, cited in the newspaper article read into the Congressional g. Rec., vol. 57, No. 44, Jan. 23, 1918, p. 1988), concerns two es imposed in France for sleeping on post in a front-line trench. lly three distinct questions involved in those cases—first, whether death in all cases of this offense should be the inexorable policy; ether, if not, these particular cases showed sufficient extenuating s; and, thirdly, whether the cases were fairly and fully tried to ts.

rst question it is enough here to say that Gen. Pershing especially portance of adopting this policy for the protection of his Army's his chief law officer concurred in this message; and that under stances no one could have been criticized for acceding to this st and adhering to the principle handed down by all the fixed military law. I myself, as you know, was at first disposed to urgent recommendation of Gen. Pershing, but continued reflection o withdraw from that extreme view, and some days before the sented for your final action the record contained a recommendation ting in the direction of clemency.

second question it can be stated that, except for the youth of the ey were about 20 years of age), there were no special extenuating s. The task laid upon these soldiers was no greater in its exac- as laid upon hundrds of others at the very same moment in the doing duty in the trenches. The Chief of Staff's memorandum uation with great force:

erican Expeditionary Force is confronted by the most alert and e known in the history of the world. The safety not only of the npany but of the entire command is absolutely dependent on the ormance of his duties as a sentinel. The safety of that command n equal measure upon the prompt and complete obedience of the n to the lawful commands of their superior officers. There is no at the members of this court had had the necessity for the alert of the duties of a sentinel strongly impressed upon them at the ime of the commission of those offenses. Before daylight on the November 3, 1917, the first attack by the Germans upon the Ameri- k place. A salient near Artois, which was occupied by Company F enth Infantry, was raided by the Germans, who killed 3 of our d 11, and captured and carried off 11 more. The very next night— night of November 3-4, 1917—Pvt. Sebastian was found sleeping and on the night of the 5th Pvt. Cook was found sleeping on his of these men belonged to the regiment which had suffered in the l of the 2d and 3d. This condition of affairs presented an absolute only to that portion of the line held by the American troops, but to troops in the adjacent sectors."

decision to exercise clemency was a sound one I do not doubt. But eader of the record could look upon these cases as anything but a instance of the inevitable mental conflict that arises between the ities of war discipline and the natural human sympathy for men ncurred the death penalty—a conflict which equally agitates every and every civil executive when such a case is presented for his s unconscionable that this situation should be cited as a peculiarity ary system.

l question—whether the case was fairly and fully tried so as to the facts—would require too extended a survey for giving all the

details here. I content myself with assuring you (what you indeed know already) that the record was scrutinized by several of the most experienced judge advocates of my staff, as well as by myself personally; and that, although the cases were not tried as thoroughly as they could and should have been tried, where the death penalty was involved, nevertheless no reversible error was found and there was no doubt of the facts in either case. The only issue in this case was the severity of the sentence, as above mentioned.

These illustrations must suffice for the present to show how unreliable have been the public citations of individual cases of supposed injustice. What the source of information has been for each of these cases I am not aware. But I believe that I am justified in assuring you that it would be a mistake for the intelligent public to assume, when an individual case of supposed injustice is cited, that there is necessarily any ground for believing that injustice has been done. The information seems to have come from such partisan sources, and there are so many hundreds, that it is natural to find the details gradually altering themselves, in transmission, so that the case as stated becomes one of obvious injustice, and yet the case in its actual facts was nothing of the kind. How unreliable are these citations of supposed cases of injustice can be seen in the circumstances that out of the several scores of cases recently cited in a speech on the floor of the House (Cong. Rec., Feb. 22, p. 4640) and cited with the detail of general court-martial number and place of trial and name, it has thus far proved impossible to find and identify more than a small fraction of the cases in the records of this office owing to errors in the citations.

I must, therefore, so far as individual cases are concerned, content myself with giving you the assurance first that this office is ready and anxious to investigate and supply full explanation for every case that can be identified; and, secondly, that so far as such investigation has thus far been able to be made the cases, with few exceptions, reveal that they merited no such public statement.

What is really at issue, however, is the general state of things in the administration of military justice; i. e., whether there do exist specific shortcomings of law or of method which in themselves permit and have permitted the doing of injustice in any appreciable fraction of cases. It is to that real issue that I now address myself.

(II) *General principles and methods in military justice.*—Assembling the various criticisms of a general nature they seem to be reducible to the following heads:

1. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the Criminal Code, but is according to the arbitrary discretion of the commanding officer in each case.

2. That the military Criminal Code itself is not modern and enlightened, but is an archaic code which systematically belongs to medieval times.

3. That a soldier may be put on trial by a commanding officer's arbitrary discretion without any preliminary inquiry into the probability of the charge.

4. That commanding officers do thus put on trial a needlessly large number of trivial charges.

5. That the court-martial is composed of and the defense is conducted by men not acquainted with military law.

6. That the judge advocate combines incongruously the functions of prosecutor, judicial adviser of the court, and defender of the accused.

7. That second lieutenants "knowing nothing of law and less than nothing of court-martial procedure" are assigned to the defense of "enlisted men charged with capital or other most serious offenses."

8. That a plea of guilty is received from an accused on a charge for which the sentence of death may be imposed.

9. That commanding generals, as reviewing authorities, send back for reconsideration judgments of acquittal.

10. That the judgment of the court is kept secret until after the action of the reviewing authority is taken, even when the initial judgment is an acquittal.

11. That the sentences imposed by courts-martial are as a rule excessively severe.

12. That the sentences imposed by courts-martial are variable for the same offense.

13. That the Judge Advocate General's office either partakes in the attitude of severity or makes no attempt to check it by revisory action.

14. That the action taken in the Judge Advocate General's office is ineffectual to enforce military law and procedure, because its rulings do not have the force of a Supreme Court mandate, but are only recommendatory, and are either ignored by the division commanders or vetoed by the Chief of Staff.

I will now take up these assertions briefly in succession.

1. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the Criminal Code, but is according to the arbitrary discretion of the commanding officer in each case.

The complete refutation of this assertion will appear very plainly in the answers to the other specific criticisms, which are merely details of this general charge; but in order to gather the full force of the answers which will be made to those more specific criticisms it is necessary to keep in mind the general structure and machinery of the military courts. It may be supposed that the intelligent public in general is not aware of their essentially legal nature and procedure. The public impression perhaps has been gained that there is substantial correctness in the language of one of the Members of Congress:

"The records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice; we have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer."

As a concrete demonstration of the incorrectness of this assertion, the facts, later to be cited, taken directly from the records of courts-martial appealed to by the critic, must suffice as a principal refutation.

And yet the critic's remarks call for more than the citation of concrete facts to the contrary.. The substance of my counterassertion is that although the theory of military justice does differ slightly from the theory of civil justice. yet in substance and in practice both of them, in our inherited Anglo-American system, are fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law.

The only kernel of correctness in the abstract statement made in Congress is that the theory of military justice is in its general purpose somewhat different from the theory of civilian criminal justice. The contrast of theory between the two is well set forth in a statement of Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War. He says:

"The object of civil law is to secure to every human in a community the maximum of liberty, security, and happiness, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation."

This definition of Gen. Sherman shows that the objects to be attained are different, in that military justice aims to make the man a better soldier or to eliminate him from the military organization if he can not be improved, while civilian justice looks to the ultimate protection of the community at large.

But, once this difference of theory and purpose is conceded, the two systems proceed in identical method, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand, and the inflexible rigor of automatic penalties on the other hand.

The former end is obtained by a system of courts, procedure, and definition of offenses which contains the counterpart of civil justice in virtually every respect; and the latter aim, viz, to protect the offender from the harsh consequence of rigid penalties, is secured by the method of indeterminate sentences for virtually all military sentences. In a few words, let me set forth the way in which this system operates.

The system of courts, procedure, and defined offenses is one of law and order and not one of arbitrary discretion of the commanding officer. The proceedings follow the fundamentals of our criminal common law—the accused has his challenges; he may have process for his witnesses; he has counsel without cost, either selected by himself or assigned by the proper authority; he is not compelled to testify against himself; he is furnished on request a copy of the testimony and proceedings. The proceedings are so conducted as to preserve for scrutiny of a superior authority every point of law that can be raised for the protection of the accused. This record of proceedings goes up to the reviewing authority and then to the Judge Advocate General. The Judge Advocate General's rulings on revision represent all those legal principles which are required by law and regulations to be observed. How completely legalistic

is this scrutiny of the trial record can best be shown by reproducing here from Form No. 16 the fundamental points to be observed in every general court-martial trial before it receives approval in the Judge Advocate General's Office. This form is known as Form No. 16, and upon the initial examination of the record these questions must all be answered, before sending the case to the Chief of the Division of Military Justice:

Was court ordered by proper authority?

Are all orders showing membership of court properly entered in record?

Does record show place, date, and hour court convened?

Are all members of court, judge advocate, and assistant judge advocate accounted for as present or absent?

Was accused given opportunity to introduce counsel?

Was reporter sworn?

Was interpreter sworn?

Was accused extended right of challenge as to each member of court?

Was action of court upon challenges regular and properly taken?

Was the court sworn?

Was the judge advocate sworn?

Was the assistant judge advocate sworn?

Was the accused properly arraigned?

Are charges and specifications and name of officer signing charges copied into record?

Was the trial within statute of limitations?

Are pleas of accused regularly entered?

Were the witnesses sworn?

Are the findings properly entered?

Is the record properly authenticated?

Is the action of reviewing authority properly entered in record and signed?

In case of adjournment or continuance, are each day's proceedings properly signed by judge advocate?

After each adjournment during trial is presence or absence of members of court, judge advocate, assistant judge advocate, accused, his counsel, and reporter properly accounted for?

Did all members who participated in proceedings in revision vote on original findings and sentence?

Were pleas of guilty properly explained by president of the court?

Were rights of accused as a witness properly extended and explained?

Does each specification state an offense under the Articles of War?

Are the findings legal?

Is the sentence legal?

Does the evidence sustain the findings of the court?

Is the action of the reviewing authority legal and properly taken?

Does any ruling of the court on the admission of evidence or other matters affect the substantial rights of accused?

Did the court have jurisdiction of person and offense?

Such are the fundamental points of law which must first be verified before the record proceeds further in the office. But this is only the beginning of the scrutiny. The Office of the Judge Advocate General in the Division of Military Justice is divided into several sections according to the nature of the sentence imposed, viz., disciplinary barracks cases, retained in service cases, penitentiary cases, death and dismissal of officers cases. In the first two branches, including the minor sentences, the case is initially verified and approved or disapproved by one officer; the allotted number during the greater part of 1918 was 10 majors in this branch; the record then goes to the chief of the section. Thus two officers under the Judge Advocate General must pass upon cases of this class. The same is true of the section dealing with sentences not including dishonorable discharge (retained in service). In both these classes of cases written opinions are prepared only where the cases involve some new or important point of law or some serious irregularity or an unduly severe sentence. In the third section, that of penitentiary cases, to which six majors are allotted, the written opinion is required in every case; one officer prepares this opinion, and it then passes to the chief of the section for his approval; if both officers approve, it then passes to the board of review, consisting of three other officers, acting as an appellate court, each of whom must concur in approval of the opinion (or note his dissent) before the opinion is transmitted to the Chief of the Division of Military Justice; finally, the opinion must be approved by the chief of that division. Thus, for cases

of penitentiary sentences, six officers must have scrutinized the case and concurred in or dissented from the final opinion before its submission for signature to the Judge Advocate General. In the fourth section, dealing with cases where the sentence is death or (for an officer) dismissal, again a written opinion is required in every case, and in this instance the chief of the section, upon receiving that opinion, assigns it to a second officer, who makes an independent examination and review; if the second officer concurs in the first opinion, the chief of the section may then approve it and send it further upward; but if the second officer does not concur, the case is handed to a third officer for examination; not until two officers concur in an opinion does the chief of the section accept it and approve it and send it onward; it then arrives at the board of review, where each of the three officers on the board of review must concur in the final opinion; it then goes in to the Chief of the Military Justice Division for his sanction. Subject to office changes in procedure from time to time, the foregoing is substantially the course of examination of court-martial cases which has been in vogue heretofore in my office. Thus in these most serious cases seven officers must have passed upon the case before it arrives finally for the signature of the Judge Advocate General. Moreover, the board of review is a double one, like some appellate courts, having two branches, each composed of three officers; during the past six months or more these six officers represent one former chief justice of a State supreme court (who resigned his office to become judge advocate), one former justice of nine years' incumbency on the Philippine Island Supreme Court, two professors of criminal law from leading universities, who have been between 15 and 20 years at the bar, and two other eminent practitioners of equal or longer legal experience before their appointment as judge advocates. It may be safely asserted that in no State of the Union is any more thorough scrutiny given to the record of a criminal case than is given in my office, and that in most State supreme courts the scrutiny does not approach in thoroughness the methods here employed.

Moreover, it should also be kept in mind that the accused under the system of military justice enjoys an advantage which does not exist in civil justice, viz, the automatic appellate examination of every serious case. In civil justice there is no appellate or revisory action unless the accused has the moral aggressiveness to insist upon it, and possesses the money (or the friends who will contribute the money) to print the record of the case and to retain counsel who will argue the case on appeal. But every soldier is assured not only of an automatic appeal, as a safeguard against illegal or unfair condemnation, but also of a double appeal in serious cases. The proceedings (except in case of inferior courts, corresponding to petty police courts, and having power to impose only short sentences of imprisonment) are taken down verbatim, and every word of the testimony, every ruling of the court, and every claim of counsel is submitted, first, to the reviewing authority in the field. This authority is the commanding general who appointed the court and who in all serious cases (practices vary somewhat in the different divisions) submits the case to the judge advocate of the division for a quasi judicial opinion. This judge advocate, having the rank of a major or lieutenant colonel, has been, since September, 1917, in almost every instance a lawyer fresh from civil life, chosen for his high standing, and imbued with the standards and traditions of civil practice rather than those of the Regular Army; hence, likely to give fully as careful scrutiny as a civilian judge would give. If the reviewing authority approves the judgment, it then goes on, if a general court-martial case, to the Judge Advocate General at Washington for the second appellate scrutiny (if in France, to the Paris branch office of the Judge Advocate General's Office); the method of scrutiny in this office has been above described. It goes finally to the Judge Advocate General or to the senior officer acting as Judge Advocate General for military justice, who appends his signature if satisfied. Every general court-martial case thus obtains thorough scrutiny in two separate stages.

Putting together these features of the automatic appeal and the thorough scrutiny of all general court-martial cases by at least three superior officers, and in some classes of cases by eight superior officers, before final disposal, it is believed that no such guaranties for the protection of the accused, in the scrutiny of the trial courts' judgment in criminal cases, exist in any civilian system in the United States. I take consolation in believing that if the public at large and particularly the families of those men who have been subjected to military discipline during the past two years could realize the

thoroughness of this system they would feel entirely satisfied that the system is calculated in its method to secure ultimate justice for every man; and that the instances where this result is not obtained must be exceptional only. In the foregoing description I have tried to make it possible for the intelligent civilian to visualize the military procedure as it really is, and not as it exists in the fervid imagination of those who do not know it and have never tried to understand it.

The other chief stage in military justice, viz, the stage of the serving of the sentence, has for its aim, as already stated, to protect the offender from the harsh or unequal consequences of a rigid system of penalties. It attains this end by a method of indeterminate (or probationary) sentences. It is not generally known, I presume, that the only War Department prisons to-day in the United States are the three so-called Disciplinary Barracks, viz, at Fort Leavenworth, Kans., at Fort Jay, Governors Island, N. Y., and at Alcatraz, San Francisco, in which are served substantially all sentences of imprisonment for military offenses other than the short terms (less than six months) served in the camp guardhouse. In these disciplinary barracks every sentence is indeterminate as to its minimum, i. e., virtually a probationary sentence for every man whose offense is not so heinous as to require immediate separation from the Army. Speaking generally, soldiers convicted of purely military offenses, i. e., desertion, mutiny, absence without leave, disobedience to officers, assaulting and officer, etc., are sent to these barracks; the penitentiary being used (except in rare and heinous cases) only for those offenses involving murder, forgery, embezzlement, or other civil crimes. The indeterminate or probationary sentence having no minimum, only a maximum, the confinement may be terminated at any time, and the offender (except in the unusual case where a sentence of dishonorable discharge has not been suspended) may be restored to duty in the Army whenever his record of intelligence and good conduct justifies the commandant of the disciplinary barracks in so recommending; and hundreds, if not thousands, of offenders have been so restored since the beginning of the war.

I can not forbear, at this moment, to cite as an illustration an incident recently told by the commandant of the Fort Leavenworth Barracks, while attending the conference lately held in your office on prison discipline. He cited the case of an enlisted man who had been sentenced to two years for desertion. Arriving at the disciplinary barracks on March 8, 1916, he soon acknowledged the error of his former conduct, went into the disciplinary battalion, and was restored to duty within nine months; was assigned to the Sixty-fourth Infantry at El Paso, became successively corporal, battalion sergeant major, and regimental sergeant major; landed in France March 15, 1918; anxious to get into the fighting, he began again, at his own request, at the bottom, as private in another unit; was made sergeant and fought at Chateau-Thierry in July, 1918; was sent to an officers' training camp, commissioned as second lieutenant on October 1, 1918, was promoted to first lieutenant on October 28, and ended on armistice day in command of Company L, One hundred and thirty-eigth Infantry. He wrote to the commandant a few months ago, recounting his history, and ending thus: "There is only one question which I have to ask: Do you consider that I have made a success?" And yet the entire period of time which had elapsed since his original sentence was less than three years. In other words, though sentenced for a period of two years, he had been released from confinement, restored to duty, and traveled up through the grades of noncommissioned offier and had earned promotion through two grades of the commissioned officer, and occupied an honorable status in the Army, within a few months after the nominal period of his original sentence had expired.

This incident illustrates somewhat prematurely what I shall have later to say about the length of some of these apparently severe sentences. But the incident here illustrates what I am concerned to emphasize, viz., that military justice possesses in its indeterminate sentence and its probationary methods a system that is in advance of that of probably any State of the Union. I am given to believe that very few of our States yet possess a law authorizing this indeterminate sentence with no minimum. Our disciplinary barracks should indeed be thought of as a reform school, rather than a prison; it corresponds to the term "industrial school" as used in some States. And I need hardly point out that the disciplinary barracks at Fort Leavenworth are totally distinct from the United States Penitentiary at Leavenworth. And I remember that you yourself recently stated informally at the above mentioned

conference of officials that in your opinion the disciplinary barracks at Fort Leavenworth was the best penal institution in the United States. Without claiming any personal credit for its excellent administration, I must here, as some sort of proof of my own deep and long-standing interest in enlightened military justice, take the liberty of reminding you that the probationary system, as exemplified at the disciplinary barracks, was initiated in 1913, on my own personal recommendation, two years after my first appointment as Judge Advocate General; and that the act of March 4, 1915, which transformed the formerly so-called United States military prison at Fort Leavenworth into the United States disciplinary barracks, and organized the modern system of probationary detention for military offenders, was drafted at my instance. Space does not permit me to describe more fully its methods of vocational training and of psychological and psychiatric study and attention given to all prisoners there confined. I will only mention that Maj. King, now Lieut. Col. King, who was for a long time stationed at the Fort Leavenworth barracks, and whose genius I encouraged and supported in applying his practical methods, is an officer of the Regular Army of the United States; and that the elaborate psychiatric attention given to military offenders sent there for detention is not paralleled, so far as I am aware, in any of the civilian penitentiaries now administered by the Federal Government, nor at most of the State penitentiaries.

This much ought in justice to be placed here on record, as information doubtless new to the intelligent American public, and yet calculated to assist in maintaining that public confidence in the military penal system to which it is justly entitled.

2. That the Military Criminal Code itself is not modern and enlightened, but is an archaic code which systematically belongs to medieval times.

Of this statement I can only remark that it is baseless. Those who have ignorantly repeated the statement may be perhaps extenuated for this utterance to the American people of a gross slander, not only upon the War Department and the military system, but also upon the Congress which so conscientiously revised the military code in 1916. But though extenuated they can not be exonerated; for the entire story, so plain that anyone can read, is contained in the introductory six pages to the Manual for Courts-Martial published in November, 1916, and printed with every one of the 250,000 copies that have been issued since that date. Those introductory pages state the entire history of the Articles of War, or Military Code; explain the revision of 1874, and enumerate the most fundamental of the charges introduced in the thorough revision of 1916. That introduction, however, does not state, and I will now add, that the revision of 1916 was pending in draft for four years before the Houses of Congress; that the draft was prepared in my office shortly after my appointment as Judge Advocate General; that it was founded on the most exhaustive consideration of the entire military code, as well as on a thorough comparison with the modern criminal law and its progressive tendencies; and that the hearings before the Military Affairs Committee (S. Rept. 229, 63d Cong., 2d sess., Feb. 6, 1914) showed the most conscientious discrimination of every detail; and that the testimony fills a volume of 146 pages.

The military criminal code of 1916 no more deserves the term "archaic" than the Revised Statutes of the United States under which the Federal courts since 1878 administered civil justice; and it is nearly 40 years later than the civil Revised Statutes. It represents the result of the most conscientious and constructive thought which could be brought to bear by the combined energies of the War Department and of the Congress of the United States in the year 1916.

That the experiences of this great war, with all its novel conditions, multiplying forty-fold the size of our military forces should have revealed nothing in the way of new lessons for improvement, is not for a moment to be asserted. In the light of that experience, which subjected the military code to a tremendous and unprecedented test, I readily admit that certain improvements, limited in number, have been demonstrated to be worth while introducing, and I shall conclude this letter with a suggestion of those improvements. But the statement repeatedly made, and published far and wide, that the military code of 1916 is "an archaic code which systematically belongs to medieval times" and does not "belong to this modern enlightened period," but rather "to the England of 200 years ago, whose criminal code of that time was marked by civil harshness and brutality," is not only a cruel and dangerous

slander, but is nothing less than a reflection upon the Congress which so conscientiously consummated that great task.

3. That a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge.

Every system of penal justice has some method of insuring the exercise of caution by a responsible officer in scrutinizing an accusation before an accused is put to the necessity of defending himself by a formal trial. The traditional method inherited by us, in civilian justice, for serious offenses, is the presentment of a grand jury. This method has now proved cumbrous and ineffective; it has been abandoned in perhaps a majority of our States. The modern method of those States is a so-called information by the official State prosecutor, filed after such inquiry as he sees fit to make. This modern American method is the one to which France and other continental nations arrived some centuries ago, about the time when England developed the grand jury instead. This modern American method is also the one used in our courts-martial; it arrived in the Anglo-American military system some centuries ago, said to be by adoption from Scotland, which itself had adopted the French system; for the French were the great military nation of three centuries ago.

By this Anglo-American military system, some officer must file charges before any soldier can be tried. This protection is invariable. Often the judge advocate, as legal adviser, additionally scrutinizes a serious charge before it is filed. This is exactly the protection given by the State official prosecutor in the modern American method. How essential and thorough is this protection can only be appreciated by perusing the strict terms of the law and regulations. Paragraph 62 of the Manual of Courts-Martial reads:

"By the usage of the service all military charges should be formally preferred by—that is, authenticted by the signature of—a commissioned officer."

Paragraph 75 reads:

"*Submission of charges.*—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

"(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

"(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of any offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

"They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require."

Paragraph 76 proceeds:

"*Investigation of charges.*—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself, or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority the commanding officer will include: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken."

It will, therefore, be seen that the regulations require the strictest scrutiny by a responsible officer before any accused can be put on trial by a court-martial.

In one of the speeches uttered in Congress, occurs the following sentence:

"The commanding officer may, without any investigation of the circumstances, order a man tried by court-martial; in the French Army such cases are not sent to trial until investigation can determine whether the man ought to be tried."

How is it possible for such an assertion to be made, in the face of the law and regulations represented in the quotation above from paragraph 76 of the manual? The safeguard contained in our manual of military justice stands on exactly the same footing with the safeguard contained in the modern method of the State prosecutor, and of the French system as cited by the critics.

But whatever may be the law and the regulations, doubtless it may be asserted that the regulations are not obeyed in spirit. This is, in fact, the precise assertion made in one of the congressional utterances and to that assertion I now come.

4. That commanding officers do thus put on trial a needlessly large number of trivial charges.

It has been asserted that commanding officers direct the filing of trivial charges in excessively large numbers. The precise language is: "It is not surprising, under the circumstances, that there are too many trivial cases sent to trial by court-martial."

Let us examine this assertion in the light of the facts of military justice during the past year as shown by the records.

The United States military forces raised up to November 11, 1918, numbered some 4,186,000; of these about 290,000 were already in service at the opening of the war, of whom 127,000 were in the Regular Army. Thus over 90 per cent were new men, fresh from civilian life. It must be taken for certain that their unfamiliarity with military discipline and the novelty of its rigid restraints would produce an unusual proportion of minor breaches of discipline. In other words, if commanding officers had been merely as strict and rigorous as with the Regular Army before the war in pursuing minor breaches of discipline with court-martial charges, the ratio of trials would be at least as great and presumably far greater than before the war and the accession of the new army.

But the facts show, on the contrary, that commanding officers must have been far less strict and rigorous than before.

Let us take first the serious charges brought before general courts-martial. The printed report of the Judge Advocate General for the fiscal year 1918 shows that the total number of general court-martial trials in the Regular Army of 127,000 in the year ending June, 1917, was 6,200, or about one for every 20 men, while the total in the entire Army for the year ending June, 1918, was less than 12,000, or one for every 200 men (the military forces on May 31 numbering 2,415,000 and the average for the year not being ascertainable with accuracy); and during the last six months of 1918 the total was 7,624, or at the rate per annum of only one for every 275 men (the military forces on November 11, 1918, numbering 4,185,000). As to special courts-martial, for the lesser offenses, the number in the Regular Army for the year ending June, 1917, was 2,970, or one for every 42 men, while for the year ending June, 1918, it was 14,700, or only one for every 165 men on the above annual basis. Moreover, as between the Regular Army and National Guard and the National Army, or new drafted men, the number of general courts-martial for the year ending June, 1918, was 10,363 for the former and only 1,660 for the latter, or one for every 107 men in the Regular Army and National Guard (numbering on May 31, 1918, some 1,112,000, and composed in part of seasoned men), but only one in every 785 men for the National Army (numbering on May 31, 1918, some 1,303,000, and composed entirely of new drafted men), showing conclusively that commanding officers were more lenient and liberal with the men fresh from civilian life.

Turning now to the "trivial offenses" referred to in the above utterance, they are covered by the summary courts-martial, representing the extremely petty disciplinary penalties. The number of trials for the Regular Army, viz, 48,000 in 1917 (rising from an average of 38,000 for 10 years past, due to a proportionate increase in the size of the Regular Army), rose in the year ending June, 1918, to only 212,000, or slightly more than four times the number, although the entire military forces in the year ending June, 1918, rose to

2,415,000, or nineteen times the former size. In short, the petty disciplinary penalties dropped from a ratio of 1 to each 2.7 men to a ratio of 1 to each 11.4 men, or a decrease for 1918 to less than one-quarter of that of 1917.

There could be no more conclusive demonstration that commanding officers though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did in fact use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial. The facts show, therefore, precisely the opposite of the conditions asserted on the floor of Congress.

5. That the court-martial is composed of and the defense is conducted by men not acquainted with military law.

It would, perhaps, be sufficient in refuting this criticism to point out that the court-martial, though it nominally combines in itself the functions of judge and jury, and though this combination is under military conditions absolutely unavoidable, has, nevertheless, as its essential and predominating function, that of a jury of fact. The court-martial listens to the testimony and makes findings of fact based upon the evidence. In our criminal common law it has always been regarded as a disadvantage that the jury should be technically skilled in the law; and it is a well-known practice of all experienced defenders in criminal cases to challenge and exclude from the jury members of the bar. Whether this belief is a sound one, I do not pretend to say; I only point out that the possession of legal knowledge by the jury is at least not considered vital in ordinary civil justice. In the practice of military justice the legal knowledge necessary to insure an obedience to the requirements of law as to the composition of court, the procedure, and the definition of the offenses charged is expected to be supplied primarily by the commissioned judge advocate, who acts as the judicial adviser of the reviewing authority. And the thorough scrutiny and review in the Office of the Judge Advocate General (a review, as already pointed out, more elaborate and thorough than is ordinarily supplied by any civil system) is especially calculated to insure an observance of all the rules of law. As the entire testimony is reported verbatim, including every point of law raised by objections of counsel, and as the application of all relevant rules of law must lie open to scrutiny on the face of the record, it is obvious that the court-martial's own lack of technical knowledge of law (in so far as it might exist in a given case) is amply made up, and more than made up, by the legal scrutiny supplied in the course of automatic appeal already described.

But in spite of these guaranties of legality for the court's action, the military system, none the less, takes all possible pains to insure an acquaintance with the law by the members of the tribunal. The entire military code, with an elaborate commentary and an appendix of forms, making a volume of 400 pages, and entitled "A Manual for Courts-Martial," is distributed in abundant quantities throughout the Army and forms a part of every military officer's education. Since 1916 more than 250,000 copies of this manual have been printed and distributed; in the month preceding the armistice in November, 1918, a new edition of 50,000 copies, revised to date, were being distributed throughout cantonments and camps in this country and to the divisions in the theater of war. Every officer of the Regular Army, during his four years in the Military Academy, must pass an examination in the course of military law. Every reserve officer who graduated from a training camp in 1917 and 1918 was equally obliged to study and pass an examination upon the Manual for Courts-Martial. Thus, a fair familiarity with the substantive and the procedural portions of military law is established as a part of every officer's military training. Moreover, the regular duties of almost every officer in active service oblige him to take his turn frequently either as a member of the court or as a judge advocate or as counsel for the defense. Thus there are probably few officers in the service who have not had a greater or less practical experience in the use of the military code, and who have not thus familiarized themselves with the operation of the system which they have already studied in the Manual for Courts-Martial.

In the closing portion of this letter I am proposing an expedient which will supply an additional guaranty of technical legal knowledge in the composition of the court in cases especially likely to involve serious, difficult, or complex questions of law. Apart from such exceptional cases I am of the firm opinion that, so far as the members of the court-martial can properly need an acquaintance with the military code they are in fact ordinarily equipped with enough of such knowledge, and that the efficacy of the guaranties for the observance of

such rules of law does not depend, in the military system, upon the extent of the court-martial's legal knowledge (for they are essentially jurors of fact), but upon the legal knowledge of the commissioned (staff) judge advocate, who advises the reviewing authority, and of the commissioned (staff) judge advocates who scrutinize the record in the office of the Judge Advocate General by way of automatic appeal.

6. That the judge advocate combines incongruously the functions of prosecutor, judicial adviser of the court, and defender of the accused.

That the position of a judge advocate is a unique one may be conceded. A precise analogy does not exist in the civil system. This is because military conditions are not identical with civil conditions. But the asserton that the judge advocate combines incongruous functions which defeat each other or substantially impair his efficacy as a guardian of the military law must be emphatically denied.

The staff judge advocate is supposed to supply the professional and technical legal knowledge that is requisite to secure the observance of the law in all stages of the trial. Essentially he is a kind of superintendent of justice. From beginning to end his duty is to prevent the occurrence of illegalities. In this respect he aids the accused quite as much as he aids the prosecution; he has no more interest in securing a conviction than in securing an acquittal. He is, by his position, as impartial as is the Comptroller of the Treasry, whose principal function is to see that no moneys are paid out except according to law, irrespective of the persons to whom they are to be paid. In practice, during the present war, a commissioned judge advocate (whose rank is never less than that of major or lieutenant colonel) is attached to the staff of each commander of a division or a department or other large organization having a separate zone of jurisdiction. After a court-martial trial is ended and when the record arrives in the hands of the commanding general as reviewing authority, the judge advocate's main function in military justice is exercised; he reviews the record and advises the commanding general whether the trial has been conducted according to law in every respect; this includes the duty to advise whether the weight of evidence sustains the conviction regardless of legal error. In this aspect he is essentially an appellate judge, and it is his duty to enforce the law as fully on behalf of the accused as on the behalf of the Government. The judge advocate thus attached to the division commander's staff has other duties of legal advice corresponding to those of the Attorney General of the United States as legal advser of the Government in all civil matters, but in military criminal justice his function is essentially judicial.

The misunderstanding which has led to the above criticism is doubtless based upon a confusion of the staff judge advocate with the trial judge advocate. The latter, who bears the same title, but who is not commissioned as a judge advocate, performs actually the duties of prosecuting attorney in an ordinary criminal case. This trial judge advocate is usually a junior officer and is detailed from any branch of the service (Infantry, Artillery, etc.), but not ordinarily from the Judge Advocate General's branch; i. e., he is not commissioned as a judge advocate, though he may have had legal experience in civil life. He is detailed anew for each separate court which may remain in session for some weeks or months. He therefore usually conducts a series of trials for a certain period in that division. But he is entirely distinct in personality from the staff judge advocate, who later acts as the judicial advisor of the reviewing authority. It may be confidently asserted that (except in a few special cases) no staff judge advocate attached as judicial advisor to the commanding general has acted during the present war as trial judge advocate (or prosecuting attorney) in a court-martial trial. The few exceptions to this statement occurred in special cases (such as the Houston riots and murders in 1917), where a staff judge advocate was specially detailed to conduct the prosecution, and where also the accused were aided by counsel consisting of specially detailed officers of high rank and legal experience or by civil counsel of their own choice, but in such case the judge advocate was brought in from a different department or division.

If this distinction be kept in mind, viz, the distinction between the staff judge advocate regularly attached as legal advisor to the staff of the reviewing authority, and the trial judge advocate specially detailed for the prosecution of general court-martial trials in the various units within the division, it will be perceived that these two functions are in practice exercised by different persons. The trial judge advocate does indeed perform the duty of prosecuting attorney; he is supposed to conduct the prosecution, not indeed with the ruth-

less partisanship frequently to be observed in civil prosecuting attorneys, yet with the thoroughness suitable to a proper performance of his duties. But the staff judge advocate, in whose hands the record of the trial subsequently arrives and who reviews the record and advises the reviewing authority as to its legality, is a different personage and is in no way hampered by having formerly acted as prosecuting attorney in the same case. Such has been the universal practice in our Army during the present war. It is believed that this plain statement of facts ought to suffice to remove that natural misapprehension which seems to have been founded on a confusion of the terms.

The necessity of furnishing some legal advice by a trained military officer on many complex aspects of law and the impracticability of allowing in the staff organization more than one officer for this purpose does indeed require the staff judge advocate occasionally to give legal advice in a composite capacity. Whether these few anomalous situations can be removed, with due regard to the necessities of military organization, is a problem that has often been discussed. On that point it is enough to say that the system which we now possess has substantially stood the test of time and experience. But so far as concerns the actual administration of military criminal justice, it ought to be plainly understood that military law does not tolerate the anomaly of expecting the same man to be both appellate judge and prosecutor, and that in the practice of the present war (as above pointed out) the trial judge advocate acting as prosecuting attorney in general courts-martial is a different person from the staff judge advocate regularly attached to the staff of the reviewing authority as a judicial officer and quasi appellate judge.

7. That second lieutenants, "knowing nothing of law and less than nothing of court-martial procedure," are assigned to the defense of "enlisted men charged with capital or other most serious offenses."

In commenting on this criticism I may dispose of one part of it, viz, the statement that these officers "know nothing of law and less than nothing of court-martial procedure," by referring to what I have already stated, namely, that graduates of every training camp have studied and passed an examination upon the Manual for Courts-Martial, and that, therefore, the above criticism is upon its face groundless. The roster of Army officers during the present war contains probably thousands of young men who have been admitted to the bar and enjoyed the benefit of a longer or shorter experience as practitioners. While no direct proof by statistics can be adduced, it is common knowledge that the commanding generals in the assignment of counsel (where the accused does not make his own selection) have usually sought to utilize the services of those officers who have already had legal experience. It would be impracticable to propose that no officer shall be assigned to the defense of an accused unless he is already qualified as a civilian lawyer. Given the composition of the officers' roster, all that can be expected under the circumstances is that commanding generals shall do their utmost to select men of those qualifications, if available within the unit; and I do not for a moment doubt that such was the constant endeavor of the appointing authorities.

The other part of this criticism is that in capital or other most serious offenses the defending counsel has been an officer of the lowest commissioned rank.

In so far as it seems to assert that the defending counsel in cases where a capital sentence was actually imposed have been second lieutenants, the complete facts could only be learned by a lengthy collation of all the records. But of the 21 records now available on file in which a capital sentence was imposed the defending counsel were as follows: In four cases a second lieutenant, in nine cases a first lieutenant, in six cases a captain (aided in three cases by a lieutenant), in one case by a chaplain, and in one case by a major.

In so far as the assertion refers, not to offenses in which a capital sentence was actually imposed, but in which the offense under the military code is liable to be punished with death, the assertion is to a large extent correct, although misleading. In time of peace all offenses (except one or two heinous ones, such as murder) are strictly limited by a small maximum period of imprisonment, which for strictly military offenses can not exceed 2½ years for ordinary desertion, and for civil offenses are graded according to the usual civil limitations, such as 10 years for burglary or manslaughter or robbery. But in time of war some military offenses may rise to a degree of danger vital to the safety of the Army, and therefore in time of war the death penalty is reserved in a number of military offenses as a possible maximum penalty. It is, I believe, a fact that the death penalty has been imposed by courts during

this war in only 96 cases, of which approximately one-half were for military offenses; and that in all of these cases the death penalty for the military offenses was subsequently commuted or remitted. But it remains true that for the principal military offenses the death penalty is expressly authorized by the Articles of War to be imposed in time of war. In thousands of such offenses the penalty actually imposed (there being no minimum prescribed by the Articles of War) has been only a few months or perhaps a few years of imprisonment. In many of those cases it is true that the defense of the accused has been conducted by officers of the rank of second lieutenants. Just what proportion of cases this represents could not be stated without a complete and special examination of the 20,000 cases of general courts-martial arising since April 6, 1917.

But, assuming that the proportion is a substantial one, I must point out that the situation existing in the camps and in the theater of war presents almost insuperable obstacles to any other practice. The number of officers available for taking part in military trials is necessarily limited, for the active duties of military preparation and operation are obviously paramount. The main object of the Army is victory, not trials. Moreover, in the composition of the court it is plain that the prime requisite is to procure for the court itself the most experienced officers of adequate rank as a guaranty for the wisdom of their judgment. Having regard for both these considerations it therefore becomes a matter of great difficulty, if not impossibility, to secure for the conduct of the defense officers of equally high rank with the court. It is not to be denied that if it were feasible in every case to assign for the defense an officer of equal rank with the senior officer sitting upon the court this would be a desirable measure. But no one who has any acquaintance at all with conditions in the theater of war could suppose for a moment that this is practicable. Even as it is the organization of courts-martial makes already a serious drain on the efficiency of the strictly combatant work of the organization. The problem is a difficult one. It may be that some means can be devised for strengthening systematically the conduct of the defense in courts-martial in respect to the rank and experience of the officers so assigned. But that under the present war conditions it was feasible to obtain officers of higher rank in any considerable number must be denied.

Moreover, it is at this point that the military system offers a guaranty (not found in the civil system) of protection against the consequences of such inadequate defenses as may from time to time be found. The system of automatic appeals, already described, and the thorough scrutiny of the record given in the Office of the Judge Advocate General may be relied upon to supply that protection which in civil courts is usually given only by the skilled scrutiny of counsel for defense in the trial. Whatever point of law might have been made for accused's benefit by counsel's objection, and has failed to be made through his ignorance, can be and is habitually detected and enforced during this appellate scrutiny. The civil doctrine of utilizing only points raised by counsel's exceptions has no place in military appellate procedure. The officers of the Judge Advocate General's Office, as already shown above, scrutinize the record and insure the observance of those fundamental rules of law which ordinarily are watched over by counsel for defense, and if such rules of law are found not to have been observed the record is disapproved for legal error, regardless of whether counsel for defense took notice of it or not. Virtually this appellate review performs over again the functions of counsel for the defense, and, not only in technical duty but in actual spirit, this appellate review seeks to make good those deficiencies of defense which may become obvious to the experienced scrutiny of the appellate officer. It is in this appellate review that I find the most satisfactory assurance that such deficiencies as may have from time to time occurred through the inexperience of officers assigned for the defense have been adequately cured.

8. That a plea of guilty is received from an accused on a charge for which the sentence of death may be imposed.

I find it difficult to give a complete statement of facts in answer to this criticism, because a complete answer would require an examination of all the 20,000 records of general courts-martial since April 6, 1917, and such a complete examination can not be made in the time allotted me.

In what proportion of cases a plea of guilty has been received, and in what fraction of that proportion this offense has been one for which the death penalty might have been imposed, although not actually imposed, is impossible to say, but I firmly believe that the percentage is a small one. The common in-

stincts of fairness and justice which form the motive for such a criticism are equally entertained by the same officers, taken recently from civilian life, who sit upon the courts as judges.

But if it be meant in the above assertion that when a plea of guilty has been received it has been customary or even frequent to forego the presentation of evidence by the prosecution, I can confidently assert that such cases have not occurred. The prosecution has seldom failed to adduce the requisite evidence: and whenever it has so failed, the reviewing authority has disapproved the record for such legal error. The Manual for Courts-Martial does not permit (except in the very minor cases) a plea of guilty to exempt a prosecutor from presenting his evidence. I quote from paragraph 154 of the Manual, page 72: it is obvious that if the injunctions of the Manual are observed (and the records show that they have been) a plea of guilty does not signify that the circumstances of the case were not thoroughly examined, with a view to ascertaining both the exact effect of the plea as well as the extenuating circumstances which might affect the sentence:

"In cases where the punishment is discretionary, a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority on the sentence. In cases where the punishment is mandatory, a full knowledge of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. The court should therefore take evidence after a plea of guilty, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea of "guilty," the witnesses may be cross-examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence and in extenuation of the offense or in mitigation of punishment. After a plea of guilty, the accused will always be given an opportunity to offer evidence in mitigation of the offense charged, if he desires to do so.

"In each case tried by a general court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification the president of the court shall explain to him as to that part:

"First. The various elements which constitute the offense charged, as set forth in Chapter XVII, defining the punitive articles of war; and

"Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

"The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear in the record. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record.

"When the accused pleads 'guilty' and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and if guilt is not conclusively admitted the court will direct the entry of a plea of 'not guilty' and proceed to try the case on the general issue thus made. The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where after a plea of guilty the accused makes a statement, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away, that he expected to return when he had earned some money, or that when arrested he was on his way back to his organization, etc, or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., the court should direct the entry of a plea of 'not guilty,' but the criminality of an intent once formed is not affected by a subsequent change of intent."

9. That commanding generals, as reviewing authorities, send back for reconsideration judgments of acquittal.

This power undoubtedly does exist; and it is occasionally exercised. But only a brief explanation will be needed to show that it by no means signifies (as the criticism would imply) a subjection of the accused to injustice by placing the arbitrary discretion of the comamnding officer outside and above the guaranties of lawful procedure.

The reviewing authority, i. e., ordinarily the commanding general who has convened the court, represents essentially a first appellate stage. No sentence of court-martial can be carried into execution until it has been approved by the reviewing authority, i. e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law, and to surround the accused with an additional protection independent of the trial court. This power to approve or disapprove a finding is given great flexibility by the articles of war; it includes the power to approve a finding of guilty of a lesser offense and the power to approve or disapprove the whole or any part of the sentence. In this respect the military appellate code differs from the usual civil code. Incidentally, this power to disapprove includes the power to disapprove a sentence of acquittal and to return the record for reconsideration by the court. But, intrinsically, nothing more is here implied than the court is to reconvene and reconsider its judgment freely and independently. It is in no sense a measure which subjects the court-martial to the command of the reviewing authority in framing the tenor of its judgment upon such reconsideration; for the court is, under the law, entirely at liberty to adhere to its original decision.

That this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to an abuse of the commanding general's military prestige, will, I think, appear from the figures to be gathered from the records. In the first place, the power is exercised in the vast majority of cases solely for the purpose of making formal corrections of the record; for example, to enable the fact to be shown, if it was a fact, that a certain member of the court was present or was qualified or that a witness was sworn, or the like formal correction which will make the record of the trial correspond to the facts. In the second place, the exercise of the power in cases of an initial judgment of acquittal has been rare indeed; and in those few cases the trial court, far from exhibiting a supple obedience to the supposed hint of the commanding officer has, in the great majority of cases, adhered to its original judgment.

For the purpose of ascertaining the facts an examination was recently made in my office of 1,000 cases (taking the first thousand as they came in the files) thus returned by reviewing authorities to trial courts for revision. Out of these 1,000 cases the instances in which the original judgment was one of acquittal numbered 95. Of these 95 acquittals, 39 were returned only for formal corrections. Of the remaining 56, the court adhered to its original acquittal in 38 cases; and in only 18 cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty of any offense. It seems plain, therefore, that in no appreciable number of cases has the exercise of this power resulted in a change of verdict upon reconsideration; and it would be going further than any natural presumption would permit us, if we were to infer that those changes involved substantial injustice to the accused. My own experience in the field can recall more than one case in which the verdict of acquittal was notoriously unsound, and in which the action of the commanding general in returning the case furnished a needed opportunity for doing full justice in the case.

But even though the power is a useful one, and even though the facts show that it is seldom exercised in cases permitting an inference that possible injustice was done, and even though the facts demonstrate that the power does not necessarily signify a subjection of the court-martial to the will of the commanding general, nevertheless it can not be denied that the practice differs radically from the traditions of civil justice. Whether the practice in civil justice is not too scrupulous in favor of the accused, and whether the future may not rather witness some change of civil practice in the direction of the traditional military practice, I will not attempt to say. But the present military practice is one which on first impression is repugnant to the accustomed methods in civil trials, and for that reason I am ready to concede that the time has come to approximate the two methods. In the British system that change was made some years before the onset of the present war. I am ready to recommend a similar change in our own practice. Although the power is a useful one, nevertheless, on the other hand, it does not appear that it is a necessary or fundamental one to the maintenance of military discipline; and in that situation the solution may well be to assimilate the practice as nearly as may be to the usual civil practice. This would mean that wherever the initial judgment is one of acquittal (either of the whole offense or of any particular charge), the reviewing authority should

not have power to disapprove the finding of not guilty; and that, for the same reason, the reviewing authority should not have the power to revise a sentence upward.

10. That the judgment of the court is kept secret until after the action of the reviewing authority is taken, even when the initial judgment is an acquittal.

It is obvious that the rule upon which this criticism is founded is a natural consequence of the rule just commented upon, viz, that commanding generals as reviewing authorities may send back cases for reconsideration by the court even after a judgment of acquittal. If the initial judgment of the trial court is subject to change by the reviewing authority, it is obvious that its tenor should not be disclosed until after the reviewing authority has acted and has so notified the trial court. If, therefore, the above rule is to be changed, it would follow that the present rule should also be changed, for the one depends naturally upon the other. In view of what has been said above as to the proposed alteration of the rule permitting the reviewing authority to correct and change a judgment of the trial court, I frankly admit that the corresponding change should be made in the present rule, and that upon a judgment of acquittal, which would therefore be final and not subject to change upon review, there is no reason why an immediate announcement should not be made, precisely as in the case of the verdict of an ordinary civil jury. I am pointing out that the rule here criticized is merely a corollary of the other rule, and that its maintenance under the system hitherto in force has therefore not been subject to criticism.

11. That the sentences imposed by courts-martial are, as a rule, excessively severe.

In considering the severity of sentences (and this topic has been the main theme of the criticisms uttered on the floor of Congress) I must make my comments in the following order:

(*a*) The sentences as they have actually been imposed;

(*b*) The reasons for those sentences; and

(*c*) The measures now taken to give proper mitigation or remission of sentences.

(*a*) In considering the severity of sentences, it is, of course, necessary to examine separately the different offenses, since obviously the appropriate punishment varies widely for offenses of different moral culpability and different danger to military discipline. Space does not permit me here to set forth the facts for all of the offenses and sentences covered by the general courts-martial since April 6.

I handed to you on February 12 a complete table of data as to the length of sentences for the period October, 1917, to September, 1918, covering the nine principal military offenses of desertion, absence without leave, sleeping on post, assaulting an officer or a noncommissioned officer, disobeying an officer or a noncommissioned officer, mutiny, and disobeying a general order or regulation. As this table is too lengthy for inclusion in this letter, I shall content myself by taking the three most typical offenses: Desertion, absence without leave, and disobeying an officer.

(1) *Desertion.*—No one can approach the subject of sentences for desertion in time of war without keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes, acting assistant provost marshal general for Illinois, as set forth in his report printed in the report of the Provost Marshal General for the Civil War (Pt. II, p. 29). In impressive language he lays the following injunction upon us:

"Incalculable evil has resulted from the clemency of the Government toward deserters. By a merciful severity at the commencement of the war the mischief might have been nipped in the bud, and the crime of desertion could never have reached the gigantic proportions which it attained before the close of the conflict. The people were then ardent and enthusiastic in their loyalty, and would have cheerfully and cordially assented to any measures deemed necessary to the strength and integrity of the Army. They had heard of the 'rules and articles of war,' and were fully prepared to see * * * that deserters from the Army would be remorselessly arrested, tried by court-martial, and, if guilty, be forthwith shot to death with musketry.

"This was unquestionably the almost universal attitude of the public mind when hostilities began, and the just expectations of the people should not have been disappointed. Arrest, trial, and execution should have been the short, sharp, and decisive fate of the first deserters. * * * The Government was far behind the people in this matter, and so continued, until long and certain impunity had thrown such swarms of deserters and desperadoes into every

State that it was then too late to avert the calamity. * * * I state these things so that, if we have another war the Government may start right * * * put deserters to death, enforce military law, strike hard blows at the outset, tone up the national mind at once to a realization that war is war; and be sure that such a policy will be indorsed and sustained by the people.

"There are other suggestions to be made in respect to deserters, but the one I have already advanced—the nonindorsement of the penalties provided by the military code for the crime of desertion, especially at the beginning—is, beyond all question, the grand fundamental cause of the unparalleled increase of that crime, and of the inability of district provost marshals, with their whole force of special agents and detectives, to rid the country of deserters."

This solemn warning was naturally in our minds at the opening of the present war. But, in spite of its urgency, it was decided to exhibit our faith in the American people, and to place our trust in that loyalty and devotion to duty which we felt sure would characterize the vast majority of to-day's young American manhood. We believed that the "short, sharp, and decisive fate of the first deserters" should not be the extreme penalty as urged by Gen. Oakes. And the view was generally accepted in the Army that terms of imprisonment should be ordinarily deemed the adequate repressive measure for the few who might need it. And it is a fact that of the (approximately) 3,000 convictions for desertion during the war the sentence of death was imposed in only 24 cases, and in every such case it was commuted or remitted.

It must, therefore, be kept in mind at the outset that the refusal to adopt the policy of death sentences for desertion was in itself a repudiation of the policy of extreme severity; and that the practice of limiting desertion sentences to terms of imprisonment is in itself the adoption of a policy of leniency. Reproach for severity must deal with the fact that the policy adopted disregarded both the extreme penalty authorized by Congress and the warnings of the Civil War.

Turning, then, to the recorded facts, we find in the table that the total number of convictions for desertions for the year October, 1917–September, 1918, was 2,025; that the average sentence was 7.58 years; that nearly 24 per cent of these sentences were for less than 2 years; that 64 per cent were for less than 10 years; and that only 35.90 per cent were for a greater period than 10 years. The Article of War reads:

"Any person who deserts shall, if the offense be committed in time of war, suffer death, or such other punishment as the court-martial may direct."

It would seem, therefore, that in point of severity the result of courts-martial sentences for desertion can not be charged with erring on the side of severity.

You will notice that I do not here attempt to account for the justice of individual cases. Certain of the sentences for 25 years, or even for lesser periods, are open to criticism as excessively severe under the circumstances of the individual case. But it must be kept in mind that these trials and sentences were found legally valid by the Judge Advocate General's Office; that the only issue of doubt that could arise concerns the quantum of the sentence; and that the scrutiny of the clemency section in the Military Justice Division of the office may be relied upon to detect cases of excessive severity before any excessive portion of such a sentence has been served. But the excessive severity of an individual sentence is not the question here; that question would call for the scrutiny of the particular case. The question here is of general conditions. What the above figures show in respect to general conditions, or the trend of conditions, is that the practice has been one of relatively moderate penalties instead of the severest one permissible under the law.

(2) *Absence without leave.*—Absence without leave is an offense which represents, in many instances, cases of actual desertion; but, owing to the movements of the military unit and thus the difficulty of obtaining the necessary technical proof, the actual deserter is frequently convicted of no more than an absence without leave. It is, therefore, plain that the offense of absence without leave may, upon its circumstances, merit an extremely severe penalty, equal to that of desertion. In time of war this offense may lawfully be punished by any penalty short of death; in time of peace a presidential order limits the maximum penalty of six months' confinement.

For the year ending September, 1918, the total convictions for this offense number 3,362; the average sentence was 1.59 years (or only three times the small maximum allowed in peace times); 11 per cent of the offense received no penalty of imprisonment; 67 per cent received a sentence of less than two

years' imprisonment; and only 22 per cent received a penalty of more than two years in prison. When it is remembered, as above pointed out, that this offense is in many cases virtually the offense of an actual deserter, it will be seen that the number of the sentences over two years is not disproportionate to the probable ratio of cases individually calling for the higher penalties. An average sentence of 1.59 years for this offense, committed in time of war, can not be deemed an exhibition of severity, where in fact the act of Congress establishing the Articles of War leaves the court-martial absolutely untrammeled (short of the death sentence) in the penalty to be fixed to this offense.

(3) *Disobeying an officer.*—The offense of disobeying a superior officer is punishable, under the Articles of War, by "death or such other punishment as the court-martial may direct." The total number of convictions for this offense was 785; the average sentence was for 4.34 years; 6 per cent of offenses were punished by no imprisonment; 43.69 were punished by confinement of less than 2 years; and a trifle over 50 per cent were punished by some period greater than 2 years, there being one death sentence and 18 sentences for 25 years or more. Comparing the absolutely unlimited nature of the punishment permitted by the Articles of War to be imposed by the court-martial, and observing that 50 per cent of these sentences were for periods of under 2 years, it can not be that the tribunals appear to be seeking to exercise the maximum of severity allowable, but rather the contrary.

Moreover, interpreting these sentences for the offense of disobedience of an officer, it is worth while to remind the civilian public that little or nothing turns upon the nature of the command itself which is disobeyed. Much has been made in public discussion of one or two instances in which the subject of command was apparently of trivial consequence; for example, a command to an enlisted man to give up some tobacco unlawfully in his possession, or a command to clean a gun. But in military life, obviously it is not the thing commanded that is material; it is the act of deliberate disobedience. Deliberate disobedience in one thing, if unchecked, means deliberate disobedience in any and all things. It was a condition of deliberate disobedience, in small and great things alike, which caused the Russian Army to melt away and transformed Russia into the home of Bolshevism. The military officer does not rule by violence, but by moral sway. He is able to organize his men upon the battle field only because he can be confident that every command of his in matters great or small will result in instant and unquestioned obedience. Hence, an act of military disobedience is a symptom as alarming to the military commander as is the first incipient cancer cell to the surgeon—a warning that the knife must soon be applied. The War Department must invoke and expect the sympathy and support of an enlightened public in realizing that the offense of disobedience is to be ranked among the cardinal offenses of the soldier and requires the most rigid measures for its repression.

In the foregoing comments, it will be noticed that, since a charge of excessive severity implies the habitual resort to a maximum standard allowable under the law, the standard here to be taken must of necessity be the standard set by the Articles of War as adopted by the act of Congress. Judging by this standard, the practices of the court-martial, to any candid observer, must be vindicated from the charge of the habitual employment of severity; rather have they proceeded in a direction of a lenient use of their discretion.

I must freely admit that, in any discussion of the severity of sentences, notions of severity are so widely different that it will be hopeless to satisfy the standards of all varieties of critics. There exists to-day, in some minds apparently, a sentimentality toward offenders of every sort, which we could never expect to satisfy without a virtual undermining of the entire criminal law, whether military or civil. I received recently a letter, complaining of the "inhuman and outrageous punishments administered for trivial matters": this expression being used of a court-martial sentence of 10 years for conspiracy to rob. In the particular case, four soldiers, out on leave in a city adjacent to a military camp, assaulted with a pistol and violently beat a fellow soldier at midnight in a vacant lot, for the purpose of obtaining his money by force; and upon his raising an outcry they ran away, and his wounds were attended to by the military police. To apply the term "trivial" to this act of cowardly violence, and the term "inhuman" to the sentence of 10 years, indicates such a singular standard of moral judgment that it would be impossible to reach an agreement, in estimating the severity of the sentence, with those who are willing to acknowledge such a standard of judgment. I am assuming, in what

I have now to say, that the idea of severity is always to be interpreted in the light of a rational standard of normal judgment based upon the danger and heinousness of the offender's act in comparison with the sentence imposed.

I close this comment with a forceful quotation form a recent editorial in a leading daily journal:

"When a soldier goes absent without leave, deserts his post of duty to see a dying father, he does so because his own personal desires are stronger than his sense of responsibility to his country. It may be a hard thing to give up seeing a dying father, but it is a harder thing to give up running away in the face of the enemy.

"That is what military justice is about. The sole preoccupation of any army, wherever it is, is to train its men and keep them trained to obey the will of the commander under the most trying possible circumstances and serve the will of the Nation. If disobedience had been tolerated in the United States, our Army in Europe would not have captured the St. Mihiel salient or fought six weeks in the Argonne.

"An army to be successful in the field must, from the moment it begins to train at home, have absolute control of its discipline."

(*b*) The question may still be asked, however, whether even for these serious military offenses those sentences greater than, let us say, 5 or 10 years were necessary for the morale of the Army.

I must premise by pointing out first that these long sentences represent only a minute fraction in the mass of court-martial sentences, and, secondly, that the long periods of years named in those sentences were only maximum, and were therefore nominal only.

As to the first point, I call attention to the total number of sentences for a year, including trials in all grades of courts. These were approximately 240,000, of which the military offenses were at least 200,000 in round numbers. In these 200,000 sentences the vast majority, probably about 185,000, were imposed in summary courts, and those could not by law exceed three months. Another 10,000 approximately, were in special courts, and those could not have exceeded six months. Some 7,000 were in general courts, the only court authorized to impose a sentence of higher than six months. Now, for the year October 1, 1917, to September 30, 1918, the records of this office show that there were only 532 sentences for a period of 15 years or more; that is, less than three-tenths of 1 per cent of the over 200,000 trials for military offenses. And there were only about 2,200 sentences for five years or more, or a trifle more than 1 per cent of the 200,000 sentences for military offenses. If, therefore, anything is found to be wrong about this group of severe sentences, the wrongness can only affect a very small fractional corner in the area of military justice. There may be at this moment 532 cases of smallpox in the population of the metropolis of Manhattan, with more than 4,000,000 inhabitants; but this does not signify that there is any doubt as to the general healthy immunity of the metropolis against that plague.

The second point above mentioned is that these long periods of years named in the sentences were in effect nominal only. There being no minimum number of years, the offender may be released at any time by reduction or remission of sentence on recommendation of the clemency section of this office, where the offense is a purely military one. That this is not merely a possibility, but an actuality, will be seen from the fact later to be cited, that nearly 10 per cent of the 12,000 sentences for the last calendar year have in fact been selected for remission or mitigation, and that in those sentences an average of 90 per cent of the total periods has been cut off; for examle, of the 2,035 sentences for desertion, some 577, averaging a sentence of 3.80 years, were selected for reduction, and this average was reduced, on the recommendation of my office, to an average of three months. In other words, the imposition of a 25-year sentence does not signify that 25 years of a sentence will be served; the experience of the year 1918 having shown that of the sentences selected for reduction only 10 per cent of the term is actually served. It is in this sense that I refer to these long-term figures for the maximum duration as merely nominal.

As an illustration conveniently at hand, let me take the four cases cited by Senator Chamberlain as illustrating excessive severity of court-martial sentences; he cited the case of a 25 years' sentence for absence without leave, another of 15 years for the same offense, and two cases of 10 years for sleeping on post. And yet the records of this office show that in two of these four cases the Judge Advocate General had advised that there was no legal objec-

tion to their restoration to duty, on December 10 and December 12, 1918, respectively, two weeks or more prior to the date of the Senator's speech in Congress; and the records of The Adjutant General's Office show these men actually restored to duty on December 23, 1918, one full week before the day when the Senator arose to complain of the severity of these cases; and all of this in the course of the normal operation of the system. These illustrations point to what I mean in saying that the long term named in the sentence is merely nominal, in that the offender may be, and in practice frequently is, restored to duty at an early period of a few months or more, totally regardless of the long period named in the sentence.

Why then (it may be asked) was it necessary or wise to name such long maximum terms in the sentence? The answer here must be sought in the necessities of discipline while our Army was being raised, and in the just apprehensions of responsible officers over the fulfillment of their huge task. Half a million men were taken by draft in 1917, fresh from the associations of civil life; nearly another half million were entering by enlistment; and before three-quarters of the year 1918 had passed nearly 4,000,000 men had been taken into the Army and were in the process of training. This training was conducted under circumstances of urgent haste never before known in our history—for the tide of battle was going against the Allies, and the anxieties of the civilized world awaited breathlessly the arrival of our troops. To make good soldiers out of this huge and undisciplined mass, in an average period of three or four months for each contingent, was one of the most extraordinary feats ever accomplished in the history of military training; and it has testified in the highest degree to the adaptability and versatility of the American character. But it required urgent haste, and while it was going on the curtain was not raised upon the future, and the glorious results which now lie before us were still in the realm of doubt.

Our officers, charged with the duty of bringing these undisciplined men into immediate readiness for battle, were weighted with anxiety, day and night, at the possibilities of failure. The one imperative necessity was to inculcate the sentiment of obedience—obedience instant and absolute. For those few—and they were less than 15,000 out of 4,000,000—who committed serious military offenses, and thus showed themselves recalcitrant to the requirements of military discipline, some form of absolute moral compulsion was necessary. Whether that moral compulsion ought to take the shape of a sentence of 2 years or 10 years or 20 years was a matter about which it would have been dangerous to speculate. The situation called for an absolute certainty. The sentences must be such that they imposed for any disobediently disposed soldier a penalty which would be absolutely compelling. When those officers selected occasionally (and the percentage of cases was extemely small) a long-term sentence which should have this imperative significance, they knew that this was only a maximum term and that there was no minimum, and that an early release would be easily earned by those who deserved it. And I can not bring myself to-day, nor, I think, can any man who will reflect on that situation, to question now the wisdom of their judgment. And I will even go so far as to say that probably none of these officers supposed for a moment that these long terms would ever actually be served. It was their business and duty to impose a compelling sense of discipline, and they chose those terms which, in their judgment, would do so. And it was not for them to undermine the effect of their discipline by announcing that none of these sentences need be served a moment longer than the exigency of the war required. They knew that, if the danger should pass and if victory should crown their efforts, the authorities of the Army, and particularly the scrutiny of my office, would see to it that the sentences were appropriately cut down. And I think it can be safely asserted that, so far as there is anywhere an individual long-term sentence that could have been deemed excessive, the man who received that sentence has not yet served a single day of the excessive period imposed, the injustice was never one which could not be corrected before it became in fact an injustice.

How thoroughly my office is now undertaking to apply this corrective in proper cases I will later mention. But I am concerned now, in these days of international safety and of national demobilization, to carry back in retrospect the minds of all reflecting citizens to the period of 1917, when the fate of the world trembled in the balance and the embryo armies of the United States were the hope of civilization for turning that balance in the direction of world rescue. The huge responsibility of preparing these armies almost over night lay upon these men who administered military discipline. How magnificently they dis-

charged that task has been shown by the results of the battle field. I, in common with all other intelligent citizens, shared their anxieties, and I for one can not now remain silent while they are criticised for the conscientious exercise of that judgment in applying the necessary measures. Had they failed, they might have been put to the bar to account for themselves. But they succeeded, and in a manner which has commanded the admiration of the world's veteran soldiers. It is easy to be wise after the fact. But in the light of their superb success let no one now censoriously presume to disparage the soundness of their judgment nor the wisdom of the measures by which they achieved that success.

(c) I said above that I would conclude this part of my comment by mentioning the measures now practically under way for mitigating and remitting the sentences of courts-martial, in the light of the termination of hostilities and the restoration of the natioal safety.

On the 20th of January you approved a recommendation of mine, dated January 18, proposing the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency. A board of three officers was designated by me in the Office of the Judge Advocate General on January 28. This board of officers, with a large number of assistants, is now examining the record of every sentence of courts-martial under which any soldier is now confined in any prison in the United States. The recommendations of this board will go so far as to remit the entire portion not yet served upon a sentence of confinement or to reduce it to such amout as seems suitable to the present situation in view of the necessities of military discipline. It is expected that at least 100 cases a day will be passed upon by this board. The completion of the work of this board, which can not require more than a few months at the most, will signalize a complete readjustment of all sentences in a manner appropriate to the termination of hostilities and the resumption of peace-time requirements for military discipline. It is certain that every sentence that might now be deemed in excess of the necessary period will be duly reviewed and that no soldier now in confinement will serve any period in excess of that just amount, so far as human powers of judgment are equal to this task.

12. That the sentences imposed by courts-martial are variable for the same offense.

When we come to the question of variability of sentences, we reach a subject which has been the fertile field for complaint and criticism in civil courts for a century past. It is notorious that the independent judgment of different courts and of different juries seems to be characterized by the most erratic and whimsical variety. Such has been the constant burden of complaint in civil justice, and it can hardly be hoped that military justice could escape a similar complaint in some degree. On the other hand, it must always be remembered that here the individual circumstances vary so widely that a variation of sentences is perfectly natural, and that the mere variation of figures in itself signifies very little where the individual circumstances remain totally unknown to the critic. Nevertheless a variability of sentences for the same offense is something which naturally excites attention and caution; and it should be the object of appellate authorities to equalize the penalties for the same offense where no obvious reason for substantial difference is found. How far the revisory authority of the Judge Advocate General and the clemency powers of the Secretary of War have been effectual to secure such equalization will be noted later in this letter. At the present the inquiry of fact is whether there has been such variability and at what points it has taken place.

The table above referred to, and already handed to you, summarizes for the nine principal military offenses the variance of the sentences, first by months of the year covered, and secondly by jurisdictional areas from which the court-martial records come up for revision. In summary of these variances it is here to be noted that such variances obviously exist; that these variances are not in themselves any more striking than those that are found in the sentences of civil courts, as already shown in the other table submitted to you; that in seeking the possible source of these variances it appears very strikingly that there has been a slight but appreciable increase in the number of higher-period sentences as we come down to the later months of the war; and that, so far as jurisdictional areas are concerned, there have been notable variances which seem in some cases to localize the higher-period sentences for certain offenses in certain specific areas.

As illustrating the foregoing inferences it will be sufficient here to take the single offense of desertion. Examining it by months it will be noticed that the

long-term sentences of 10 to 15 years, and of 15 to 25 years, and over 25 years increased slightly in their ratio to the whole of the sentences for the month as we approach the later months of the year under examination. For example for the months of October, 1917, to February, 1918, there were no sentences over 25 years, although the number of convictions increased from 55 to 196 (the increase, of course, being due to the much greater ratio in the increase of armed forces). But during the months of April to July, with approximately the same number of convictions, averaging 225, the number of sentences for over 25 years increased from 4 to 9, to 15, and finally to 33. Apparently, therefore, some conditions in the Army changed as the months advanced so as to induce this variance in the direction of higher-period sentences. Just what those conditons were can not even be the subject of speculation without a very careful inquiry; merely the fact is here pointed out.

Again, turning to the jurisdictional areas, we find that the Central Department shows about 9 per cent of sentences for over 10 years, while the Eastern Department shows only 3 per cent; that the Twenty-eighth Division, having 21 convictions, imposed no sentences in excess of 10 years, while the Eightieth Division, with exactly the same number of convictions, imposed 14 sentences greater than 10 years.

As further indicating this variance by jurisdictional areas, a glance at the same table under the offense of absence without leave shows that, in the Twenty-eighth Division, which exhibited the above leniency for desertion, the offense of absence without leave was given a sentence of under 2 years for 127 out of 140 convictions; while the Eightieth Division, which had shown a large majority of long-term sentences for desertion, was, on the other hand, lenient for the offense of absence without leave, imposing 16 sentences of under 2 years, out of 20 convictions. Comparing again the Thirty-sixth and Thirty-ninth Divisions, with substantially the same number of convictions, viz, about 175, one finds that the former imposed about 20 sentences of above 10 years, while the other imposed 101 sentences above 10 years. This same Thirty-ninth Division had also used a majority of higher period sentences for desertion, whereas the Thirty-sixth Division showed for desertion a record that averaged with the other divisions.

It will be seen, therefore, that in many, if not in most cases, the extreme variances may be traced to difference of practice in the different jurisdictional areas. Just what conditons existed which would justify in the individual cases, or in the general trend of cases, this variance between divisions can hardly be the subject even of hypothesis. But it must be obvious to any candid observer that there do exist wide differences of conditions, not only in the racial and educational make-up of the different camps, but also in the morale and necessities of discipline prevailing in different camps. It is well known that the sentences of civil courts for civil offenses vary widely in the different States. For example, in 1910 (Census Report, 1910, "Prisoners and Juvenile Delinquents," p. 50), the percentage of sentences of 10 years or over was 9.7 in the East South Central States, but was only 0.1 in the New England States; in Mississippi it was 22.51, but in California it was only 2.3. This illustration is mentoned merely to suggest that whenever one discovers that variances in sentences have a certain relation to variances in camps or divisions, the subject becomes at once too complex for hasty judgment.

Apart from what is now being done in my office by way of the equalization of sentences by commutation in the way of clemency, I am only concerned here to point out the facts as they are found in the records relative to the action of the courts-martial themselves; and to note that such variances (apart from peculiar individual cases) as are revealed in any noticeable amount, seem to be due most largely to differences of conditions in the different camps, divisions, and other jurisdictional areas; and the greatest caution must be exercised before passing judgment upon such variances as inequitable, without being fully familiar with the conditions operating in those places.

Moreover, I must utter a further caution against the popular presumption that a difference in sentences of different individuals for the same offense signifies necessarily any inequity. The individual circumstances differ so widely that the injustice would consist, not in the variability, but in the rigid identity of the same sentence for the same offense in every individual case. This very matter of variation in sentences is one of the triumphs of modern criminal law. One hundred years ago virtually every criminal code of the civilized world was marked by a rigid fixation of penalties for each variety of offense. It was regarded as one of the great objects of criminal reform in that era to introduce

variability of the sentence and adapt it to the circumstances of the individual case. One of the first criminal codes to introduce this reform was that of the State of Louisiana, drafted just a century ago by the great Edward Livingston, recognized as the most eminent jurist of his day; this code received the approval of the jurists of the world; and one of its most remarkable features was its recognition of the variability of sentences for varying individual circumstances. Ever since that day all progress in criminal codes has included this element in an increasing degree. The particular virtue claimed and proved for the indeterminate sentence, which has now been adopted in probably three-quarters of the States of our Union, is that it gives full play for the adaptation of the sentence to the individual case. We must, therefore, always recall that the variability permitted by law is in itself a powerful feature tending to the apportionment of justice according to the circumstances of each case.

The one complementary element necessary in a criminal code in guarding against too great a variability in the action of different courts is the power of ultimate readjustment by some central tribunal. In the language of one of the very Senators who has criticized some of these sentences:

"The sure cure for it all is to have some sort of a tribunal, appellate or supervisory, that shall have the power to formulate rules and equalize these unjust sentences." * * *

Precisely this power of recommendation is now exercised, and long has been, by the Judge Advocate General's Office, in its clemency section. The explanation of this activity brings me to the next point of criticism.

13. That the Judge Advocate General's Office either partakes in the attitude of severity or makes no attempt to check it by revisory action.

The distinct implication running through the critical remarks above quoted is that there exists no central authority that can check, equalize, or correct such severity or variability as may be found to merit such action, and that the Judge Advocate General's Office, charged with the duty of revising these court-martial records, either acquiesces in the result of the court-martial sentences as approved by the reviewing authority or makes no attempt to check any excesses by revisory action.

It is, therefore, necessary to emphasize that the Judge Advocate General's Office not only scrutinizes the court-martial records for the purpose of discovering errors of law and procedure, but also, in the clemency section of the Military Justice Division, occupies itself exclusively with the scrutiny of records for the purpose of recommending for remission or mitigation those sentences which are open to question as to severty or inequality. This power has been exercised habitually ever since our entrance into the war, as well as before that date.

Inquiring into the results to see what the facts show the question presents itself: To what extent has the Judge Advocate General's Office called for a reduction of sentences by a recommendation of clemency to the Secretary of War? And I note in passing that in no instance, so far as I am informed, has such a recommendation of clemency failed to be approved and given effect by yourself.

(*a*) The extent of such recommendations as to the number of sentences is shown in the following summary, covering the clemency recommendations for the year 1918, as applied to the sentences from October 1, 1917, to September 30, 1918, for the nine principal military offenses:

Total number of such sentences imposed, 7,624; total number of such sentences selected by the Judge Adovate General's Office for reduction, 947; percentage of selected sentences on all sentences, 12.42. I see no reason to doubt that this 12½ per cent is ample enough to cover all the individual cases in which an excessive severity would have been apparent on the face of the record.

The table as placed in your hands shows the reduction in its relation to the sentences of different lengths. The table shows that the largest percentage of reduction occurred in the sentences of medium length, and that the smallest percentages of reduction occurred in the sentences of shortest and of longest periods. This result is perfectly natural and appropriate. The shortest sentences are those in which there would be the least call for reduction by clemency on the ground of excessive severity. The longest sentences are those in which the reduction on the ground of excessive severity would presumably not bring them to an extremely low period and, therefore, in which the time for recommending such reduction had presumably not arrived.

(*b*) How much reduction did this action effect in the total length of all the sentences acted upon? This will afford some gauge of the thoroughness of the action in the nature of clemency. A table already in your hands shows the

number of sentences recommended for reduction, the total years of the original sentences, the total years reduced on recommendation of the Judge Advocate General's office, and the net years of sentence as actually served; and the figures are given separately for the nine principal military offenses, as well as for the total of all offenses, October 1, 1917, to September 30, 1918.

Referring to the table for details as to the specific offenses, I will point out here merely that for all offenses, military and civil, the total reduction effected was a reduction of 3,876 years out of an original period of 4,331 years, or a reduction of 89½ per cent. In other words, action of this office, in effecting reductions in the 1,147 sentences selected on their merits for reduction, cut them down to 10.50 per cent of their original amount. Presenting the same result in another form, the average original sentence, of these 1,147 sentences, was for a period of 3.78 years (or nearly 4 years), and the average sentence served as reduced was only 0.40 of 1 year, or less than 5 months.

These figures as to reduction effected in the length of the sentences, demonstrate that the action of this office was a radical one and must have served to eliminate any excessive severity in those sentences. That the sentences selected for such recommendations of clemency included all of the sentences meriting the term "severe," neither I nor anyone else would be in a position either to affirm or deny without an examination of every record.

How extensive is the scope of reduction now undertaken for all sentences, by the special clemency board recently appointed at your instance has already been told.

14. That the action taken in the Judge Advocate General's office is ineffectual to enforce military law and procedure, because its rulings do not have the force of a supreme court mandate, but are only recommendatory, and are either ignored by the division commanders or vetoed by the Chief of Staff.

This brings me to the question which has formed the principal theme of recent discussion in Congress; and I must divide my comments under three heads covering each one as concisely as accuracy will permit: (*a*) The question of simple fact, i. e., what actually is the effect of the Judge Advocate General's action; (*b*) the question of legal theory, i. e., what is the extent of his legal powers under existing law; and (*c*) what use has recently been made of this question of legal theory by certain parties in disparaging the administration of military justice by the War Department.

(*a*) *The simple question of fact.*—The foregoing exposition of the principles of military law and procedure, as enforced through the appellate system culminating in the advisory action of the Judge Advocate General's office, is vain and meaningless to some of the critics of our military system. I find it repeatedly asserted and implied that the commanding officer of the division or department—in technical language the reviewing authority—is not obliged to follow and does not, in fact, follow these recommendations. "Court-martial sentences found, by the reviewing authorities, to be null and void for want of jurisdiction," it is stated, "have been allowed to stand." "The military commander is not obliged either to ask for legal advice or to follow it when he has asked for it and it has been given to him by the responsible law officers of the Army." "Courts-martial should be required to accept the interpretation of the law by a responsible law officer."

The records of courts-martial come to the Judge Advocate General to "revise," and what legal effect this "revision" ought to have in theory is a mooted question of law and policy on which I shall later comment; suffice it here to say that a difference of view exists, and that the judgment expressed by the Judge Advocate General in his appellate capacity is customarily phrased in terms of a recommendation to the commander in the field. But this question, after all, like many questions of fundamental principles, may become practically irrelevant in the light of the facts. The assertion made in the remarks above quoted is an assertion of fact, viz, that the commanding officer does not follow the legal advice which is given him and does not accept the rulings of the responsible law officer.

On the question of fact let the facts themselves answer.

The cases fall necessarily into two groups. One class of cases, coming to the Judge Advocate General for revision under United States Revised Statutes, section 1199, the thirty-eighth article of war, and General Order No. 7, January 1918, require and receive no other revision or approval than that given by the Judge Advocate General. The other class of cases includes sentences of death and of dismissal of officers, which, under the forty-eighth article of war, require confirmation by the President, as well as certain other cases in which error of law has been found but the execution of the sentence has not been suspended by

; authority. The former class of records go directly back from lvocate General to the reviewing authority in the field; the latter go from the Judge Advocate General through The Adjutant General f of Staff to the Secretary of War, and sometimes to the Presi- iestion of fact is, therefore, in what proportion of cases does purely ority fail to give effect to these revisory rulings of the Judge Advo-

in both classes of cases are shown in the following table:

tion of Judge Advocate General's office Apr. 6, 1917–Jan. 1, 1919.

led for modification or l on legal grounds.[1]	Number of cases.	Recommendations given effect.		Recommendations not given effect.	
		Number.	Per cent.	Number.	Per cent.
iority	212	205	96.7	7	3.3
'ar	279	273	97.8	6	2.2
	491	478	97.4	13	2.6

ide a few cases in which the Judge Advocate General's office recommended changes finement.

ears that out of a total for the period covered of 491 cases recom- he Judge Advocate General for disapproval on legal grounds, nly 13 cases in which the Judge Advocate General's ruling was of these cases, 7 were not followed by the reviewing authority nd 6 were not followed in the Secretary of War's office.

it of these facts, I think I am justified in asserting that the ise no foundation for the assertion contained in the above-quoted is not a fact that the military commander or that any military ceeds to follow out the dictates of his own discretion regardless 'pretation of the law by a responsible law officer," nor that he w the legal advice "when he has asked for it and it has been by the responsible law officers of the Army." Whatever may theory of the function now placed by statute in the Judge ieral as the law officer or appellate tribunal for military justice , that theory becomes virtually immaterial in the light of the the period of the war. The state of things supposed by critics ly does not exist. Virtually the recommendations of the Judge ieral are given practical effect in the same manner as the trial il justice give effect to the mandate of the supreme court of the

iestion of legal theory.—The question of legal theory, stated con- s: Is the Judge Advocate General's ruling mandatory, like that e appellate court, with the effect of compelling the reversal or a court-martial judgment founded upon legal error? Or is it endatory, in that the commanding general or the President, as y be, is not bound implicitly to follow and give effect to the

on was first presented to this office, during the present war, in f, in the now celebrated case of the "Texas mutineers" (C. M. ried at Fort Bliss, Tex., in September, 1917). In this case certain ving been ordered under arrest by a young officer, for a very e, were afterwards, while still under arrest, directed to drill; Army Regulations, properly construed, do not authorize noncom- icers to be required to attend drill formations while under arrest, s declined to drill as ordered; for this disobedience they were of mutiny and sentenced to dishonorable discharge and imprison- ns of between 10 and 25 years.

ay be at once and unreservedly admitted that this was a genuine stice, and that the injustice was due to an overstrict attitude of ers toward discipline; for it is conceded by all that the young gave the order to drill was both tactless and unjustified in his l it is conceded that the commanding officer who reviewed and

approved the sentence was a Regular Army officer of long experience, who failed to appreciate the justice of the situation. That this case illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice is plain enough. But that it indicates any general condition can not for a moment be asserted. Moreover, this very case serves also to illustrate the essentially law-enforcing spirit which dominates in the office of the Judge Advocate General. The impropriety and illegality of the sentence in this case was immediately recognized when the record arrived in the office for review. An opinion was prepared pointing out the irregularity and injustice and directing that the findings be set aside. But the legality of such a direction was questioned, in the face of a ruling by the Attorney General of the United States, many years ago, that a sentence of court martial, once executed, can not be set aside even by the President himself. This raised the general question of the authority of the Judge Advocate General not merely to recommend for clemency (which would not have been an adequate redress for the convicted men in this case), but to direct the setting aside of the findings, in a judgment of a court-martial, for legal error, where the sentence had been already executed (namely, in this case, the sentence of dishonorable discharge).

The Secretary of War having sustained the doubt as to the authority of the Judge Advocate General to take such radical action, clemency was extended by the President, releasing the men from confinement, and restoring them to duty, within about three months from the date of their conviction. At the same time a new measure was adopted by the Secretary of War, in the shape of General Order No. 7, War Department, 1918, taking effect February 1, 1918, which prevented the recurrence of such instances, by directing that the commanding general, upon confirming a sentence of death or officer's dismissal or dishonorable discharge, should suspend the execution of the sentence, pending a review of the case in the office of the Judge Advocate General. Thus immediate measures were taken, to go as far as could be gone under the law as conceded on all hands, to prevent the recurrence of the situation presented in the Texas mutiny case.

It would be out of place here to set forth at length the arguments pro and con upon this question of legal theory. The basic statute denning the powers of the Judge Advocate General in respect to courts-martial judgments dates from 1862, and provides (U. S. Rev. Stat., sec. 1199) that "the Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial," etc. This word "revise" was construed by the senior officer on duty under me, when dealing with the Texas mutineers' case (above cited), to signify a complete appellate authority empowering the Judge Advocate General to correct and, if appropriate, to set aside, reverse, and annul a court-martial judgment which involved some legal error. But this construction of the statute could not be accepted by me. One reason was that for 55 years my predecessors in office, beginning with Judge Holt, in Lincoln's administration, had failed to advance any such construction enlarging their powers, and that a decision of a Federal court in 1882 had expressly repudiated the propriety of such construction. A second reason was that the assumption of such a power by this office under that statute would equally operate to control not only commanding generals of a division or department but also the President, as Commander in Chief, in those cases where he has the reviewing authority under the forty-eighth article of war, and thus would render the Judge Advocate General virtually a supreme military tribunal independent of the President himself; the ultimate control of the discipline of the Army would become vested in the Judge Advocate General. A third reason was that even the President himself does not under the existing law possess such a power to set aside and annul a sentence of a court-martial when once it has been executed, the absence of such a power in the President having been constantly maintained in a long series of opinions by the Attorneys General of the United States, beginning with Caleb Cushing in 1854. (6 Op. A. G., 514; 10 Op. A. G., 66; 15 Op. A. G., 290; 17 Op. A. G., 303.) It would thus be anomalous and extraordinary to suppose that the Congress had intended to vest the Judge Advocate General with a supreme authority which they had not seen fit to grant to the President himself, the President being the "natural and proper depository of appellate judicial power" for the Army, as pointed out by William Wirt when Attorney General in 1818. Such was the issue of legal theory and such were the controlling reasons forcing me to refuse to accept the construction of Revised Statutes, section 1199, which would vest that extraordinary power in my office.

But the lack of that power lodged somewhere, and most preferably in the President himself, was certainly to be regretted. The General Order No. 7, effective February 1, 1918, and drafted at my instance and in my office in December, 1917, virtually prevented the recurrence of injustice in most cases by requiring the reviewing authority to suspend execution of the sentence pending the review in my office. But for cases that had occurred prior to that date, and possibly for other occasional cases, a more radical remedy was needed—for example, in the above-cited case of the Texas mutineers, for whom the record of dishonorable discharge remained perforce unrevoked, although they had been already released from confinement and restored to duty.

I was ready and anxious to see the existing law so amended as to remedy this defect by a grant of power from Congress to the President. Far from opposing such remedy, I took prompt measures to secure it. My only negative attitude was to oppose the assumption of that power by myself, through mere construction, sudden and revolutionary, of a statute never before deemed to bear such interpretation.

This attitude on my part has been subjected to the most unwarrantable distortion in recent discussion, and I am therefore obliged now to place before you the facts that (as I hope) furnish my vindication.

(c) *The use made of the foregoing controversy.*—It has been publicly alleged, first, that I was opposed to the correction of this admitted defect in existing law, and, secondly, that I carried my opposition so far as to secure the revocation of the appointment of my senior officer as Acting Judge Advocate General because of his championship of the view which I opposed.

On the first point, a brief reference to documents long in print will supply the instant refutation. In January, 1918, you yourself, having agreed with my construction of the statute, and having concurred in the view that the situation required remedy, sent a letter, dated January 19, to the chairmen of both the Senate and House Military Affairs Committees, transmitting a bill S. 3692, H. R. 9164 (drafted in my office), amending the section of the Revised Statutes in question so as to enable the President, advised by the Judge Advocate General, to reverse or modify findings and sentences of courts-martial and, in general, to cure the existing defect of power. On February 5, 1918, I testified fully in support of the bill at a hearing before the House Committee on Military Affairs (printed as "Hearings before the Committee on Military Affairs on H. R. 9164," Feb. 4, 5, 22, 1918). During the year that has elapsed since the presentation of that bill neither the Senate nor the House has seen fit to take action upon it. So far as I am informed, it was never even reported out by either committee. I think, therefore, that in mere justice to myself I am entitled to point out that the responsibility for any injustices that may have occurred in the administration of military justice since February, 1918, and the inability to correct injustices prior to that date, due to the defect of appellate powers here in question, can not be laid at the door of the Judge Advocate General.

In January of the present year, however, was introduced a new bill, both in Senate and House, S. 5320 and H. R. 14883 (Cong. Rec., p. 1988, Jan. 23), which again proposed to correct the defect already described, but this time by vesting in the Judge Advocate General (sec. 8) this power to disapprove the whole or any part of a finding or sentence of a court-martial. The expedient proposed in this measure, viz., the grant of power to the Judge Advocate General (not the President), is identical with the construction of Revised Statutes, section 1199, urged by the senior officer on duty in my office in November, 1917, more than a year before. And speeches were now heard on the floor of Congress lamenting the errors due to the defective military law, urging the passage of this bill, and reflecting on the negligence of the War Department in failing to administer complete military justice. I am here concerned only with pointing out, in respect to this particular and conceded defect, that the responsibility surely does not lie with either yourself or myself, for the passage of the earlier bill, S. 3692 and H. R. 9164, introduced just one year before, in January, 1918, would have rendered needless either the bill or the discussion of January, 1919.

As to the second point: I said above that the bill of January, 1919, proposed to lodge this appellate power not in the President but in the Judge Advocate General, exactly as maintained by the senior officer above referred to, in November, 1917, and as repudiated by me at that time. This officer in a letter dated February 17, 1919 (Cong. Rec., p. 3982), Feb. 19), has now attempted to place both you and me in the position not only of having opposed his efforts to correct

the defect of the law but even of concurring to cause him to be "relieved of any duties in connection with the administration of military justice," because of his efforts to reform the law.

It is unpleasant to have to defend oneself against such a charge, because to set forth the facts as they were must involve the revelation of a discreditable course of conduct in an officer whose abilities had heretofore possessed my entire admiration and personal confidence. Summarizing the facts as they appear of record, they are these: In October, 1917, I was dividing my time between the duties of Judge Advocate General and Provost Marshal General, usually spending the evenings and often other parts of the day at the former office. On November 3, 1917, the officer in question forwarded to me a memorandum formally superscribed, "Memorandum for Gen. Crowder," and containing the following passage:

"I am at times considerably embarrassed, and besides the transaction of public business is, I think, somewhat impeded and confused by the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of the Provost Marshal General, the public conception being that you are, as you legally are, the head of both offices, as in fact you are not. * * * I ought to be designated in orders by the Secretary of War as Acting Judge Advocate General during your practical detachment from the office."

The reference here was to Revised Statutes, section 1132, which authorizes the President "during the absence of the chief of any military bureau" to empower "some officer of the department or corps whose chief is absent to take charge thereof." The letter continued:

"I believe that the conception which the service has of your relation to both offices has succeeded in minimizing the importance of each office and that this has resulted already in considerable disadvantage to yourself and has resulted in no advantage to me. I submit this matter to you wholly disinterestedly personally, but with the absolute conviction that the order ought to issue. If the suggestion should be agreeable to you, I should ask you to join in the memorandum to the Secretary of War asking for its accomplishment."

I am expressing it mildly when I say that the conviction thus communicated was a total surprise to myself. Its formal manner of transmission, when a personal visit from an adjacent room would have sufficed to open the matter frankly and naturally, gave me the impression of being virtually charged with a neglect of duty which others had observed but of which I was myself totally unaware, and showed me that I was hardly in a position to pass an unbiased judgment upon the propriety of my being relieved from titular charge of the office of the Judge Advocate General pursuant to the statute. I therefore resolved, without personal protest or even argument, to leave the matter entirely in the hands of yourself, the natural judge of the proprieties. My reply of November 4 read:

"MY DEAR GEN. ANSELL: It will be entirely agreeable to me to have you take up directly and in your own way with the Secretary of War the subject matter of your letter of yesterday"—

and closed with a simple sentence disclaiming knowledge of any supposed embarrassment to public business as alluded to. No further communication passed between us nor between the officer in question and the Secretary of War, for it will be noted that both his original proposal and my reply were expressly directed to his taking up the matter "directly with the Secretary of War." But on November 6, two days later, the officer presented in person to the Acting Chief of Staff a memorandum containing a draft order for his own designation, under Revised Statutes, section 1132, as Acting Judge Advocate General, and asking that the order "be published immediately." This memorandum began: "Doubtless the Judge Advocate General of the Army is 'absent' from this office in the sense of 1132 Revised Statutes, and has been so absent since I have been here in charge," and it ended thus: "I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention." The Acting Chief of Staff, taking this memorandum at its face value, corroborated as it was by certain representations from the officer, which raise a further question of veracity, on the same day made an order designating the officer as Acting Judge Advocate General; but this order was marked for suspended publication until December 9. Meanwhile neither the order itself nor any information about it from the officer himself or from any other officer was brought to the notice of yourself. On November 17, of your own motion, you addressed to me a personal letter, expressing your disinclination that I should permit my duties

as Provost Marshal General to encroach increasingly on my time, and asking whether it would be possible for me to allot my time more liberally to the office of the Judge Advocate General. On November 18, I replied, pointing out that the revision of the Selective Service Regulations, pending during October and November, was now completed and that thereafter I should expect to divide my time in even shares between the two offices. On the same day, November 18, your attention was first called to the unpublished order of November 6, above mentioned, the occasion being the presentation to you by that officer of a list of proposed appointees as judge advocates. Your inquiry of him whether I had been consulted upon those names evoked from him the revelation of the existence of that order, which had been obtained by him under the circumstances above mentioned. Neither you nor myself had up to that time been made aware of its existence. Contrary as it was to your own expressed desire in your letter of November 17 to myself, you promptly directed The Adjutant General to revoke it, and that revocation appears of record in the file of The Adjutant General, dated November 19, the next day.

This chronology, taken from each day's records, makes it plain that the revocation of the order was due solely to the fact that the order was obtained surreptitiously without your knowledge and was contrary to your express and recorded intention; that you revoked it the moment you became aware of its existence; and that I myself was not aware of its existence until you informed me.

Meanwhile, however, the memorandum of the officer in question, arising out of the Texas Mutineers' case, and claiming extraordinary powers for the Judge Advocate General, had been prepared by him in this office, but without bringing it to my knowledge. It bears date of November 10, but in the officer's own handwriting; and there is nothing to show when it was transmitted to your office; for it never passed through my hands, nor did it ever come to my knowledge, in any form, nor was the existence of such a memorandum even suspected by me, until after the completion of the entire chronology above set forth. It was on the evening of Friday, November 23, four days after the above order had been revoked by you, that I first received from your hands the memorandum in question, with the request to consider its legal argument for the power therein claimed. During the days of November 24, 25, and 26 I proceeded with a study of the precedents, calling two skilled judge advocates to my assistance, and on Tuesday, November 27, a brief, so dated, was filed with you by me. This brief exposed the legal fallacies of the above officer's memorandum, pointed out its suppression of material and conclusive authorities to the contrary, and expressed the view to which I have ever since adhered, viz, that the power did not exist under present law, and that the only source of remedy would be a grant of power from Congress. On the same day, November 27, you expressed assent to the views set forth in my brief; and your memorandum concludes: "A frank appeal to the legislature for added power is wiser." This concurrence of views between yourself and myself was reached, I note, on November 27, and not before then.

It is a peculiar coincidence that the above officer's surreptitious act of securing the order designating him as Acting Judge Advocate General took place on November 6; that his brief claiming extraordinary judicial powers for the Judge Advocate General (which he had been preparing, as his letter states, since October 18) was withheld until at least a week later than the signing of the order which placed him in the position, as he supposed, to exercise that extraordinary power; and that although the order itself which placed him in office was so managed as to be kept from your knowledge, yet the memorandum which would have added that power to his office was handed directly to you (not to me), and at a time when you still supposed that I was the incumbent, and not he. The coincidence is so remarkable than an inference of deliberate and ambitious planning for personal power, and only for personal power, is unavoidable.

At the risk of being tedious, I have thus set forth from the records the chronology of this episode; for thus alone could these recent public insinuations—reflecting both on your supposed conduct and on mine—be conclusively dispelled. It must now be clear to all that the actual reason for your revocation of the order designating that officer as Acting Judge Advocate General was that it had been surreptitiously obtained and was contrary to your initial and constant intention; that the memorandum claiming for the Judge Advocate General an unauthorized power to correct court-martial errors was not brought to my notice until four days after the above order had been revoked; that

your consensus with me as to the unsoundness of that claim was not reached until a week subsequent to that revocation; that therefore the revocation of that order could not possibly have been motivated, either in your mind or in mine, by our failure to accept his views on the subject of the legal powers of the Judge Advocate General; and, in conclusion, that the assertion or insinuation that his appointment was revoked because of your and my opposition to his views as to the proper method of improving the law, is baseless and unjust to us both.

I must, however, continue for a moment on this subject, because the same officer, in his letter of February 17, 1919 (Cong. Record, p. 3983, Feb. 19), makes a second charge of a similar sort, which is not only equally baseless but reveals on his part the same singular methods of manipulation. In that letter, setting forth his continued efforts "to break up such a static and intolerable legal situation," he continues:

"In September (1918), upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, in our forces in France which would control all commanding generals until overruled by the Secretary of War. This is now being opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subjected to question."

The reference is to General Order No. 84, dated September 11, 1918, amending Section II of General Order No. 7, dated January 17, 1918, the latter being the general order, above referred to, which aimed to avoid the recurrence of such dilemmas as that of the Texas mutineers' case, so far as the Judge Advocate General's powers permitted. The facts are in the first place, that this amending General Order No. 84 was also obtained surreptitiously by the above officer: but in the second place, that it has not been opposed by Gen. Pershing. A brief statement will suffice to show this. The original General Order No. 7, in its Section II, applying to the branch Judge Advocate General's Office in France, directed that office to "report" to the reviewing authority any legal errors, "to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect." The amending General Order No. 84 substituted for the above clause this sentence: "Any sentence or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General (in France)." This amendment was prepared by the officer above referred to. Obviously, its language embodies precisely the grant of mandatory appellate power in the Judge Advocate General for which he had been contending in his brief of November, 1917—a contention which was at that time explicitly repudiated by both yourself and myself; and since February, 1918, the bill above mentioned, curing the defect of law, and granting the power to the President, was still pending in Congress.

Since his return from France in July, 1918, this officer being senior on duty in my office, had the actual supervision of all matters of military justice; the selective draft then requiring my most urgent attention, and the volume of rulings coming from the 50 officers of the military justice division being left entirely for the final signature of the officer in question. He thereupon prepared this amending order, embodying the fundamental principle already expressly repudiated both by you and by me, and took it, not to yourself nor to myself, but directly to the office of the Chief of Staff. The radical nature of the proposed change of rule in this respect was not called to the attention of that office; rather was it represented as involving merely verbal improvements. It issued on September 11; and amidst the mass of other printed general orders it never came to either your attention or mine until recently. Here, then, was a second attempt to introduce into our overseas practice, surreptitiously, the same unsound assumption of power which had been already squarely rejected nearly a year before.

This sudden and inconsidered introduction of such a fundamental novelty was indeed calculated to evoke objection from the reviewing authorities in France, more especially from a commander in the field who had been accorded in unprecedented fashion that independence of military action so wisely exercised by Gen. Pershing. The unwisdom of this act, added to its surreptitiousness, was under the circumstances extreme. But it is not true to assert that the order "is now being opposed by the commanding general American Expeditionary Forces." Had it been opposed or protested this attitude would have

been natural enough. On the contrary, no word of such opposition or objection is anywhere on record in my office, nor can any trace of it be found. The only document in which is found any objection on a point of law, on the part of the commanding general in disagreement with the Acting Judge Advocate General in France, is a memorandum of November 14, 1918, raising a question under the thirty-seventh article of war. That article, which applies equally at home and in the field, lays down the usual modern rule forbidding that an erroneous ruling on evidence or procedure shall be ground for disapproval unless it affects the substantial rights of the accused "in the opinion of the reviewing or confirming authority"; and the contention of Gen. Pershing's judge advocate was that under this statute only the reviewing authority can pass upon the question of insufficiency of evidence as a substantial error There is no mention of General Order No. 84 in the entire document, nor any reference to its contents. Neither in this nor in any other document yet received from Gen. Pershing's headquarters is there any opposition to General Order No. 84. The insinuation that here again the Army—this time the Army in France—is opposing a beneficent measure of reform in military law is baseless.

The foregoing two instances of a groundless charge that I have opposed the reforming efforts of this officer are intimately connected by him with a third instance equally groundless, in which the misrepresentation has been so significant to the public that I must in this place record its refutation. In the same letter of this officer, published in the Congressional Record, February 19, last, page 3983, column 1, the officer is supposed to be exonerating himself from criticism made on the floor of Congress that he "should have gone directly to the President" when balked in his efforts made within the department. Purporting then to explain the "impossibilities of such a course," he gives as an illustration his action when four sentences of death were pending in the department for confirmation and when this office had recommended execution: "I went to the head of the office," meaning myself, of course, presumably, "and orally presented to him my views in opposition. I then filed with him a memorandum in which I did my best to show what seemed to me to be obvious, that these men had been most unfairly tried, had not been tried at all, and ought not to die or suffer any other punishment upon such records. Discovering that these memoranda had not been presented to the Secretary of War, and feeling justified by the fact that I had no other forum in this department, I gave a copy of the memorandum to a distinguished member of the Judiciary Committee of the House and was told by him that he could present the cases to the President himself." The story as thus told is plausible, and purports to condemn the superior authorities of the War Department, and implies that the subsequent commutation was obtained solely by this outside intervention of a Member of Congress. But a simple perusal of the official files now lying before me demonstrate that the charge is a mere fabrication and a cruel one.

These cases of the sentence of death had been pending during March, 1918, in this office. These several officers in the Division of Military Justice had, after scrutiny, found no legal error, and the record in that condition, approved by the very officer who now makes this charge, had been placed in my hands. In the meanwhile, I submitted it informally to more than one other officer, including a judge advocate, not at that time attached to this office, who had taken part in the 1916 revision of the Court-Martial Manual in the chapter upon procedure, witnesses, and evidence, and whose name is well known to the legal profession as an authority on the subject of evidence; the memorandum of the latter disclosed no reason to doubt the adequacy of the proof of the offense. Meantime, also, I had directed further inquiries to be made in my office as to the practice in respect to death sentences for the offense of sleeping on post in the theater of war; for two of the sentences were imposed for the offense of sleeping on post.

On April 5, 1918, my memorandum transmitted the four death cases to Gen. March, Acting Chief of Staff; the memorandum including this statement, "There is a very large question in my mind as to whether clemency should be extended," and calling attention to the express request of the commander-in-chief in France and of his judge advocate (already alluded to above in this letter), that the death sentences should be confirmed. On April 15 the senior officer on duty in my office (the one now making these charges) presented a memorandum to me, at my request, examining the four cases in detail. In the two cases of sentences for refusal to drill this memorandum

refers to the plea of guilty put in by the accused; then, treating together the two cases of Sebastian and Cook, sentenced for sleeping on post, the memorandum continues: "The death penalty in each of these cases was awarded for sleeping on post, after a plea of guilty." The memorandum goes on: "These cases were not well tried," setting forth the inadequate composition of the court; "those were mere youth; not one made the slightest fight for his life; each was defended by a second lieutenant; such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that meant the forfeit of his life." This memorandum of the officer in question was dated April 15. It was addressed personally to me in rough draft, and was not such a document as is usually prepared, in final form, for transmission beyond the immediate chief. On the very next day a document dated April 16, signed by me personally, was filed with the Chief of Staff; it begins: "Since our interview on the four cases from France * * * my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should be invited." The memorandum then proceeds in the fourth and concluding paragraph as follows: "Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we were called upon to act were not well tried." The memorandum then continues, using almost literally the language of the above officer's memorandum: "Each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made a fight for his life. Each of the men was defended by a second lieutenant who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty." It will be observed that this language is almost a literal reproduction of the language of the above officer's memorandum above quoted and filed with me on the very day before. On the very next day, viz, April 17, the Chief of Staff writes a memorandum to the Secretary of War.

The notable fact of chronology thus is that within 24 hours after receiving the memorandum of the senior officer on duty under me, in opposition to the confirmation of these sentences, I myself drafted and sent to the Chief of Staff a memorandum covering the very points mentioned by the above officer and using, in large part, the identical language. Furthermore, within 24 hours more, or within 48 hours after memorandum in question was dated, the Chief of Staff had filed a memorandum with the Secretary of War. On May 1 the Secretary of War forwarded the records to the President, recommending clemency, and on May 4 the President remitted, by pardon, the sentence of death for the two men sleeping on post and reduced the sentence of the other two men to three years (for refusal to drill), thus following exactly the recommendation of the Secretary of War, and explicitly thanking the Secretary for his careful presentation of the cases.

Whatever, therefore, may have been said to the President during this interval by the Member of Congress, it is obvious that the President's action was taken as the culmination of a careful study of the case within the department and of a series of memoranda initiated in my department and following their due course to the Secretary of War; and that this conclusion was the result of the united efforts of all the War Department officials concerned with that subject in which the rôle of the officer in question was only a minor one, and was at the beginning far from being a humane one.

But the specially notable fact is that I not only incorporated and presented the ideas of the officer in question, but that I was unfortunately thus led into an important blunder of fact through my reliance upon it. In paragraph 4 of my memorandum I stated, as a ground for doubting the thoroughness of the trial, "in each case the accused was allowed to make a plea of guilty." The Chief of Staff, in his memorandum opposing the extension of clemency, pointed out the blunder, as follows: "Referring to paragraph 4 of the memorandum of the Judge Advocate General, I do not find that his statement, 'I regret exceedingly that in each case the accused was allowed to make a plea of guilty,' is a fact; the record shows that two of these men, namely, Pvt. Sebastian and Pvt Cook, did plead not guilty, and in the cases of the other two men, Pvts. LeDoyen and Fishback, although the accused pleaded guilty, the court proceeded to take evidence in the cases in spite of that plea." The significant thing about this error in the officer's memorandum was that I, relying implicity on his memorandum, was led to repeat the same error in my own memorandum for the Chief

of Staff, thus furnishing the latter the opening for his destructive criticism above quoted.

It is now apparent that the statement in the officer's above-quoted letter of February 19, "discovering that these memoranda had not been presented to the Secretary of War," is not only a gross misrepresentation, in that the very ideas and language of his memorandum were incorporated in my own memorandum, but that this document went forward within 24 hours to the Chief of Staff and within 48 hours to the Secretary of War, and that these documents were officially on file and could have been inspected in the file at any moment; so that the officer in question must have gone to the Member of Congress without any attempt to discover the facts; and one year later he has published far and wide a defamatory statement which is contrary to facts as they stare out from the face of official records.

I confess myself unable to comprehend such methods of manipulation in this agitation. Certainly, to cope with them would be endless, and I shall not attempt to continue the refutation of any others of the specific and completely groundless charges reflecting upon my supposed personal attitude.

I close this part of my comments, regretfully entered into by me, with the observation that neither in these nor in any other aspects of this issue of fundamental legal principle has there been exhibited at any time any opposition on my part to measures of real improvement in military law or procedure. The issue here was simply whether the incumbent of my office, whether acting ad interim or for the four-year term of appointment, should be vested with a power which belongs, if anywhere, in the President, and which Congress alone can grant to him. Neither ambition nor any other motive will ever induce me to assent to an illegal and unwise assumption of official power. Apart from this single instance, I have never opposed any action or proposal of the officer in question directed either to the improvement of military justice in general or to the doing of better justice in an individual case; and this for the simple reason that he has never made any such proposals to me. Except for the period of his absence in France for about 90 days in April–July last, he has been, since August, 1917, the senior officer on duty in my office, with ample opportunity to introduce general improvements of procedure or to remedy individual cases; and the moral responsibility for not initiating whatever might have been done and was done lies therefore upon him for the greater part of the war period. How ample was that general opportunity to act, unchecked either by me or by yourself, may be plainly seen by the manner in which General Order No. 84, above mentioned, was promulgated in September, 1918. And how little he did in fact avail himself of individual opportunities may be inferred from the circumstances that in the three cases recently cited on the floor of Congress as cases of excessively severe sentences in which this office is said to have harshly denied an application for mitigation by clemency (C. M. Nos. 113076, 115506, and Robbin's case), the document containing the refusal to recommend clemency bears in each of the three cases the signature of that officer himself.

I would have preferred to be spared the recital of these facts. But even as it is I have refrained from the disposal of other specific criticisms, equally groundless, in which personal mention would have been necessary. I have said no more than seemed unavoidable in refuting these unjust inuendoes, now so widely spread that it is perhaps impossible for the truth ever to overtake them.

(III). *Recommendations.*—I have not made my position clear, Mr. Secretary, if I have given the impression that in my opinion there is nothing to change or to improve in our system of military justice. My chief concern in this letter has been to remove the slurs that have been cast upon the whole system as such; to refute by plain facts the extreme and exaggerated criticisms that are calculated to undermine, unjustly and needlessly, the public confidence in that system; and to redeem, if I can assist in doing so, the honor of that admirable band of conscientious and able officers who have been called to share in its administration during the last two years. I would like the American people to know confidently and take pride in the fact that we possess a genuine and adequate system of military justice, founded upon the Constitution of our forefathers and the acts of Congress of our contemporaries—administered in the trial courts by officers required to be familiar with it—and thoroughly scrutinized in its appellate stages by professional lawyers whose sole object is to insure conformity to the requirements of law and to secure the just protection of the accused.

That military justice can not be improved in any details could certainly not be maintained by anyone. But neither does anyone maintain that civilian jus-

tice is perfect. The experience of the last two years, when carefully studied, will doubtless reveal wise measures by which improvements of the military code can be secured. The same is true of each one of our institutions, civil as well as military, that has passed through the crucible of war time. But it will first be necessary to compare divergent opinions, based on differences of local experience, and of important policies. At the present moment there lies before me a voluminous report, in manuscript, representing the collated result of suggestions of improvement, prepared at my request by each one of the officers on duty in my office, as based on his own observations and experience. In its final form this report will be of the greatest value.

Meanwhile, as it is never my preference to remain content with a defensive or critical attitude, but rather to offer constructive measures where apt and necessary, I venture to select a few proposals, representing those which in my judgment offer the greatest promise of benefit and require the least assistance from statutory change. I refrain from explaining at length in this letter the effect of each proposal; it will be fairly obvious to one familiar with the military system.

The specific proposals are as follows:

1. (*a*) By general order amend paragraphs 75 and 76 of the Manual of Courts-Martial relating to submission and investigation of charges, so as to require the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs either to personally conduct the investigation or else to depute it to an officer of experience, preferably not below the rank of captain, and to confront the accused with witnesses and prepare a summary of the evidence and settle upon it in agreement with the accused, substantially as in the British practice.

(*b*) Amend paragraph 78 of the Manual "Determination of proper trial court" by a general order providing in substance that the officer exercising court-martial jurisdiction shall not order a case to trial until he has received and considered the written opinion of his staff judge advocate or of this office.

The intent of this proposal is, by laying down with greater particularity the duties and responsibilities of investigating officers and of staff judge advocates, to guard against any possibility of (*a*) hasty, ill-considered, or arbitrary action by any commanding officer, (*b*) ordering any person to trial without full and careful, as well as impartial, investigation of the case, and until reasonable probability of his guilt has been shown, or (*c*) trivial cases going before general courts; and also to insure adequate preparation in all cases ordered to trial.

2. (*a*) Amend the forty-fifth article of war by striking out the words "in time of peace."

(*b*) By proper amendment of the Articles of War, so change the composition and increase the importance and the powers of the special court-martial, that (like the British district court-martial) it may award confinement up to two years with accompanying forfeitures of pay and allowances; and may adjudge a suspended sentence of dishonorable discharge, to be suspended until the soldier's release from confinement.

(*c*) Provide by general order further amending the seventy-eighth paragraph of the Manual for Courts-Martial by way of caution to convening authorities as an expression of the policy of the Government, a direction, substantially in the language of the general order issued January 22, 1919, that "Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the one hundred and fourth article of war would be under all circumstances of the case clearly inadequate."

I believe the changes included in this proposal would tend powerfully to increase the number of special courts-martial, and correspondingly decrease the general courts, as in the British Army; and thereby automatically to reduce the possibility of unduly severe sentences. Striking the words "in time of peace" out of the forty-fifth article of war would enable the President to fix the maximum limits of punishments, in war as well as peace.

3. Recognizing the need, in the trial of serious, difficult and complicated cases of an impartial legal adviser to the trial court, and recognizing also the difficulties involved in the institutions of so far-reaching a change in our system of court-martial procedure, I propose, in order to try out the plan—

(*a*) A general order, modeled after the practice of the British field general court-martial, of appointing an especially qualified member on the court who is required to be present at the trial of all serious, difficult, and complicated

cases, this member to be a member of the Judge Advocate General's Department, if one be reasonably available.

4. Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War January 19, 1918, which covers the ground more completely and more flexibly than the now pending bills, and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact."

This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters, the Judge Advocate General.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

EXHIBIT 73.

EXTRACT FROM ADJUTANT GENERAL'S CABLEGRAM NO. 663, DATED JANUARY 20, 1918.

Paragraph 3. Order made directing Brig Gen. Walter A. Bethel, judge advocate, assume charge of branch office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

EXTRACT FROM ADJUTANT GENERAL'S CABLEGRAM NO. 666, DATED JANUARY 20, 1918.

Paragraph 1. General Orders, No. 7, these headquarters, publish courts-martial rules of procedure prescribed by President, effective February 1, an outline of which is furnished for your information. Rule 1: Sentence of death or dismissal of officer confirmed by commanding general of territorial department or division not to be executed until review of record in the office of Judge Advocate General or branch thereof. Action to be entered in record and to conclude with recital that the execution of sentence will be directed in orders after the record of trial has been reviewed by Judge Advocate General and that jurisdiction is retained to take additional or corrective action prior to or at time of publication of general court-martial order in case. Rule 2: Sentence of dishonorable discharge not intended to be suspended will not be ordered executed before review of record, as in rule 1, and action to conclude with same recital. Rule 3: When record of trial in cases covered by rules 1 and 2 is reviewed in the office of Judge Advocate General or branch thereof the reviewing authority will be informed as to the legality of his proposed action. Errors and omissions which admit of correction will be indicated. Proper disposition of case suggested. Rule 4: Delay in execution of sentence by reason of these rules to be credited on any term of confinement or imprisonment imposed. Rule 5: Procedure prescribed in rules 1 and 2 to apply to commanding generals in the field when the Secretary of War so decides and orders. Rule 6: Authorizes the Secretary of War to establish branches of the office of Judge Advocate General for review of courts-martial records. Section 2 of the order reads as follows: There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in French, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army. The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to

return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his reviews thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

BIDDLE.

EXHIBIT 74.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, February 13, 1918.

From: The Office of the Judge Advocate General.
To: All department and division judge advocates.
Subject: General Order No. 7, War Department, 1918, its purpose, procedure thereunder, etc.; suggestions as to office administration.

1. The procedure under General Order No. 7, War Department, 1918, was established to enable the War Department to do substantial justice in those cases in which it is found, on reviewing, in this office, the records of trial by general courts-martial, that persons have been improperly or insufficiently charged with, or convicted on insufficient or illegal evidence of, serious crimes or offenses, and dishonorable discharge or dismissal has already become an accomplished fact. Cases of this character are not numerous, but a case occasionally arises in which remedial action by way of remission of sentence with an offer of restoration to duty or reenlistment is, at best, but a futile attempt to do justice so long as a discharge or dismissal which has been finally executed can not be reached and set aside or reversed, but must remain standing forever against the record of the accused. Cases where the death sentence is imposed also fall within this class. Great embarrassment would result if it should be held that a death sentence was illegal after the same had been executed.

The necessity for a new procedure growing out of the circumstances indicated, it goes without saying that it was not intended by the publication of General Order No. 7 to magnify or increase the importance of this office or decrease the importance or responsibility of department or division judge advocates.

2. In order to bring about the necessary cooperation in the enforcement of General Order No. 7, War Department, 1918, the following suggestions are made for your information and guidance:

(*a*) In all records of trial by general court-martial falling within the purview of General Order No. 7, War Department, 1918, to wit: Cases involving a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man, in which it is not intended to suspend the dishonorable discharge, the department or division judge advocate should prepare a review of the evidence in the case. This should be as brief and concise as possible, but should outline clearly the evidence upon which the conviction must rest. A copy of this review or summary of the evidence should be attached to the record to which it pertains and forwarded for file therewith in this office.

(*b*) In all cases in which the execution of sentence is deferred until the record of trial is reviewed in this office, judge advocates, prior to forwarding the record of trial, will take the necessary data from the same, draft the general court-martial order, give it the date of action by the reviewing authority, and, upon receiving notice from the office of the Judge Advocate General, or any branch thereof, that the record is legally sufficient to support the findings and sentence, cause the general court-martial order to be published in the usual form. This will make unnecessary the return of the record.

(*c*) The action of a reviewing authority upon a record of trial which is to be forwarded to this office for review before the execution of sentence should be entered in substantially the following form, the necessary changes being made to conform the action to the facts of each particular case:

——— ——— (Place and date.)

In the foregoing case of ——— the sentence is approved (but the period of confinement is reduced to ———). The execution of the sentence will be directed in orders as of this date after the record of trial has been reviewed in the Office of the Judge Advocate General, or a branch thereof, and its legality there determined. Jurisdiction is retained to take any addition or corrective

action that may be found necessary prior to or at the time of the publication of the general court-martial order in this case.

——— ———, *Commanding.*

(*d*) When the record of trial in any case is found legally insufficient to support the findings and sentence, the record will be returned for the necessary corrective action, which will be entered on the record in substantially the following form, the necessary changes being made to conform the action to the facts of the particular case:

——— ——— (Place and date.)

In the foregoing case of ———, under the jurisdiction retained in the action dated ———, the following corrective action is taken:

(Action.)

As thus modified the sentence will be duly executed. ——— is designated as the place of confinement. (Or such final order by way of disposing of the case as the action may require.)

——— ———, *Commanding.*

(*e*) When the additional or corrective action outlined above has been taken, the necessary changes will be made in the general court-martial order prior to the publication of the same. It is needless to say that any prior action which has been changed or nullified by subsequent action will not be included in the general court-martial order as published.

(*f*) The letter of advice sent from this office will give in each case the court-martial record number given the record upon its receipt in this office. It is desired that the printed copy of the court-martial order be made to carry at the end thereof, in brackets, the number reported by this office, thus: (J. A. G. O. No. ———.) Five copies of the general court-martial order in each case will, when published, be forwarded to this office as promptly as possible.

3. The following suggestions are made with reference to the question of office administration. It is hoped they may be helpful and that their adoption will bring about greater uniformity in the administration of military justice:

(*a*) Judge advocates should not recommend the reference of charges for trial by general courts-martial until thorough investigation has shown that the charges as laid can be substantiated by sufficient legal evidence.

(*b*) They should endeavor in every proper manner to limit the number of trials by general courts-martial. No case should be so tried where the offense committed can be adequately punished by a minor court or by administrative punishments imposed under authority of the 104th Article of War.

(*c*) They should also aim to prevent the trial of cases whenever it appears on investigation that the offender is lacking in mental responsibility. In all cases where it appears probable that the accused is lacking in physical, mental, or moral equipment as an efficient fighting man, the psychiatrist assigned to duty with their commands should be called into consultation. Disposition of the case other than through trial by general court-martial should be made whenever full examination shows this to be proper. Judge advocates should realize, however, that the responsibility for decision in all cases rests upon them and not upon the psychiatrist who may be called into consultation. It should be the latter's duty to advise but not to decide.

(*d*) As the discipline of the various commands improves it may be possible to reduce trials by general courts-martial to those cases in which it is determined by the methods hereinbefore indicated that the accused who is under general court-martial charges is not a desirable soldier and that his further retention in the service is a waste of time, effort, and money.

(*e*) When a record of trial by general court-martial has been received in the office of a judge advocate, it becomes his duty to thoroughly study the case and to recommend such punishment as should be approved. Where the accused has within him the elements of service, the following principles should govern in deciding upon the punishment to be awarded in time of war:

(i) Guard houses are breeding places for crime. They are not designed to foster self-respect. Men should be kept out of them in all cases except where restraint is necessary.

(ii) Time spent in confinement is time lost from training. Our task is to turn out in the shortest possible time the greatest possible number of trained men.

(iii) Whenever and wherever possible, men sentenced to undergo confinement or hard labor should be drilled with their organizations and required to serve punishment when other men are resting or off duty.

(*f*) It is desired that judge advocates make every possible effort to bring offenders who must be tried by general court-martial to trial at the earliest practicable date, to the end that the period between arrest or confinement on the charges and the date of the trial may be reduced to the lowest possible limit.

(*g*) Judge advocates will also expedite in every possible way the preparation of records of trial, their review of the same, and action thereon by the reviewing authority. They will also endeavor to forward records to this office as nearly as possible on the date on which action is taken by the reviewing authority.

(Signed) E. H. CROWDER,
Judge Advocate General.

EXHIBIT 75.

FEBRUARY 20, 1918.

Memorandum for Gen. Ladd.

(Suggested cablegram to Gen. Pershing.)

Recently approved tables of organization provide for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our cable 666. In the event you so desire, Bethel may remain in charge of said branch office and Kreger be detailed on your staff in his stead. Wire your wishes.

——— ———,
Judge Advocate General.

EXHIBIT 76.

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, February 20, 1918.

Memorandum for the Judge Advocate General.

DEAR GEN. CROWDER: You may recall that about two or three days ago I reported to you the instructions of the Chief of Staff, that before Col. Creager's nomination could be sent in it would be necessary to communicate with Gen. Pershing. As you were familiar with the whole situation I suggested that you prepare a cable, which you stated you would do, provided I would give you the reference to the cable recently sent Gen. Pershing relative to the establishment of a branch of your office in France. I sent you this information day before yesterday, stating that the cable number was our cable 666, and have been expecting to get your draft or a cable from Gen. Pershing, but so far have seen nothing on the subject.

Very truly, yours, LADD.

EXHIBIT 77.

[Extract from The Adjutant General's cablegram No. 816, Feb. 20, 1918.]

Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendation.

[Extract from The Adjutant General's cablegram No. 857, Mar. 2, 1918.]

Paragraph 7. With reference to paragraph 3 your 644. To avoid delay it is desired that you establish a branch office Judge Advocate General's Department in accordance with our 663, paragraph 3, and 666. Lieut. Col. E. A. Kreger has been nominated to the grade of brigadier general and has been ordered to report to you to take permanent charge of this office.

[Extract from The Adjutant General's cablegram No. 663, Jan. 20, 1918.]

Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch of office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

[Extract from Gen. Pershing's cablegram No. 644, Feb. 25, 1918.]

Paragraph 3. With reference to paragraph 2, your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663, of 20th, appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action.

EXHIBIT 78.

WAR DEPARTMENT,
OFFICE OF THE WAR COUNCIL,
Washington, February 28, 1918.

Memorandum for Gen. Crowder:

The following cable extract is furnished for your information:

Cablegram from Gen. Pershing, No. 644, February 24:

"Paragraph 3. With reference to paragraph 2, your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663, of 20th, appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action."

Cablegram to Gen. Pershing, No. 816, February 20:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendations."

Cablegram to Gen. Pershing, No. 663, January 20:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch of office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order.

W. FESSER,
Major, General Staff, Recorder.

EXHIBIT 79.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 8, 1918.

From: The office of the Judge Advocate General.
To: All judge advocates serving with Expeditionary Forces in Europe.
Subject: Procedure under General Order No. 7, War Department, 1918. Sending of cases to the Acting Judge Advocate General in France.

1. Lieut. Col. E. A. Kreger, judge advocate, United States Army, has been designated as Acting Judge Advocate General for the American Expeditionary

Forces in Europe, under the provisions of General Order No. 7, War Department, January 17, 1918.

Acting under the provisions of this order Col. Kreger will establish an office in France and will advise all judge advocates with our Expeditionary Forces in Europe of the location of such office. Under the said order cases in which the sentences imposed require confirmation by the commanding general of the Army in the field before being executed should be sent to such commanding officer for confirmation before being forwarded to the office of the Acting Judge Advocate General for review. Cases which do not require such confirmation should be forwarded from the headquarters of the reviewing officers direct to the office of the Acting Judge Advocate General.

Any additional advice which may be necessary in order to secure the proper enforcement and operation of General Order No. 7, War Department, 1918, will be issued by the Acting Judge Advocate General for the American Expeditionary Forces in Europe direct to the judge advocates concerned.

(Signed) E. H. CROWDER,
Judge Advocate General.

EXHIBIT 80.

EXTRACTS FROM CABLEGRAM RECEIVED AT THE WAR DEPARTMENT.

LONDON, *March 24, 1918.*

THE ADJUTANT GENERAL, *Washington.*

* * * * * * *

Paragraph 3. For the Judge Advocate General. With reference to your letter February 25. Johnson's promotion along with many others in the various staff departments seems quite out of proportion, and the line and staff officers here feel that such promotions made at home are unfair to men who are serving in France. I have tried to impress this upon the War Department, but the staff departments at Washington evidently continue to press for promotion and men promoted at home are now relatively very far ahead of men serving over here. I hope that the plan proposed in paragraph 1, my cablegram 680, and approved by the Secretary of War will receive earnest consideration and that it will be adopted. This plan will relieve us all of probable equitable commitments to individuals, so many of whom fail to achieve after promotion what was expected of them. I can not too strongly urge the adoption of the plan proposed and think it should apply to all other staffs at home as well as to our forces abroad. In the meantime no further promotions ought to be made at home until the proposed system is adopted or rejected. May I ask that this matter be discussed with Gen. March.

Subparagraph A. With reference to a branch of the Judge Advocate General's office in France to review certain court-martial proceedings after they have been acted upon by the Judge Advocate here, the reason for this is not clear. It submits to review cases [grand jurors] within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the Commander in Chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possible miscarriage of justice would be unfortunate for us and injurious to the morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here.

* * * * * * *

PERSHING.

EXHIBIT 81.

CORRECTION TO CABLEGRAM.

MARCH 28, 1918.

GEN. PERSHING TO THE ADJUTANT GENERAL:

* * * * * * *

Paragraph 3. For Judge Advocate General. * * *

Subparagraph A. Change sentences "* * * review cases grand jurors * * * in time of peace and is in direct conflict with broad and liberal * * * President's, etc." to read: "* * * review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character President's, etc."

* * * * * * *

EXHIBIT 82.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 15, 1918.

Memorandum for the Chief of Staff:

Subject: The establishment of branch of the office of the Judge Advocate General in France.

1. Herewith is a memorandum from the Judge Advocate General, dated April 3, 1918, occasioned by a cablegram from Gen. Pershing protesting against the establishment of a branch of the office of the Judge Advocate General in France. The cablegram reads:

"Paragraph 3, subparagraph A: With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of Presdent's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here." (No. 779, March 24, 1918).

The Judge Advocate General sets out in sequence communications upon the subject of the establishment of the branch office in question. He first explains General Orders, No. 7, War Department, January 17, 1918, the effect of which is to take from department and division commanders the power of final action in cases where sentences involve death, dismissal of an officer, or dishonorable discharge of a soldier, and to require records in such cases to be examined by the Judge Adovcate General's office, or a branch thereof. In order to expedite matters in France, a branch office of the Judge Advocate General's office has been established in Paris, as directed in General Orders, No. 7.

2. On January 20, 1918, Gen. W. A. Bethel, judge advocate, American Expeditionary Forces, was directed to assume charge of the branch office established in France. On the same date there was cabled to Gen. Pershing a digest of paragraph 1 of General Orders, No. 7, and section 2 of the order was quoted in full. On February 20 Gen. Pershing was cabled in effect, as follows: That it was proposed to promote Lieut. Col. E. A. Kreger, judge advocate, to brigadier general and place him in charge of the branch office of the Judge Advocate General in France, established by General Orders, No. 7. If desired, Gen. Bethel could remain in charge of the said branch and Gen. Kreger detailed on the staff of the commanding general. Recommendation was requested.

Gen. Pershing replied, under date of February 25, that he desired Gen. Bethel to remain on his staff and that so much of the cablegram as spoke of Gen. Bethel remaining in charge of the branch office was not understood, and

that the cablegram of January 20 appeared to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, 1918, just received in the mail; that Gen. Bethel had not established a branch office and would not do so pending further instructions, and in regard to cablegram of January 20 it was desired to know when the officers might be expected who were to establish the branch office, as cases were being held for action.

Paragraph 169, Special Orders, No. 15, War Department, 1918, is, in effect, as follows: That Gen. Bethel would assume charge of the branch of the office of the Judge Advocate General established in France and would perform the duties of Acting Judge Advocate indicated in General Orders, No. 7. It is not understood by the War Plans Division how the cable of January 20 could appear to supersede paragraph 169, Special Orders, No. 15, War Department, 1918.

3. The Judge Advocate General next sets forth the reasons for the issuance of General Orders, No. 7. All that is necessary to say in this connection is that the Judge Advocate General states that "experience during the present war has led to the conclusion that in a substantial number of cases reviewing authorities have approved and carried into execution sentences based upon proceedings which are invalid or which so palpably prejudiced the substantial rights of the accused that the sentences could not be carried into execution without outraging that sense of justice which characterizes the administration of all American law, military as well as civil." He then proceeds to explain how General Orders, No. 7, was intended to prevent such action. The Judge Advocate General states that inasmuch as Gen. Pershing was fully informed of the establishment of a branch office prior to the time the order went into effect, it is not understood why the objection he now raises should have been so long delayed; that it is not believed that the general is fully informed as to the purposes and the function of the branch office in question, and that when he is, he will not persist in the objection which is raised; and the Judge Advocate General recommends the sending of a cablegram to Gen. Pershing worded as follows:

"The order establishing a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriage of justice by assuring that legality without which no serious sentence should ever be carried into execution."

4. The War Plans Division sees no reason why the cablegram as set forth by the Judge Advocate General should not be sent, and inasmuch as it is known that Gen. Kreger is now in France, the War Plans Division is of the opinion that the cablegram should be added to by stating: "It is desired that conference be had with Gen. Kreger."

5. In this connection it may be stated that the War Plans Division is at present considering Senate 3692, which is an amendment to section 1199, Revised Statutes. The effect of General Orders, No. 7, will be considered in the memorandum submitted upon S. 3692.

6. Memorandum for The Adjutant General of the Army attached.

D. W. KETCHAM,
Colonel, General Staff,
Acting Director War Plans Division, Acting Assistant Chief of Staff.

EXHIBIT 82A.

[Third indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
March 28, 1918.

To Brig. Gen. E. A. KREGER,
Judge Advocate, Branch Office Judge Advocate General,
American Expeditionary Forces.

1. The foregoing request to have the branch office of the Judge Advocate General of the Army placed on the mailing list of The Adjutant General of the

Army is forwarded inviting attention to the second paragraph hereon, wherein The Adjutant General states that all War Department publications are supplied the American Expeditionary Forces through the Commanding General Expeditionary Forces.

(Signed) R. K. SPILLER,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE WAR COUNCIL,
Washington, April 19, 1918.

Memorandum for Gen. Crowder:

The following cable extract is furnished you for your information:

Cablegram to Gen. Pershing No. 1135, April 19, 1918:

"Paragraph 4. The order which included the establishment of a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country, and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood, it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution. It is desired that conference be held with Gen. Kreger.

"MARCH."

EXHIBIT 83.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 1, 1918.

Memorandum for Gen. Crowder:

1. Gen. Pershing's cablegram No. 779, March 24, 1918, from London to The Adjutant General, Washington, is as follows:

"Paragraph 3, subparagraph A: With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the commander in chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the Army. Any thoughts in minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

The first thing to be noticed is that notwithstanding the fact that Gen. Pershing was advised of the establishment of this branch office of the office of the Judge Advocate General as early as January 20 last, and was in due course advised of Gen. Kreger's promotion and detail in charge of the branch office, he has voiced no objection until now. A conclusion so long delayed should weaken the confidence the department might otherwise have had in Gen. Pershing's judgment upon the matter. On January 20 the department, in a cablegram (A. G. O. 666), communicated to Gen. Pershing, paragraph 2 of

General Orders, No. 7. That paragraph, which is unmistakably explanatory of the purpose of establishing the branch office and the scope of its jurisdiction, is verbatim as follows:

"II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the acting judge advocate general of the American Expeditionary Forces in Europe, and shall report and be controlled in the performance of his duties by the Judge Advocate General of the Army.

"The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

"By order of the Secretary of War."

And on the same day paragraph 3 (A. G. O., cablegram 663) was communicated to Gen. Pershing, as follows:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch office of Judge Advocate General established in France by War Department General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order."

On February 2 paragraph 2 (A. G. O., cablegram No. 816) was communicated to Gen. Pershing, as follows:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of the said branch office and Kreger be detailed on your staff in his stead. Cable recommendation."

In due course the department received paragraph 3 of Gen. Pershing's cablegram No. 644, dated February 25, 1918, as follows:

"Paragraph 3. With reference to paragraph 2, of your cablegram 816 desire that Walter A. Bethel (Brigadier General) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3 your cablegram 663 of 20th appears to supersede paragraph 169, Special Orders, No. 15, War Department, January 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office and will not do so pending further instructions. With reference to paragraph 3 your cablegram 663 desire to know when officers may be expected to arrive to establish branch office as cases are being held for his action."

It has to be observed that Gen. Pershing states that he had just received and had his attention invited to paragraph 169, Special Orders, No. 15, War Department, current series, when he sent his cablegram No. 644 of February 25. That paragraph is as follows:

"Until further orders Brig. Gen. Walter A. Bethel, judge advocate, National Army, will assume charge of the branch of the Office of the Judge Advocate General established in France by the War Department, General Orders, No. 7, January 17, 1918, and will perform the duties of Acting Judge Advocate General indicated in the said order."

The action taken was the result of the most thorough consideration at the War Department; it was organic in character and required by law. Even if it were within the power of administration to do so, the revocation of such orders would constitute a serious reflection upon the administrative capacity of the department.

2. But Gen. Pershing's objection is based upon a misconception of the law establishing the relation of the Office of the Judge Advocate General to the military authorities, of whatever rank, empowered to convene general courts-martial. He has ignored section 1199, Revised Statutes, which not only empowers but requires the Judge Advocate General of the Army to revise all proceedings of courts-martial. This is a substantial function which is established by law and can not be dispensed with by administrative direction. All cases are to be reviewed and revised in this department. Besides, in the numerous cases contemplated by the forty-eighth article of war it is there supposed that final action can not be taken by any military authority but that the confirmation of the President is required. As to sentences of death imposed for rape, murder, mutiny, desertion, or spying, the President, speaking through the War Department, has expressed his will as Commander in Chief that the final authority to carry such sentences into execution, imposed by the forty-eighth article of war by a commanding general in the field or a commanding general of a territory, department, or division, shall not be exercised until an independent review of the proceedings has been made by the Judge Advocate General of the Army in the exercise of the revisory power conferred up him by law or by an officer acting for him, such as the acting judge advocate general for the expeditionary forces. It is obviously absurd to exercise a revisory power after the execution of death sentences or other sentences finally separating an officer or member of the Military Establishment therefrom.

3. Gen. Pershing says:

"Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect."

By misconduct, of course, he means something distinguishable from murder, rape, mutiny, desertion, or spying. It must be observed that sentences of death for such misconduct can not be carried into execution by any commander in the field. Our law requires in such cases the final confirmation of the President.

4. Gen. Pershing says:

"Any method that causes delay and possible miscarriage of justice would be unfortunate for us and injurious to the morale of our Allies."

Beyond argument the law clearly requires final confirmation by the President in many cases where Gen. Pershing, mistakenly, thinks he has the authority. Since all proceedings are required to be revised by this office, it must be patent that the location of a branch office in France for the purpose of that revision, carrying, as it does, the full authority of this office in such revision, makes not for delay but for expedition. Gen. Pershing's reference to possible miscarriage of justice is not understood. That review by an authority charged with that duty can result in a miscarriage of justice when justice can not be administered without such review is beyond apprehension. If Gen. Pershing means that the review by a representative of this office, whereby substantial and prejudicial errors of law are detected and corrected and legal correctness is secured and assured, will prevent the carrying into effect of illegal sentences which otherwise he would be able to carry into effect, then the need of that revision is much emphasized. It would indicate that in the administration of military justice mere summariness of execution of a sentence is to be preferred to a reasonable assurance of its legality.

5. Our law contemplates military situations in which crime may be punished on the spot and with death; but when the offense is once submitted to judicial processes established by the law of the land applicable to our forces universally, those processes can not be destroyed by considerations of summaries without violating the law and sacrificing the quality of justice. The law requires correctness to be determined by an independent review by this office or its representatives; its representative has been placed at Gen. Pershing's right hand, not that the required procedure be delayed, but, on the other hand, expedited.

Neither do I understand the last sentence but one of Gen. Pershing's cablegram, reading:

"Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous."

If Gen. Pershing means that men ought not to escape punishment awarded as a result of a trial that is found to be fundamentally illegal, his attitude could hardly fail to shock the ordinary sense of justice. On the other hand, it is conceivable that the morale of the command would be improved when assured that they will be punished only according to law and not according to hasty and ill-advised judgment. Certainty and correctness of punishment are to be desired rather than mere summariness. The implication that the review of this office

must necessarily result in men escaping deserved punishment imposed according to law is thoroughly unjustified.

S. T. ANSELL.
JAMES J. MAYES.

EXHIBIT 84.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 1, 1918.

Memorandum for the Chief of Staff.

Subject: Cablegram to Gen. Pershing.

1. I recommend, therefore, that substantially the following be dispatched to the commanding general American Expeditionary Forces:

"You evidently misapprehend your own jurisdiction in relation, in some cases, as those under the forty-ninth article of war, to that of the President, and in all cases to the power and duty of the Judge Advocate General of the Army, under section 1199, Revised Statutes, to revise court-martial proceedings with a view to assuring that they are free from prejudicial error. The order establishing the branch office was thoroughly considered by the department; you were advised of it immediately; and in none of your previous communications have you expressed any objection. The order, therefore, must be complied with. Doubtless it will not, when its purposes are thoroughly understood, be objectionable to you. Delay necessitated by the review required by law of the Judge Advocate General is reduced to a minimum by the establishment in France of the representative of the Judge Advocate General; such delay is inevitable, can not be hurtful, and will assure that legality without which no sentence should be executed."

JUDGE ADVOCATE GENERAL.

EXHIBIT 85.

[321.4 Branch Office. J. A. G. O. Apr. 4, 1918.]

APRIL 3, 1918.

Memorandum for the Chief of Staff.

Subject: Cablegram from Gen. Pershing in re establishment of branch of the office of the Judge Advocate General in France.

1. Gen. Pershing's cablegram No. 779, March 24, 1918, from London, to The Adjutant General, Washington, is in part as follows:

"Paragraph 3, subparagraph A. With reference to a branch of the Judge Advocate General's Office in France to review certain court-martial proceedings after they have been acted upon by the judge advocate here, the reason for this is not clear. It submits to review cases within the jurisdiction of department commander in time of peace and is in direct conflict with broad and liberal character of President's instructions at inauguration of command. Any authority outside of control of the Commander in Chief will cause delay in possibly more cases. Beyond doubt punishment for desertion or misconduct must be almost summary if it is to have deterrent effect. This is practiced in both British and French Armies. Any method that causes delay and possibly miscarriage of justice would be unfortunate for us and injurious to morale of our Allies. The circumstances under which we are serving are in no sense comparable to our Civil War conditions, as here we are fighting a strong and virile foreign nation, and every possible means must be placed in the hands of the supreme commander to enable him to maintain the morale and integrity of the army. Any thoughts in the minds of men that they can possibly escape punishment for such misconduct would be disastrous. I am very strongly of the opinion that final authority in these cases should rest with the supreme commander here."

This cablegram from Gen. Pershing makes it necessary to review and set out in sequence previous communications on this subject. General Order No. 7, War Department, current series, was published under date of January 17, 1918. On January 20, 1918, a cablegram was transmitted by The Adjutant General

to Gen. Pershing containing a digest of section 1 of General Order No. 7 and section 2 of the said order in full. The cablegram as sent reads as follows:

"Paragraph 1, General Orders, No. 7, these headquarters, publish court-martial rules of procedure prescribed by President, effective February 1, an outline of which is furnished for your information. Rule 1. Sentence of death or dismissal of officer confirmed by commanding general of territorial department or division not to be executed until review of record in the office of Judge Advocate General or branch thereof, action to be entered in record, and to conclude with recital that the execution of sentence will be directed in orders after the record of trial has been reviewed by Judge Advocate General, and that jurisdiction is retained to take additional or corrective action prior to or at time of publication of general court-martial order in case. Rule 2. Sentence of dishonorable discharge not intended to be suspended will not be ordered executed before review of record, as in rule 1, and action to conclude with same recital. Rule 3. When record of trial in cases covered by rules 1 and 2 is reviewed in the office of the Judge Advocate General or branch thereof the reviewing authority will be informed as to the legality of his proposed action. Errors and omissions which admit of correction will be indicated. Proper disposition of case suggested. Rule 4. Delay in execution of sentence by reason of these rules to be credited on any term of confinement or imprisonment imposed. Rule 5. Procedure prescribed in rules 1 and 2 to apply to commanding generals in the field when the Secretary of War so decides and orders. Rule 6. Authorizes the Secretary of War to establish branches of the office of Judge Advocate General for review of court-martial records.

"II. There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

"The records of all general courts-martial in which is imposed a sentence of death, dismissial, or dishonorable discharge and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

"By order of the Secretary of War."

On the same date, January 20, 1918, cablegram 663 was sent to Gen. Pershing, paragraph 3 of which reads as follows:

"Paragraph 3. Order made directing Brig. Gen. Walter A. Bethel, judge advocate, assume charge branch office of Judge Advocate General established in France by War Department, General Orders, No. 7, current series, and to perform the duties of Acting Judge Advocate General indicated in said order."

On February 20, 1918, cablegram No. 816 was sent to Gen. Pershing, paragraph 2 of which reads as follows:

"Paragraph 2. Recently approved tables of organization provides for one additional brigadier general, Judge Advocate General's Department. It is proposed to promote Lieut. Col. E. A. Kreger and detail him in charge of branch office of Judge Advocate General established by our 666. In the event you so desire, Lieut. Col. Walter A. Bethel, Judge Advocate General's Department, may remain in charge of said branch office and Kreger be detailed on your staff in his stead. Cable recommendation."

The department received in reply paragraph 3 of Gen. Pershing's cablegram 644, dated February 25, 1918, as follows:

"Paragraph 3. With reference to paragraph 2 of your cablegram 816, desire that Walter A. Bethel (brigadier general) remain judge advocate on my staff. So much of your cablegram as speaks of Walter A. Bethel's remaining in charge of branch office not understood. Paragraph 3, your cablegram 663 of 20th, appears to supersede paragraph 169, Special Orders 15, War Department, Jan-

uary 18, just received in mail. Brig. Gen. Walter A. Bethel has not established branch office, and will not do so pending further instructions. With reference to paragraph 3, your cablegram 663, desire to know when officers may be expected to arrive to establish branch office, as cases are being held for his action."

It is to be observed that Gen. Pershing states in this cablegram that he had just received paragraph 169, Special Orders 15, War Department, January 18, by mail, and that paragraph 3 of cablegram No. 663, January 20, appears to supersede the said paragraph 169, Special Orders 15, War Department, 1918. Paragraph 169 of Special Orders 15, War Department, 1918, is as follows:

"Until further orders Brig. Gen. Walter A. Bethel, judge advocate, National Army, will assume charge of the branch of the office of the Judge Advocate General established in France by the War Department, General Orders, No. 7, January 17, 1918, and will perform the duties of Acting Judge Advocate General indicated in the said order."

A comparison of paragraph 3 of cablegram No. 663 with paragraph 169 of Special Orders 15, just cited, shows that it was not intended to supersede the order but to convey advance information that the order had been issued.

2. The action of the War Department in establishing a branch of the office of the Judge Advocate General in France was taken only after the most thorough consideration. It was organic in character and believed to be necessary in the administration of military justice. The revocation of the order establishing this branch office does not seem to be called for, and it is believed that if Gen. Pershing fully understood the purpose and operation of this order his cablegram cited at the beginning of this memorandum would not have been sent.

Under section 1199, Revised Statutes, the Judge Advocate General is required to revise all proceedings of courts-martial. Acting under this authority, this office reviews not only those cases which require the action of the President before the sentences imposed may be carried into execution, but also all cases in which the action of a lesser reviewing authority is final in and of itself. Experience during the present war has led to the conclusion that in a substantial number of cases reviewing authorities have approved and carried into execution sentences based upon proceedings which are invalid or which so palpably prejudiced the substantial rights of the accused that the sentences could not be carried into execution without outraging the sense of justice which characterizes the administration of all American law, military as well as civil. To prevent action in such cases from becoming final before the records of trial are reviewed in this office, General Order No. 7, current series, was published. Its purpose is to prevent a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man from being finally executed prior to review of the record of trial in this office. Action in all such cases under General Order No. 7 has been expedited in this office, and every effort is made to reduce delays in the administration of military justice to a minimum. The beneficial effects of this order are pointedly shown by one case which is now under consideration in this office. The accused was charged and convicted of murder, was sentenced to death, and the sentence of death would undoubtedly have been promptly executed by the reviewing authority in question had not General Order No. 7 been in force and effect. The review in this office has disclosed the fact that, although the record of trial had been passed by the department judge advocate, there was no evidence in the record upon which a conviction of anything more than manslaughter could be predicated, and for this offense the death penalty is not authorized. In one case at least, therefore, General Order No. 7 has already served to prevent the execution of an illegal death sentence.

It goes without saying, I think, that however careful or conscientious a judge advocate serving on the staff of a commanding general may be, he can not give a case which has passed through his hands, and which he has recommended for trial, the same unbiased consideration which is given by an officer who is wholly independent of such commanding general and who is directly responsible to the Judge Advocate General for the accuracy of his opinions. What has happened elsewhere may well happen in our Expeditionary Forces in France. Serious errors of the nature indicated above might well be overlooked by judge advocates serving in the field and result finally in the execution of unjust and illegal sentences if an independent review is not to be had prior to such execution. These considerations indicate the necessity for such an independent review in all cases covered by

General Order No. 7 before final execution of sentences. In order to minimize the delay a branch of the Judge Advocate General's office was located in France, with the same powers of review as exist in this office. There is every reason to believe that the operation of this branch office will in no way interfere with the administration of military justice, that it will in no way weaken the discipline of our forces, and it will not, in any case, result in a miscarriage of justice or create in the mind of any soldier the belief that it was established in order to enable him to escape punishment for misconduct. On the other hand, there is reason to believe that the office may result, as it was intended to result, in certain cases, in preventing serious miscarriages of justice.

Inasmuch as Gen. Pershing was fully informed of the establishment of this branch office prior to the time that the order went into effect, it is not understood why the objection which he now voices should have been so long delayed; but, as stated above, it is not believed when he is fully informed as to the purposes and functions of the branch office in question he will insist upon the objections he has raised. On the other hand, it is believed that he will recognize the necessity for its establishment and the useful purpose which it was designed to serve. In our governmental system it is as necessary that punishment be legal as that it be swift and summary. It is, therefore, recommended that a cablegram be sent to Gen. Pershing in terms as follows:

The order establishing a branch of the office of the Judge Advocate General in France was promulgated after the most thorough consideration on the part of the War Department. The existence of this order has already justified itself in preventing the execution of one illegal death sentence, not coming, however, from your command. The operation of the order has not delayed the administration of military justice in this country and the establishment of the branch office in France will prevent delay in the administration of military justice in cases arising within your forces. It is believed that when its purposes and operation are thoroughly understood it will no longer be objectionable to you. Your suggestion that it may result in miscarriages of justice is not concurred in, since it is believed that it will operate to prevent miscarriages of justice by assuring that legality without which no serious sentence should ever be carried into execution.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 86.

APRIL 5, 1918.

Brig. Gen. WALTER A. BETHEL,
American Expeditionary Forces, France.

MY DEAR BETHEL: I am going to spend the necessary time out of a very busy day in an attempt to clear up the situation in respect of the establishment in France of a branch of the Judge Advocate General's Office, regarding which matter there seems to have been more or less misapprehension at your headquarters. You are, of course, familiar with the cable correspondence which has passed on the subject. For your convenience in reference, however, I inclose a copy of a memorandum that I have had prepared for the Chief of Staff, in which that correspondence is reviewed and set out in sequence.

First, let me say that it is difficult for me to understand why, upon receipt of the two cablegrams of January 20, 1918, one cabling Gen. Pershing the contents of General Order No. 7 and the other designating you as Acting Judge Advocate General, the branch office of the Judge Advocate General was not immediately established. I assumed that it was in operation from that time and continued of this view until the receipt of Gen. Pershing's cablegram of February 25, 1918, wherein he says:

"Brig. Gen. Walter A. Bethel has not establishd branch office and will not do so pending further instructions."

This leads me to comment upon the situation which is presented by Gen. Pershing's cablegram, No. 779, which seems to imply some dissent from the action here taken in establishing the branch office. He appears to view it as a possible obstruction to the administration of military justice and as a mistake of judgment.

I wish you would assure Gen. Pershing (whom I would address directly but for the reason that I know he has no time to read letters) that every thought

of this office, and I believe every thought of the War Department, is directed toward the discovery of ways and means to help him in his enormous task; that our idea was to expedite and not delay, and that he will understand better the occasion for this order if he will consider the following:

Prior to the issue of General Order No. 7 it had become apparent that due to the large increase in commissioned personnel, which included many officers with little or no experience in court-martial practice, a large number of proceedings were coming in which exhibited fatal defects. A congressional investigation was threatened, and there was talk of the establishment of courts of appeal. The remedy for the situation was immediate executive action which would make it clearly apparent that an accused did get some kind of revision of his court-martial proceedings other than the revision at field headquarters where these prejudicial errors were occurring. At this point permit me to say that very few errors have been discovered in cases coming up from your headquarters. It was primarily with reference to errors occuring at field headquarters other than in France that this step was taken.

Accordingly we formulated the scheme of General Order No. 7. The Secretary of War gave personal consideration to the matter and on three or four occasions discussed it exhaustively with this office. He finally approved the order and contemplated, as I did, the establishment of the branch office promptly upon the receipt of our two cables of January 20. I may say here that at other headquarters the scheme has worked beautifully. It has silenced all criticism and I believe that no invalid sentences are now beyond the reach of remedial action.

Your own intimate knowledge of court-martial procedure makes it quite unnecessary for me to enter upon a lengthy discussion of the merits of the new system, which I feel quite sure will not fail to commend itself to you as a substantial step in the right direction. As stated in my memorandum to the Chief of Staff, it is believed that had Gen. Pershing fully understood the purpose and operation of General Order No. 7, his cablegram No. 779 of March 24, 1918, would not have been sent. I trust that the cablegram which I have recommended be sent him in reply, a draft of which is contained in the concluding paragraph of the inclosed memorandum, will serve to convince him of the wisdom and propriety of the issue of this order and that the procedure it contemplates will materially aid rather than obstruct the prompt and efficient administration of military justice in the American Expeditionary Forces.

With best wishes, I am,

Very truly, yours,

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 87.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
AMERICAN EXPEDITIONARY FORCES IN EUROPE,
G. H. Q., A. E. F., France, April 15, 1918.

Maj. Gen. E. H. CROWDER,
Judge Advocate General, United States Army,
War Department, Washington, D. C.

DEAR GENERAL: As indicated in my report of March 31, made pursuant to paragraph 827, Army Regulations, I arrived at general headquaters American Expeditionary Forces, and reported for duty on March 26.

Before my departure from Washington an unsigned draft of an order appointing me Acting Judge Advocate General for the American Expeditionary Forces in Europe came into my hands. The arrival of an official copy of such an order has been expected from day to day, but thus far none has been received. Maj. Rand and myself were assigned to station here upon our arrival and at once took up the work of the branch of the Judge Advocate General's Office; but, pending the arrival of my orders, Gen. Bethel remains in charge of the office and the duties of the office are being performed in his name.

Gen. Pershing being absent from headquarters at the time of my arrival, I had a preliminary conference with Gen. Harbord, Chief of Staff, and Gen. Bethel, with reference to the location of the office. I indicated a desire to be governed in the matter by Gen. Pershing's wishes. Various considerations, among which were the existing means of communication by mail and telegraph between general headquarters and the headquarters of the various commanding officers exercising general court-martial jurisdiction, the desirability of keep-

ing in close touch with the Judge Advocate of the Expeditionary Forces, and the fact that the office had been temporarily established at general headquarters, led me to the conclusion that it should remain where it is. In that conclusion Gen. Harbord appeared to concur; and I felt justified in assuming that he reflected the views of Gen. Pershing with reference to the matter. In the course of an interview I had with Gen. Pershing at a later date my impression that to have the office located here would be satisfactory to him was confirmed.

In conformity with your suggestions I indicated to Gen. Pershing the reasons for the establishment of the office, outlined its functions, endeavored to make clear that its existence would in no wise affect the exercise of discretionary powers by officers having general court-marital jurisdiction, and expressed a desire to be really helpful in the administration of military justice throughout the command.

The establishment of the office appears to have been looked upon in some quarters here with a certain degree of apprehension—possibly because the brief cablegrams on the subject did not serve clearly to disclose the functions of the office. At any rate it appeared to me that there was an impression that the establishment of the office was without precedent—represented an innovation, and that its existence might serve to curtail the exercise of the powers of commanding officers invested with general court-martial jurisdiction. The apprehension does not, in my opinion, exist now to the extent that, apparently it did exist three weeks ago, and it shall be my endeavor to bring about the entire disappearance.

While in England I had a conference with Maj. White, the Judge Advocate on duty at Gen. Biddle's headquarters in London. Since my arrival here I have had an opportunity to confer with Col. Hull and Col. Winship, and to discuss with them personally the relation of this office to the various headquarters exercising general court-martial jurisdiction, and, of course, the matter has been fully discussed with Gen. Bethel.

Though I hope soon to receive the order assigning me to duty in charge of this office, I am inclined to the opinion that it has been well to have the administration of the office controlled, for a short time after its establishment, by the Judge Advocate of the Expeditionary Forces, because that would naturally aid in allaying the apprehension that, due no doubt to misunderstanding, appears at first to have existed as to the purpose in view in establishing the office.

Very sincerely, yours, E. A. KREGER.

EXHIBIT 88.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
France, May 1, 1918.

General Orders, No. 66.

* * * * * * *

VI. Brig. Gen. Edward A. Kreger, National Army, now on duty at these headquarters, having been appointed Acting Judge Advocate General for the American Expeditionary Forces in Europe by paragraph 126, Special Orders No. 53, War Department, current series, and directed to assume charge of the branch of the office of the Judge Advocate General of the Army, established in the city in which these headquarters are located, pursuant to General Orders, No. 7, War Department, current series, Brig. Gen. Walter A. Bethel, National Army, stands relieved from further duty in charge of said branch office.

* * * * * * *

By command of Gen. Pershing:

JAMES G. HARBORD,
Chief of Staff.

Official:
BENJ. ALVORD,
Adjutant General.

Brig. Gen. E. A. Kreger reports under date of May 1, 1918, that he was on that date assuming charge of the branch office of the Judge Advocate General of the Army at General Headquarters, American Expeditionary Forces.

EXHIBIT 89.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, May 5, 1918.

Gen. E. H. CROWDER,
War Department,
Washington, D. C.

DEAR GENERAL: I received your letter of April 5 yesterday, relating to the establishment of the branch office here. I expect to lay a number of cases before Gen. Pershing either this afternoon or to-morrow and shall take pleasure in reading to him the paragraphs of your letter relating to the reason for the establishment of the branch office.

Now, as to the misunderstanding between the War Department and these headquarters. First let me say that I am responsible for Gen. Pershing's cablegram No. 644 of February 24, 1918, but not No. 779 of March 25 protesting against the establishment of the branch office. The misunderstanding came about in the following way. War Department cablegram No. 663 (par. 3) as received here stated that Capt. John B. Richardson, Infantry, had been ordered to establish the branch office in France. This cable came at the same time as the cable announcing the contents of General Order, No. 7. We accordingly awaited Capt. Richardson's arrival and held cases for his action. Not until about a month later did we learn that the War Department had ever contemplated putting me in charge of the branch office temporarily. The first intimation of that fact was received when a copy of Special Orders No. 15 directing me to assume charge of the branch office came to me by mail. On comparing Special Orders No. 15 with the cable directing Capt. Richardson to take charge of the office it was seen that the cable bore date two days later than the order and the only reasonable conclusion under the circumstances was that the War Department had first determined to place me in charge of the office and had almost immediately thereafter decided that Capt. Richardson should establish the office. That is why I said in our 644 that the instructions in the cable appeared to supersede the Special Order No. 15. When War Department cable No. 816 was received saying it was proposed to place Kreger in charge of the office but that I might remain in charge of the office if Gen. Pershing should so desire, the word "remain" indicated to me that the War Department supposed that I had established the office and I felt it necessary to clear up the misunderstanding at once and accordingly drew and had sent Gen. Pershing's cable No. 644 of February 24. I need hardly say that we were more than anxious to have pending cases disposed of and had the first cable informed us that I was to take charge, the office would have been established promptly on its receipt. Not until Kreger's arrival was it ever known here that there was a mistake in the Richardson cable. When he told me that he had never heard of Richardson, I wondered how the Richardson cable came to be sent and found that Richardson's signal number is 17068 while mine is 1768.

With these facts before you I think it will be clear to you why the branch office was not immediately established. Without them our action here is, of course, inexplicable.

On receipt of the contents of General Orders, No. 7, by cable I submitted a long memorandum (Feb. 5) paragraphs 2 and 3 of which were as follows:

"2. I may say that although the order was a surprise to me, on reading it carefully I think its purpose is clear. Section 1199 of the Revised Statutes, to which reference is made in the order establishing the branch office, provides:

"'The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all court-martials, courts of inquiry, and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army.'

"The powers and duties of the Judge Advocate General comprised in the above word 'revise' have never been judicially construed, nor had the War Department, prior to the outbreak of the present war, ever arrived at a positive determination as to just what the word signifies. I remember that the Judge Advocate General expressed doubt as to this point two or three years ago. In time of peace the matter had not the importance that it may have now. No sentences of death or dismissal could be carried into effect without the confirmation of the President, and of course in the meantime the record was

reviewed by the Judge Advocate General. Sentences of dishonorable discharge were carried into effect in large number by department commanders before the records were reviewed in the Judge Advocate General's Office, but where serious injustice had been done either as a result of illegal action or otherwise, clemency was freely exercised by the President on the Judge Advocate General's recommendation.

"It is evident from the cable received that the War Department now construes the word 'revise' as requiring, or at least making proper, an examination of the record of trial by the Judge Advocate General's Office before a sentence which permanently affects the status of a military man takes effect and is beyond recall. The order requires that before the sentence take effect the Judge Advocate General's Office, or one of its branches, examine the record to see whether or not there is a fatal error in the proceedings. The reviewing authority indorses his action as usual upon the record, but the same is tentative until the legality of the sentence has been passed upon by the Judge Advocate General's Office, whereupon, on notification to the reviewing authority that the same is legal, the action is published and takes effect.

"I think it is not improbable that this order was brought about by the execution of 13 Negro soldiers in Texas recently, almost immediately after their trial. While I have no conclusive information on the point, I infer from what I saw as to the reports in the bulletins of these cases that the execution took place before the records had reached Washington. It is not improbable that there were certain errors in the trials. The statements made in this paragraph, however, are only a surmise on my part.

"3. With reference to your proposed cable recommending that I be made Acting Judge Advocate General of the American Expeditionary Forces and that Capt. Richardson be ordered to report to me as assistant, I advise that the same be not sent. I do not regard the order itself as any reflection on myself or on these headquarters, but as having been issued merely for the purpose of giving what the War Department conceives to be the proper effect to section 1199, Revised Statutes. The War Department evidently takes the view that the revision should be made by the Judge Advocate General's Office, and the judge advocate's office of these headquarters is not, and can not in my opinion be made, a part of the Judge Advocate General's Office.

"Very sincerely,

"W. A. BETHEL."

EXHIBIT 90.

MAY 14, 1918.

From: The Office of the Judge Advocate General.
To: Brig. Gen. Edward A. Kreger.
Subject: Report dated March 31, 1918.

1. In the second paragraph of your report of March 31, 1918, you state that no order has been received appointing you Acting Judge Advocate General for the American Expeditionary Forces in France. Special Order, No. 31, dated March 5, 1918, paragraph 146, is as follows:

"Lieut. Col. Edward A. Kreger, judge advocate, is appointed Acting Judge Advocate General for the American Expeditionary Forces in Europe, and will assume charge of the branch of the office of the Judge Advocate General of the Army established in France by General Orders, No. 7, January 7, 1918, War Department, relieving Brig. Gen. Walter A. Bethel, National Army, of the temporary charge of said branch."

This special order was mailed to you through the commanding general American Expeditionary Forces on March 12, 1918. The same information was cabled to Gen. Pershing earlier in March. It is expected that before this communication reaches you the entire matter will have been satisfactorily adjusted.

By direction of the Judge Advocate General:

H. M. MORROW,
Lieutenant Colonel, Judge Advocate, Executive Officer.

EXHIBIT 91.

General Orders, No. 84.

WAR DEPARTMENT,
Washington, September 11, 1918.

I. By direction of the President the commanding officer Camp Joseph E. Johnston, Jacksonville, Fla., is empowered, under the eighth article of war to appoint general courts-martial whenever necessary. [250.4, A. G. O.]

II. Paragraph 5, section IV, General Orders, No. 149, War Department, 1917, is amended so as to prescribe that enlisted men assigned to supply trains will wear the Motor Transport Corps hat cord. [320.2, A. G. O.]

III. Section IV, General Orders, No. 64, War Department, 1918, is rescinded and the following substituted therefor:

1. Hereafter quartermasters of all forts, posts, camps, and other military stations within the continental limits of the United States under the jurisdiction of department and Coast Artillery district commanders will forward requisitions for needed supplies through their commanding officers direct to such general supply depots as are designated by the Quartermaster General from time to time. A copy of requisition will, at the same time, be sent to the department or Coast Artillery district quartermaster by all forts, camps, posts, and military stations under jurisdiction of the department or Coast Artillery district commander.

2. The depot quartermaster of a general supply depot to which a fort, post, camp, or other military station is assigned for supplies is responsible for the proper supply of the station, and is authorized to transfer surplus stocks, to prevent accumulation of shortages, from one station to another, after assuring himself that the future needs of the troops at station from which supplies are transferred and those of incoming troops are provided for. He is also authorized to correspond with and call upon quartermasters direct for reports as to status of supplies at their stations.

3. For all forts, posts, camps, or other military stations under the jurisdiction of the department and Coast Artillery district commanders, the depot quartermaster will promptly report to the department or Coast Artillery district quartermaster, in the district in which the requiring troops are stationed, for the information of the department or Coast Artillery district commanders, the action taken by him on the requisitions of such forts, posts, camps, or other military stations. The depot quartermaster will also keep the department and Coast Artillery district quartermasters advised of the surplus supplies transferred from one post, camp, or other place to another, as far as such transfer affects the department or Coast Artillery district concerned.

4. Instructions in conflict with the foregoing provisions are revoked. [300.42, A. G. O.]

IV. The last subparagraph of section II, General Orders, No. 7, War Department, 1918, is amended to read as follows:

The records of all general courts-martial and of all military commissions originating in the said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file. [250.47, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
P. C. HARRIS,
Acting The Adjutant General.

EXHIBIT 92.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
France, July 5, 1918.

From: The Office of the Acting Judge Advocate General.
To: The Judge Advocate General of the Army, War Department, Washington, D. C.
Subject: United States *v.* Delbert L. Moss, private, Thirty-second Aero Service Squadron, Signal Corps. (A. J. A. G. O., 201-92.)

1. The record of trial in case mentioned above is going forward to your office under separate cover. The papers listed below accompany the record:

Statement of service; review by judge advocate of trial jurisdiction; review by this office, in duplicate; letter of advice from this office, in duplicate; supplementary review by judge advocate of trial jurisdiction; copy of memorandum by reviewing authority; and general court-martial order, five copies.

2. Pvt. Moss was tried on April 17, 1918, by a general court-martial convened by order of the commanding general, Service of the Rear, now Services of Supply, American Expeditionary Forces, upon three charges, under each of which two specifications were laid. The second charge and the specifications thereunder read as follows, viz:

"Charge II: Violation of the ninety-fourth article of war.

"Specification 1: In that Pvt. Delbert L. Moss (21196), Thirty-second Aero Service Squadron, did, at Third Aviation Instruction Center, on or about the 1st day of March, 1918, feloniously take, steal, and carry away one pair of russet shoes, value about $4.95, property of the United States, furnished and intended for the military service thereof.

"Specification 2: In that Pvt. Delbert L. Moss (21196), Thirty-second Aero Service Squadron, did, at Third Aviation Instruction Center, on or about the 1st day of March, 1918, wrongfully and knowingly sell to Pvt. Ray Van Arsdale, Twenty-sixth Aero Squadron, Signal Corps, one pair of russet shoes, value about $4.95, property of the United States, furnished and intended for the military service thereof."

The court found Moss guilty of one specification under Charge I, of one under Charge III, of both of the specifications under Charge II, and of each of the three charges, and adjudged a sentence legally justifiable without reference to the second charge and the specifications thereunder. The reviewing authority, on April 28, 1918, approved the sentence and designated a military prison camp as the place of confinement, but held in abeyance the order directing execution of the sentence, pending review of the record in this office pursuant to the requirements of General Order 7, War Department, 1918.

3. On May 11, 1918, the record was returned to the reviewing authority by this office, together with a copy of the review by this office and a letter of transmittal, carrying the following recommendations:

"(*a*) That the findings of guilty as to the charge and specifications relating to larceny and wrongful sale of Government property (Charge II and the specifications thereunder) be disapproved; and

"(*b*) That the reviewing authority consider whether or not, in view of the illegality of the findings respecting Charge II and the specifications thereunder, the entire sentence adjudged by the court should be approved and carried into execution."

Subsequently the record was returned to this office with a general court-martial order showing approval of the sentence and directing execution thereof, but containing no reference to the approval or disapproval of any particular findings. A memorandum, dated May 28, 1918, prepared by the judge advocate of the Services of Supply, in which he disagrees with the review and recommendations of this office and a copy of a memorandum bearing the initials of the reviewing authority, and reading, "Adhere to the original action and direct the execution of the sentence," also accompanied the record.

4. With reference to the conclusions stated in the review by this office (see pars. 7, 8, and 9), let me say that though ready to admit the force of the argument in the counter memorandum of May 28, I am not convinced that this office made a mistake. I am unwilling to hold that any presumption of fact arising from another presumption that Army Regulations are obeyed to the letter can take the place of evidence to support an essential element of an offense charged

as a violation of the ninety-fourth article of war. I attached no great importance to the use by the witness Griel of the expression "my shoes," as he might have so referred to the property in question, even if it had been issued to him by the Government. It was not upon affirmative evidence of property in Griel, but upon the absence of evidence of property in the United States that my conclusion was based. The inspection of the shoes by the court, even if it showed that they were of the make and character issued to enlisted men, could not have supplied this deficiency, for such shoes can be and no doubt have been bought by soldiers from manufacturers and dealers, and the change of shoes in the United States referred to by Griel may well have been such a purchase.

If my advice in this case was erroneous, I shall be glad to be so informed by your office in order that I may not repeat the error in other cases.

5. My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority, and with the portion of the counter memorandum of May 28, which deals with that point. In construing General Order No. 7, War Department, 1918, the writer of the memorandum states that:

"If the commanding general concurs in the conclusion here reached, he should approve the findings and sentence in spite of the recommendation to the contrary of the Acting Judge Advocate General. That recommendation is not controlling but merely advisory."

And again:

"The reviewing authority is required to wait until he shall receive that advice before finally deciding on his action, but there is nowhere any indication that he is to regard that advice as final."

It has been my belief that the purpose in view in the creation, by General Order 7, of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order; and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be that the writer of the memorandum of May 28 is right and that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision.

6. Your instructions in the premises are requested for my guidance; and, if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they, as well as this office, be advised to that effect.

(Signed) E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 93.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS,
American Expeditionary Forces, France, July 11, 1918.

From: The Office of the Acting Judge Advocate General.
To: The Judge Advocate General of the Army, War Department, Washington, D. C.
Subject: United States *v.* Noel F. Peters, private, Four hundred and sixty-sixth Aero Squadron, Signal Corps. (A. J. A. G. O., 201–116.)

1. The record of trial in case mentioned above is going forward to your office, under separate cover. The papers listed below accompany the record:

Statement of service, review by judge advocate of trial jurisdiction; review by this office, in duplicate; letter of advice from this office, in duplicate; supplementary review by judge advocate of trial jurisdiction; and general court-martial order, five copies.

2. Pvt. Peters was tried on May 20, 1918, by a general court-martial convened by order of the commanding general of the Services of Supply, American Expeditionary Forces, upon the following charge and specification:

"Charge: Violation of the fifty-eighth article of war.

"Specification: In that Pvt. Noel F. Peters, 25891, Four hundred and sixty-sixth Aero Squadron, Signal Corps, did, at Third Aviation Instruction Center, American Expeditionary Forces, on or about the 24th day of February, 1918, desert the service of the United States, and did remain absent in desertion until he was apprehended at Toulouse, France, on or about the 10th day of March, 1918."

He pleaded not guilty. The court found him guilty as charged and sentenced him to be dishonorably discharged, to forfeit all pay and allowance due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 10 years. On May 31, 1918, the reviewing authority approved the sentence and designated a penitentiary as the place of confinement, but held in abeyance the order directing the execution of the sentence, pending review of the record in this office pursuant to the requirements of General Order 7, War Department, 1918.

3. On June 20, 1918, the record was returned to the reviewing authority, with a copy of a review by this office. The letter of transmittal contained the following statement and recommendation:

"This office is of the opinion that the record is not legally sufficient to support a conviction of desertion, but that it is legally sufficient to support a conviction of absence without leave, in violation of the sixty-first article of war. The record is accordingly returned with the recommendation that the supplementary action suggested by the review be taken."

On July 8, 1918, the record was returned to this office, together with a general court-martial order evidencing approval of the sentence and ordering its execution, but making no special reference to the finding of guilty of desertion. A memorandum, dated July 1, 1918, by the judge advocate of the Services of Supply, in which he disagrees with the office review, and upon which is indorsed a note by the reviewing authority, reading, in part, as follows:

"I am satisfied that the original action was sound. Let it stand."

accompanies the record.

4. The counter memorandum of July 1 has not convinced me that the conclusion arrived at in the review by this office (see pars. 6, 7, and 8) is unsound. That memorandum discusses at length the probable guilt of the accused. This is beside the point. The conclusion stated in the office review is not based upon the ground that the accused is innocent, but upon the ground that he had not had a fair trial because of the admission of a great mass of incompetent and highly prejudicial testimony. It was pointed out that a sharp issue of fact as to the intention of the accused man was involved, and that the case was not one in which, if the illegal evidence had been excluded, the court would nevertheless have been compelled to a finding of guilty.

In the counter memorandum it is said that "the accused by the continued dilatory discharge of his duties convinced his superior officers that he was discontented with the service." This is not convincing. Expressions of dissatisfaction with the services are, to be sure, competent evidence of an intention to depart from it (M. C. M., p. 134); but if such dissatisfaction can be shown by the soldier's misconduct, the door is opened wide to proving as many other acts of misconduct as the prosecution can gather in proof of the offense charged, which is, of course, contrary to well recognized legal principles.

The writer of the counter memorandum appears to regard the office review as inconsistent in that it condemns a conviction for desertion and yet approves a conviction for absence without leave (see his par. 11). The reason for the distinction is plain. The accused raised no issue as to his absence without leave. On the contrary, he admitted it (see his testimony in the record, pp. 32–34). He said that he went absent from his company on the evening of February 23, at 7.30; that he did not go to Paris, because he feared the military police would arrest him; that he expected to remain away four or five days and that upon his return he would be punished and transferred. His admission that he feared arrest and expected some punishment is tantamount to saying that he had no permission to be absent and is a clear corroboration of the other testimony in the case (see office review, par. 5) that he was absent without leave. The issue of an intention permanently to remain away was, however, sharply contested; and it was for that reason, among others, that the review of this office held that the illegal testimony had prejudiced the substantial rights of the accused.

The point made in the office review that the admission of certain testimony relating to a previous trial and conviction of the accused, introduced in the course of the presentation of the prosecution's case and therefore, before the

court had arrived at a finding, was illegal and prejudicial to the accused, is dismissed by the writer of the counter memorandum of July 1 with no comment, except an indication of his failure to understand it.

In the countermemorandum there is mention of a marginal annotation made at page 25 of the record. That annotation is no part of the office review, but was made by Maj. Rand as an aid to his memory in dictating the office review. The incident referred to in the marked portion of the testimony is discussed in paragraph 7 of the office review, near the bottom of page 5, where the point is made that the declarations of the accused in December were made with reference to a particular disappointment, and were for that reason remote not only in point of time but in point of relevancy to the offense for which he was being tried.

If my advice in this case was erroneous, I shall be glad to be so advised, to the end that I may not repeat the error in other cases.

5. My immediate concern, however, is not with the question of the soundness of the advice given by this office, but with the question of what effect should have been given to such advice by the reviewing authority. That question is not discussed by the judge advocate of the trial jurisdiction in his countermemorandum pertaining to this case, but was discussed by him in his memorandum relating to the case of Pvt. Delbert D. Moss. (A. J. A. G. O., 201-92.) The following extract from a letter addressed to you with reference to the Moss case is quoted as especially pertinent in connection with this case, viz:

"It has been my belief that the purpose in view in the creation, by General Order 7, of this branch of your office was to prevent final approval of illegal findings and the execution of illegal sentences in the classes of cases described in that order; and I am unable to see how that purpose is to be fully accomplished if reviewing authorities are to be free to disregard the advice of this office with respect to the legality of findings and sentences. It may be * * * that the purpose of General Order 7 will be regarded as having been sufficiently attained by delaying the execution of sentences until the records shall have been reconsidered by the reviewing authority in the light of my views expressed by this office. As to this I do not urge my opinion, but submit the question to your office for decision."

6. Your instructions in the premises are requested for the guidance of this office; and if the opinions of this office with respect to the legality of findings and sentences are to be regarded by reviewing authorities as controlling, it is recommended that they as well as this office be advised to that effect.

7. Being still of the opinion that the record in this case is legally insufficient to support the findings and sentence, and that the advice of this branch of the Office of the Judge Advocate General with reference to the legality of a finding or sentence reviewed here should be given the same effect as if the advice had been given by the Office of the Judge Advocate General of the Army, I recommend that the sentence be declared null and void and that Peters be restored to duty.

E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 94.

[Office of the Acting Judge Advocate General for the American Expeditionary Forces in Europe.]

GENERAL HEADQUARTERS, AMERICAN EXPEDITIONARY FORCES,
France, July 14, 1918.

Maj. Gen. E. H. CROWDER,
Judge Advocate General, United States Army,
War Department, Washington, D. C.

DEAR GENERAL: To your cablegram reading "Cable total number of officers and enlisted men Judge Advocate General's Department needed in your office until January next" I have replied:

"Reference paragraph 8, your cablegram 1644. Entire personnel now authorized, seven officers and eight enlisted men, will be needed in this branch by January if jurisdiction remains unchanged. I recommend that branch be required to review all general court cases arising in American Expeditionary Forces. If this recommendation be approved, additional force of three officers

and four enlisted men will be needed by January. Recommend promotion Maj. William Rand to lieutenant colonel. Letter follows."

The terms of General Order 7, War Department, 1918, are not altogether clear with respect to cases in which the execution of sentence of dishonorable discharge is suspended. Paragraph 2 of section 1 requires that the execution of sentences in cases involving dishonorable discharge be deferred pending review in the office of the Judge Advocate General, or a branch thereof, only when the reviewing authority does not intend to suspend the execution of the dishonorable discharge until the soldier's release from confinement. The second paragraph of Section II requires that the records of all general court-martial cases in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions originating in the Expeditionary Forces be forwarded to this branch for review, and apparently does not limit the jurisdiction of the branch to cases in which the dishonorable discharge is to be executed at once, except as such limitation is to be inferred from the clause "to the end that any such sentence or any part thereof found to be invalid or void shall not be carried into effect," which, in connection with Section I of the order, seems to indicate that when it is not the intention of the reviewing authority to carry the dishonorable discharge into effect at once the record need not be sent to this branch for review. In practice the order was so construed before my arrival here and has continued to be so construed, as cases involving suspended sentences of dishonorable discharge have not been sent here. I have discussed the matter with Gen. Bethel. He holds the view that General Order 7 neither requires nor authorizes records involving suspended sentences of dishonorable discharge to be sent to this branch. However, we are agreed that such records should be reviewed here. It may well happen that within a comparatively short time after trial the conduct of a soldier in whose case a sentence of dishonorable discharge has been suspended will lead the reviewing authority to direct the execution of the dishonorable discharge. If the necessary examination were made here an opinion indicating that the record in any case of that kind is legally insufficient to support the sentence may reach the reviewing authority in time to prevent the issue of a dishonorable discharge certificate, thus avoiding a complication that may arise if the record must go to Washington for examination. I should be very glad to have the doubt resolved in favor of the more extensive jurisdiction, either by authoritative interpretation of General Order 7 by your office or by a new general order.

Before I left Washington I understood that you expected, after this branch had been established for some little time, to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and, second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and polices of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now requires such action.

The number of cases in which the execution of sentences of dishonorable discharge has been suspended has been comparatively small thus far. However, I am led to believe that the proportion of such suspensions will increase. I think that the personnel authorized on April 3—7 officers and 8 enlisted men—will be ample to meet requirements until January next under General Order 7 as now construed, and also sufficient to meet requirements if in addition to the classes of cases now coming here for review those in which dishonorable discharges are suspended are also sent here. At the time Lieut. Col. Wallace arrived I was about to request you to send over another officer. The present indications are that the three officers now regularly assigned to duty in the branch can handle the work for some weeks to come. In the course of two or three weeks more I expect to be in a better position than at present to suggest to you the time at which it will be advisable to have additional officers arrive here for duty in the branch.

An order requiring the examination here of all general court-martial cases arising in this command would increase very considerably the amount of work to be done by the branch. Less than one-half of the cases arising in the command are now coming here for review. However, it is believed that a considerable portion of the cases which involve neither death, dismissal, nor dishonorable discharge are of such a nature as not to require the preparation of a formal written review and that therefore the proposed enlargement of the duties of the branch would not, in the course of the next five or six months, call for an additional force in excess of three officers and four enlisted men. It is upon that theory that my cabled reply to your cable was based. If the suggested enlargement of the duties is ordered, one officer should be sent over for duty in the branch very soon after the change shall become effective. Applications can be made for others as the need for their services arises.

If you approve of my recommendation that additional personnel be authorized, to be applied for as needed, it is recommended that the distribution of the increase to grades be as follows: One colonel, one lieutenant colonel, one major, one regimental sergeant major, one battalion sergeant major, and two sergeants or corporals. With few exceptions the officers exercising original general court-martial jurisdictions over here are major generals. No doubt in the near future such jurisdiction will be exercised also by lieutenant generals. Chiefs of staff, who are often consulted by commanders with reference to the administration of military justice, even though the judge advocate possesses the full confidence of his commander, are of the grade of colonel or above. In order that the opinions expressed in reviews may have the benefit of the added weight that is usually given the opinion of an officer of rank, it is believed that the authorized personnel of this branch, if it is to review all general court-martial cases arising in the command, should include the number of colonels and lieutenant colonels contemplated in my recommendation.

If the jurisdiction of the office is broadened and an additional officer is ordered over here almost at once, any one of the following-named officers would be entirely satisfactory to me: Col. H. A. White, Col. J. J. Mayes, Lieut. Col. H. M. Morrow, Lieut. Col. Charles B. Warren, Lieut. Col. E. G. Davis, Lieut. Col. Guy D. Goff, Lieut. Col. William O. Gilbert, Lieut. Col. Neal Power, Maj. Grant T. Trent. I have named these officers because I have worked in cooperation with all of them, and because before I left Washington I understood from each that he desired an early opportunity to serve in France. At the suggestion of Maj. Rand the name of Maj. E. M. Morgan is added to the list. The filing of this list is, of course, not to be understood as suggesting the exclusion of others from consideration. It is understood that the requirements of the service may make it advisable for you to send some other officer.

Maj. William Rand has done excellent work here. He served here as the sole assistant from the time I took charge of the branch until the arrival of Lieut. Col. Wallace. As the grade of lieutenant colonel is now represented in the branch, I think he, as the oldest assistant, should be promoted to that grade.

Attention is invited to my letters of July 5 and 11 with reference to the question presented in cases of Pvts. Delbert L. Moss and Noel F. Peters. The records in those cases, and also the letters mentioned in the preceding sentence, were forwarded to you by ordinary mail. A copy of each of the letters, accompanied by copies of inclosures except the records, will go forward under the same cover with this letter, which will be sent by the next courier leaving here for the United States and may therefore reach your office before the original letters and the records sent by ordinary mail arrive.

Very sincerely,

E. A. KREGER.

EXHIBIT 95.

JUNE 21, 1918.

The Office of the Judge Advocate General.

The Acting Judge Advocate General, American Expeditionary Forces in Europe.

Modification of General Order No. 7, War Department, January 17, 1918, and disposition of papers relating to completed trials by general courts-martial.

1. Section 2 of General Order No. 7 of the War Department, January 17, 1918, provides that:

"The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge, and of all military commissions

originating in the said expeditionary force, will be forwarded to the said branch office for review. * * *"

The order makes no provision for review by your office in any other cases than those described. It follows that records of trials, in which there is imposed confinement or forfeiture or other punishment without dishonorable discharge or dismissal, are not reviewed by any officer other than the judge advocate for the court-martial jurisdiction prior to their receipt in this office. The result will be in a case involving, for instance, confinement at hard labor for six months that the punishment will be executed before the case is reviewed by the Judge Advocate General's Office. Of course, in that event the legality of the sentence becomes, so far as the accused is concerned, of little more than academic interest.

2. This office desires an expression from you upon the advisability of so amending section 2 of the General Order referred to as to require all cases tried by general court-martial in American Expeditionary Forces to be sent to your office for review and subsequent transmission to this office for file.

3. The filing of original charges and accompanying papers relating to completed trials by general court-martial in the offices of judge advocates of general court-martial jurisdiction creates a burdensome mass of records to be preserved and transported by those offices. Your view is desired upon the advisability of requiring these charges and accompanying papers to be forwarded with the proceedings of the trial for file either in your office or in this office.

ENOCH H. CROWDER,
Judge Advocate General, United States Army.

EXHIBIT 96.

JUDGE ADVOCATE'S OFFICE,
France, July 17, 1918.

Memorandum: For the Adjutant General.

Subject: Increase of jurisdiction of the European branch office of the Judge Advocate General's office.

1. You have referred to me for remark the following recommendation contained in a cable prepared by Gen. Kreger for transmission to the War Department:

"I recommend that branch be required to review all general court cases arising in Amex forces."

2. Under War Department orders issued in January the Judge Advocate General's Office, or one of its branches, reviews the records of general court trials in the following cases before the sentence takes effect:

(1) Death sentence.
(2) Dismissal of officers.
(3) Dishonorable discharge when not suspended.

Other sentences take effect immediately upon the approval of the reviewing authority. The European branch reviews, for the Judge Advocate General's office, the records in cases of the three sentences named above, but all other records, sentences involving forfeitures, ordinary confinement, and dishonorable discharge where suspended go to the Judge Advocate General's office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served. Or, if it is desirable to reconvene the court for correction of the error, it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make review of all court-martial cases here in Europe rather than a part. The only objection I see is that it would add probably two or three officers to the office force of the European branch, and also two or three soldiers. I have heard of but two records being found defective in the Judge Advocate General's office, one from the Service of Supply and the other from the Forty-first Division, but there may have been others, since in these matters the Judge Advocate General may correspond with the division commanders direct.

3. I see no reason for taking any exceptions to Gen. Kreger's recommendation.

W. A. BETHEL,
Brigadier General, National Army, Judge Advocate.

EXHIBIT 97.

[First indorsement.]

ACTING JUDGE ADVOCATE GENERAL'S OFFICE.
GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES.
France, July [illegible], 1918.

To the JUDGE ADVOCATE GENERAL OF THE ARMY,
War Department, Washington, D. C.:

1. In connection with the first question raised in the foregoing communication, attention is invited to the following extract from a cablegram filed for transmission on July 14, 1918, viz:

"For the Judge Advocate General. Reference paragraph 8 your cablegram 1644 * * * I recommend that branch be required to review all general court-martial cases arising in Amex forces. * * *."

And the following extract from a letter addressed to you, under date of July 14, 1918, viz:

"Before I left Washington I understood that you expected, after this branch had been established for some little time, to consider the advisability of requiring it to review the records of all cases tried by general courts-martial in the American Expeditionary Forces. I have considered the matter and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: First, in order that illegal sentences may either not be carried into effect at all or their execution arrested at the earliest possible moment; and, second, because the examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future orders be issued requiring this branch to review, before transmission to your office, the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now requires such action."

After mailing the letter of July 14 I learned that the transmission of the cablegram had been delayed in order that Gen. Bethel might have an opportunity to express his views respecting the proposed extension of the jurisdiction of this branch. A copy of Gen. Bethel's memorandum, dated July 17, 1918, as well as a complete copy of my letter of July 14 is inclosed herewith. The cablegram referred to above, which went forward on July 20, is quoted in full in the letter of July 14. I see no reason for modifying the views expressed in the cablegram and letter and therefore confirm the recommendation therein made that this branch be required to review, before transmission to your office, the records of all cases tried by general courts-martial in the American Expeditionary Forces.

2. In connection with the second question raised in the foregoing communication it is recommended that instructions be issued—

(*a*) Requiring the original charges in each case tried by general courts-martial to be appended to the record of trial, and (*b*) authorizing the transmission to the Judge Advocate General's Office of all papers relating to the case, either with the record but not appended thereto, or at a subsequent time if the temporary retention of the papers with the command in which the trial of the case takes place is necessary or desirable.

I think it desirable that the original charges be appended to the record, to remain with it permanently. The other papers, i. e., the statement of evidence, the indorsement referring the charges for investigation, the report of the investigating officer, the indorsements of intermediate commanders (M. C. M., secs. 75, 76), and the carbon copy of the voucher for the payment of the reporter (M. C. M., sec. 114) have, at best, only a temporary value for record purposes, until all disciplinary measures incident to the transactions which form the subject matter of the trial, or incident to the trial itself, have been disposed of. I see no reason for permanently burdening the files of the Judge Advocate General's Office, or the files of this branch, with those papers. If forwarded with the record but not appended thereto, or if subsequently forwarded, they may, on reaching your office, be filed separately and in due time disposed of pursuant to the provisions of the acts of February 16, 1889 (25 Stat., 672), and March 2,

1895 (28 Stat., 933), which seems to prohibit the destruction of such papers save as prescribed in said acts (Dig. Ops., J. A. G., 1912–1917, pp. 218, 548).

If the foregoing suggestions be considered favorably, the Manual for Courts-Martial (par. (*b*), sec. 79, and par. 3 (*b*), p. 334, and perhaps other paragraphs and sections) should be amended so as to prohibit placing upon the charge sheet any indorsement other than that of the convening authority referring the charges for trial.

E. A. KREGER,
Acting Judge Advocate General.

EXHIBIT 98.

AUGUST 29, 1918.

Memorandum for the Chief of Staff.

Subject: Modification of General Order No. 7, War Department, January 17, 1918.

1. The European branch of the Judge Advocate General's office, by authority of the above designated order, reviews for legality alone the record of general court trials in the following cases before the sentences take effect:

(1) Death sentences.

(2) Dismissal of officers.

(3) Dishonorable discharge when not suspended.

All other cases go to the office of the Judge Advocate General at Washington for the review which the statute and good administration require, resulting necessarily in much delay. Obviously, such a review, the sole purpose of which is to determine whether the sentence as a matter of law is valid or invalid, can not seasonably be made here. Both Gen. Kreger, in charge of the branch office in Europe, and Gen. Bethel, judge advocate, American Expeditionary Forces, recommend the extension of the duties of the branch office there to include the review of all general court trials. Gen. Kreger summarizes his view thus:

"I have considered the matter (the matter here in question) and have discussed it with Gen. Bethel. We are agreed that it would be advisable to have all such records examined here: in order that illegal sentence may either not be carried into effect at all, or their execution arrested at the earliest possible moment, and because examination of a portion only of the cases arising in the command does not give the branch the general view of the administration of military justice that would put it in a position most effectively to aid in carrying into effect the views and policies of your office and of the War Department. It is accordingly recommended that in the near future, orders be issued requiring this branch to review before transmission to your office the records of all cases tried here by general courts-martial. This recommendation is not to be understood as suggesting that the execution of sentences be held in abeyance pending review by this branch in any cases other than those in which General Order 7 now require such action."

And Gen. Bethel thus:

"Other sentences (that is, those which are not now required to be reviewed by the branch office) take effect immediately upon the approval of the reviewing authority. The European branch reviews for the Judge Advocate General's office the records in cases of the three sentences named above. (That is, death sentence, dismissal of officers, and dishonorable discharge not suspended); but all other records, sentences involving forfeiture, ordinary confinement, and dishonorable discharge, where suspended, go to the Judge Advocate General's office in Washington for review, resulting, of course, in much delay. If such a sentence is held to be invalid, the action setting it aside for invalidity can only take effect after considerable part of it has been served, or if it is desired to reconvene the court for correction of an error, it is generally impracticable to do so after so long a period. It would, therefore, in my opinion, be much better administration for the European branch to make the review of all courts-martial cases."

2. I concur in the views of these two officers, and recommend that the above designated order be amended, so as to require all cases tried by general courts-martial in the American Expeditionary Forces to be reviewed, to determine

their legality, by the Acting Judge Advocate General of those forces. The substantive portion of a draft of order to accomplish this purpose is herewith.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 99.

JUDGE ADVOCATE GENERAL'S OFFICE,
September 5, 1918.

DRAFT OF AMENDMENT.

The concluding unnumbered paragraph, on page 3, General Orders, No. 7, War Department, January 17, 1918, is hereby amended to read as follows:

"The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence invalid or void in whole or in part. Any sentence or any part thereof so found to be invalid or void shall be set aside, and the execution of all sentences of death, dismissal, or dishonorable discharge shall be stayed pending said review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file."

Mr. Smith instructed us to substitute third indorsement attached to 321.4 (August 29, 1918), branch office, instead of this draft of amendment.

L. A. H.

September 25, 1918.

EXHIBIT 100.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 8, 1918.

Memorandum for the Chief of Staff.

Subject: Amendment of General Order No. 7, War Department, January 17, 1918.

1. Herewith is a memorandum for the Chief of Staff from the Acting Judge Advocate General, dated August 29, 1918, recommending amendment of General Order No. 7, War Department, January 17, 1918.

2. Under General Order No. 7 as it now stands, the European branch of the Judge Advocate General's Office reviews for legality alone the records of general court trials before sentence takes effect in the following cases:

(*a*) Death sentence.

(*b*) Dismissal of officers.

(*c*) Dishonorable discharge when not suspended.

All other cases go to the office of the Judge Advocate General at Washington.

3. The amendment recommended by the Acting Judge Advocate General is designated to authorize the records of all cases tried in France to be reviewed by the European branch of the Judge Advocate General's Office. Gen. Bethel's and Gen. Kreger's opinions are set forth in the Acting Judge Advocate General's memorandum. The change recommended is reasonable and should make for good administration.

4. The War Plans Division recommends that the order be amended as per draft of amendment submitted by the Acting Judge Advocate General. Memorandum for the Adjutant General of the Army herewith.

LYTLE BROWN,
Brigadier General, U. S. A.,
Director, W. P. D., A. C. of S.

EXHIBIT 101.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 11, 1918.

Memorandum for The Adjutant General of the Army.
Subject: Amendment of General Order No. 7, War Department, January 17, 1918.

The Secretary of War directs that General Order No. 7, War Department, January 17, 1918, be amended as per attached draft of amendment by the Acting Judge Advocate General.

MARCH, *Chief of Staff.*

Received A. G. O.. Septemper 11, 1918.

EXHIBIT 102.

General Order No. 84, September 11, 1918—250.4, 320.2, 300.42, 250.47.

PRINTING AND BINDING.

Prepared by _____ Office mark _____
Date of requisition _____ Requisition No. _____
Number of copies _____ Jacket No. _____
Requisition sent to Public Printer September 17, 1918. _____
Estimate received _____ Estimated cost _____
Galley proof received _____
Galley proof returned _____
Page proof received September 21, 1918.

EXHIBIT 103.

[Sec. IV, G. O. No. 84, 1918.]

The records of all general courts-martial and of all military commissions originating in the said expeditionary forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records; to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void in whole or in part. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. Any sentence, or any part thereof, so found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside in accordance with the recommendation of the Acting Judge Advocate General. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

Approved:
By order of the Secretary of War:

FRANK MCINTYRE,
Major General, General Staff Corps,
Executive Assistant to the Chief of Staff.

EXHIBIT 104.

GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES,
JUDGE ADVOCATE'S OFFICE,
France, November 14, 1918.

From: The Judge Advocate, American Expeditionary Forces.
To: The commander in chief American Expeditionary Forces.
Subject: Jurisdiction of the Acting Judge Advocate General, American Expeditionary Forces.

1. The following matter is submitted in the belief there should be a decision by the War Department as to the authority of the Acting Judge Advocate

General, American Expeditionary Forces, to hold a court-martial sentence, duly approved by the proper authority, invalid on the ground that the evidence is not sufficiently convincing of guilt. The Acting Judge Advocate General has held in a number of cases, in which evidence prejudicial to the accused was improperly admitted, there was such evidence in the case as to substantially compel a conviction. Thus in the case of Sergt. Jacob J. Sonnenshein, Company F, Three hundred and sixth Infantry, the Acting Judge Advocate General said August 12, 1918:

"That all of this evidence was utterly irrelevant to the offense charged need not be argued. It remains to be considered what effect must be attributed to it. The court evidently considered it important, because in one instance it insisted upon the details, and the judge advocate thought it had some weight, because he went so far as to object to the attempt of the accused to explain why he had not resented the attacks upon his person and upon his character. Under these circumstances can a reviewer say that the substantial rights of the accused do not appear to have been prejudiced within the meaning of the thirty-seventh article of war? I think not. It is true that such prejudice is not necessarily to be implied from the admission by the court of illegal testimony. It is also true that the absence of such prejudice is not to be implied from the fact that even if the illegal testimony had been excluded enough legal evidence remained to support a conviction. The reviewer must, in justice to the accused and in compliance with the spirit of the thirty-seventh article of war, seek further and reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then, indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testinfony which under the law should have been excluded."

In the case of Pvt. Noel F. Peters, Four hundred and sixty-sixth Aero Squadron, he said June 20, 1918:

"This is not a case in which, if the incompetent evidence were excluded from consideration the court would still as reasonable men have been compelled to the same conclusion. On the contrary, with the great mass of incompetent testimony, and in view of the closely contested question of fact on the subject of intent, I do not see how it can be said that the substantial rights of the accused were not injuriously affected within the meaning of the thirty-seventh article of war."

In the case of Thomas M. Murphy, cook, Company A, Second Supply Train, he said, July 18, 1918:

"What effect shall be given to these grave errors? Did they prejudice the substantial rights of the accused? The rule of military administration is not that error necessarily imports prejudice. On the contrary, to invalidate the proceedings, prejudice must appear (A. W., 37). It is impossible, however, to examine the minds of the members of the court and determine how far illegal testimony has been effective in producing a conviction of guilt. A reviewer is required to examine the record to ascertain first, whether, with the illegal testimony excluded, enough legal evidence remains to support the conviction. This is, of course, a prime essential, but it is not enough. He must further examine and be able to say that the legal evidence of guilt in the record, weighed against the defense, substantially compels a finding of guilty."

And in the case of Sergt. Joseph Kovacs, Bakery Co. No. 320, Q. M. C., he said, September 25, 1918:

"It is not doubtful that the reception of illegal evidence may render void the subsequent finding and sentence. The thirty-seventh article of war clearly so contemplates. When such an error has or when it has not injuriously affected the substantial rights of the accused are legal and strictly judicial questions, which in some cases may be delicate and difficult to answer. They can never be answered by the direct testimony of the members of the court, and there is no method of probing the state of their minds or of estimating the balance of their judgments. Prejudice is not, of course, to be presumed. On the other hand, it is not to be avoided by the presence in the record of sufficient legal evidence to justify a conviction. Such a holding would nullify the requirement of military justice that the legal rules of evidence are to be observed (M. C. M., sec. 198). Yet some rule of administration of general application must be adopted. It appears to me that the rule followed by this office is the only safe and sound guide, namely, that the reception, in any substantial quantity, of illegal evidence must be held to vitiate a finding of guilty unless the legal evidence in the record is of such quantity and quality

as practically to compel, in the minds of conscientious and reasonable men, the same conclusion (U. S. *v.* Noel Peters, A. J. A. G. O., 201-116; U. S. *v.* Claude Wilson, A. J. A. G. O., 201-176)."

2. I deem it unnecessary to discuss here whether or not the rule as stated by the Acting Judge Advocate General is the rule of the courts in the United States exercising criminal jurisdiction, or whether or not it is the rule that the officer who approves or confirms the sentence should adopt as a guide. I do not believe that the Acting Judge Advocate General has any authority to decide as a matter of law what shall be the effect of competent testimony or what weight is to be given it or to determine what competent evidence shall and what shall not be deemed sufficiently convincing to support a conviction. Congress has recently made specific provision for the determination of the effect of the improper admission or rejection of evidence in the thirty-seventh article of war, as follows:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless, *in the opinion of the reviewing or confirming authority*, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused."

This expression of the law is so clear as to require no comment. It can not be doubted that the reviewing or confirming authority mentioned in the thirty-seventh article of war is the officer authorized to approve or confirm the sentence. Decision as to the effect of the improper admission of evidence, therefore, rests with him and must be decided by him and can not be decided by any other person.

3. Full copies of the decisions of the Acting Judge Advocate General, American Expeditionary Forces, are not submitted herewith for the reason that they are on file in the office of the Judge Advocate General.

W. A. BETHEL,
Brigadier General, Judge Advocate.

[First indorsement.]

G. H. Q., A. E. F.,
France, November 15, 1918.

To: The Adjutant General of the Army, Washington, D. C.

1. The remarks of the judge advocate American Expeditionary Forces in this letter are concurred in and decision is requested.

For the commander in chief.

——— ———,
Chief of Staff.

[Second indorsement.]

WAR DEPARTMENT, *A. G. O.*
December 6, 1918.

To the Judge Advocate General for decision.

By order of the Secretary of War.

J. C. ASHBURN,
Adjutant General.

EXHIBIT 105.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
ACTING JUDGE ADVOCATE GENERAL IN EUROPE,
France, November 16, 1918.

From: The office of the Acting Judge Advocate General.

To: The Judge Advocate General of the Army, War Department, Washington, D. C.

Subject: Jurisdiction of the Acting Judge Advocate General for the American Expeditionary Forces.

1. Late yesterday afternoon Brig. Gen. W. A. Bethel, judge advocate of the American Expeditionary Forces, handed me a copy of a communication dated November 14, addressed by him to the commander-in-chief of the American

Expeditionary Forces, with reference to the subject stated above. A copy of the communication is inclosed herewith.

2. My views concerning the effect of the improper admission of testimony prejudicial to the accused are expressed in reviews prepared in this office in the cases of Peters (201–116), Sonnenshein (201–148), Murphy (201–156), Wilson (201–176), Bird (201–212), and Kovacs (201–246). Gen. Bethel has quoted portions of the reviews in three of these cases. The record in each of these cases, except that of Kovacs, has gone forward to your office, each accompanied by a copy of our review. The record in the Kovacs case has not been received back from the reviewing authority. When the record is received back with the final orders of the reviewing authority all the papers in that case will go forward to you.

3. It will be noted that in five of the six cases mentioned in the preceding paragraphs the improper admission of testimony prejudicial to the accused was held to be fatal to the validity of the sentence adjudged, and in one case, that of Wilson, it was held that the legal evidence was sufficient substantially to compel the findings recorded by the court and, therefore, that the improperly admitted testimony did not serve to invalidate the findings and sentence of the court. The conclusion arrived at in the Wilson case was arrived at also in other cases of lesser importance reviewed in this office. The disposition of the office has been not to hold a sentence invalid because of the improper admission of testimony, unless it seemed clear that the substantial rights of the accused actually had been prejudiced thereby.

4. Attention is invited to the fact that in the case of Private Bird, Gen. Bethel agreed with this office that the record was legally insufficient to support the findings of the court. Attention is also invited to the fact that the point upon which the cases mentioned in Gen. Bethel's letter turned is discussed in Wigmore on Evidence (vol. 1, pp. 69–79), and that the test adopted by this office to determine the effect of error in the admis ion of testimony has the approval of Col. Wigmore.

5. Upon the two questions raised by Gen. Bethel's communication Lieut. Col. Rand has prepared a memorandum, of which a copy is inclosed herewith. I concur in his conclusions.

6. Until another rule to determine the effect of the improper admission of testimony prejudicial to the accused is authoritatively prescribed, I feel bound to follow the one we have adopted.

7. Gen. Bethel's communication in effect calls into question the legal validity of General Order 7, War Department, 1918, as amended by Section IV, General Order 84, War Department, 1918. In my opinion that order is well founded upon section 1199, Revised Statutes, and upon the power of the President, acting through the Secretary of War, to order a sentence to be executed only in mitigated form, or to forbid its execution entirely. However, it seems entirely unnecessary for me to discuss the validity of the order in question. That, no doubt, was fully considered by your office and by the Secretary of War before the order was issued.

E. A. KREGER,
Acting Judge Advocate General.

OFFICE OF THE ACTING JUDGE ADVOCATE GENERAL,
AMERICAN EXPEDITIONARY FORCES IN EUROPE,
France, November 16, 1918.

Memorandum for Gen. Kreger.
Subject: Jurisdiction of the Acting Judge Advocate General.

I have carefully considered the copy of a communication of November 14, 1918, from the judge advocate of the American Expeditionary Forces to the commander in chief dealing with the above subject.

I have nothing to add to the expression of my views quoted in that letter from several reviews of general court-martial cases by this office. Indeed, I do not understand that Gen. Bethel disputes them as stating the proper rule for the exercise of appellate jurisdiction (see first sentence of par. 2 of his letter). What he questions is the exercise of any appellate jurisdiction by this office in cases falling within the terms of the thirty-seventh article of war. His argument is a brief one, viz, that the terms of article 37 are so explicit as to require

no argument in support of his contention. I can not agree with him, for the following reasons:

A. The prohibition of the thirty-seventh article of war is directed to the reviewing or confirming authority and its meaning is as if it began, " The proceedings of a court-martial shall not be held invalid nor the findings or sentence disapproved by the reviewing or confirming authority * * * unless in his opinion," etc. I do not think that this article added to or subtracted anything from the existing law. It merely stated the prevailing rule governing the treatment on appeal of error in criminal cases (section 1025, R. S.).

Or, if I am wrong, and the prohibition is directed to the whole military hierarchy from the President down, then the President, the Secretary of War, and the Judge Advocate General are " reviewing " authorities (section 1025, R. S.).

In either view there is nothing in the language or intendment of the article which makes the opinion of the military commander final.

B. Why does Gen. Bethel limit his protest to cases where the error is in the reception or rejection of evidence? The article deals also and similarly with errors of pleading and procedure, and his contention for the finality of opinion of the commander must apply equally to such errors. A case might arise in which an attempted specification of murder under the ninety-second article of war failed to allege the death of the victim of the assault, although the proof showed it. This would be an error in pleading, and a finding of guilty of murder would be unsupported by the specification. Or a case might arise in which the members of the court were not sworn, and therefore the sentence was illegal. This would be an error of procedure. Would Gen. Bethel contend that because in the opinion of the commanding general these errors did not injuriously affect the substantial rights of the accused the sentences must stand? If so, he necessarily contends that the approval of a commanding general in all cases is final, since evidence, pleading, and procedure cover practically the whole field of error except jurisdiction.

C. I can not distinguish as to the point made by Gen. Bethel between the thirty-seventh and the forty-sixth, forty-seventh, and forty-eighth articles of war. The three last named give reviewing and confirming authorities (commanding officers) the power to approve or disapprove sentences and findings. This function, beyond any dispute, is to be performed in accordance with the officer's honest opinion of the legality of the proceedings and sentence. Is that opinion, as expresed in the approval or disapproval, to be final? If not, why not? And why may not finality be claimed for that opinion under articles 46, 47, and 48 with as much reason as under article 37? Yet it is the unquestioned practice of the Secretary of War to review these approvals and disapprovals through the Judge Advocate General of the Army and to take appropriate action to provide remedy in cases where they are found to be illegal (section 1199 R. S.).

D. With all due respect for Gen. Bethel's opinion, I consider the above considerations so conclusive as to the true intent of article 37 that I have refrained from mention of General Orders, No. 84, War Department, September 11, 1918. The jurisdiction of your office and of the main office in Washington was plain enough before that. But there can be no possible question now. Errors in evidence, in pleading, and in procedure are illustrations (and very comprehensive illustrations) of the causes which render findings and sentences illegal. And General Orders, No. 84, paragraph 4, in explicit terms directs that—

"Any sentence or any part thereof so (by the review of your office) found to be illegal, defective, or void, in whole or in part, shall be disapproved, modified, or set aside, in accordance with the recommendation of the Acting Judge Advocate General."

E. Even if Gen. Bethel be right and the discretion lodged in the commanding officer is final and beyond review, there is nothing to prevent the President, through the Secretary of War, from issuing instructions that no general court-martial sentence which your office has held to be illegal shall be executed.

F. I have no pride of authorship in and claim no originality for the office reviews quoted by Gen. Bethel. I am prepared to surrender the rule of administration therein described at any time for a better one. It is, however, clear to me that the necessity for some general rule—the application of some consistent and permanent test—is imperative. The effect of illegal evidence upon the substantial rights of an accused is no more to be left to the individual judgment of a judge advocate reviewer in each case than to the individual judgment of a military commander. The rule which we follow, viz, that substantial

uncured error must be held to have injuriously affected the rights of the accused (plaintiff in error or appellant) unless the competent and legal evidence is of such weight as to be compelling, is the rule adopted by courts of appeal in criminal cases. Until a better rule is suggested, I recommend that you follow it (Wigmore, vol. 1, pp. 69–79).

I am aware that the question when evidence is or is not compelling is sometimes a difficult and delicate one. It is, of course, essentially a question of fact, but one of those questions of fact which courts habitually take from the jury and reserve to themselves, as when they decline to submit cases to juries or set aside verdicts. In effect they then decide that a given finding of fact is not permissible to reasonable men. Such questions of fact are decided by the Supreme Court of the United States. When it holds unconstitutional a legislative act it decides not merely that the act is forbidden by the Constitution, but, in addition, that there is no reasonable ground to believe that it is not.

Such a question of fact has very recently been decided by Gen. Bethel himself in the case of Pvt. John Bird (A. J. A. G. O., 201–212), in which, speaking for the commander in chief of the American Expeditionary Forces, to whom an appeal had been taken by the commanding general of the 92d Division, The Adjutant General advised the reviewing authority that it was the unanimous opinion of a number of legal experts, in which the judge advocate, American Expeditionary Forces, concurs, "that there is no evidence disclosed by this record of the specific intent to commit rape."

The possible difficulty and delicacy of the question of the effect of error and its essentially legal and judicial nature confirm me in the belief that it is not the intention of Congress that it shall be finally decided by a military commander, who may or may not have a legal education or any capacity derived from training or experience, to decide such a question.

WILLIAM RAND,
Lieutenant Colonel, Judge Advocate, United States Army.

EXHIBIT 106.

General Orders, No. 41.

WAR DEPARTMENT,
Washington, March 25, 1919.

I. *Review of records of general courts-martial.*—The last subparagraph of section II, General Orders, No. 7, War Department, 1918, as amended by section IV, General Orders, No. 84, War Department, 1918, is further amended to read as follows:

The records of all general courts-martial and of all military commissions originating in said Expeditionary Forces will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the finding or sentence illegal or void, in whole or in part, to the end that any such sentence or any part thereof so found to be illegal or void shall not be carried into effect. The execution of all sentences involving death, dismissal, or dishonorable discharge shall be stayed pending such review. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon, to the Judge Advocate General of the Army for permanent file.

II. *Duties of board of appraisers.*—Subparagraph (*a*), paragraph 4, section II, General Orders, No. 30, War Department, 1918, is amended to read as follows:

4. (*a*) To determine, by appropriate methods, just compensation for all property of whatever kind, real, personal, and mixed, or for the use, possession, or occupation of any such property (1) which shall hereafter during the existing emergency be ordered, requisitioned, commandeered, or otherwise summarily taken over according to law, through, by, or by direction of the Secretary of War for the direct and special use of the Army, or which was taken otherwise than by requisition, commandeering, or other summary process issued according to law, and without valid agreement fixing compensation therefor; or (2) which has heretofore, during the present emergency, been thus taken

letermination of just compensation for which has not been con-
ot under consideration by a special board of assessors.
the Secretary of War:

FRANK MCINTYRE,
Major General, Acting Chief of Staff.

RR,
utant General.

EXHIBIT 107.

ion: Maj. Gen. E. H. Crowder, Judge Advocate General; Brig. Gen.
S. T. Ansell, Assistant; Col. James J. Mayes, Assistant.]

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 10, 1918.

f the several divisions are as follows:
tive officer. Room 132. Lieut. Col. H. M. Morrow. (One clerk.)
y of the officer in charge, as his designation implies, to see that
tion of this bureau is performed smoothly, expeditiously, and
must have an intimate knowledge of the work of all the divi-
nay advise the head of the office regarding the status of the work
all of them. He should be constantly in touch with the several
of the officers engaged in each division. So far as possible, he
e head of the office from the necessity of attending to merely
s and unimportant matters involving internal office administra-

urisdiction division. Rooms 191–199. Lieut. Col. Edwin G. Davis
h Lieut. Col. R. K. Spiller, Lieut. Col. A. E. Clark, Lieut. Col.
Maj. M. A. Coles, Maj. W. B. Pistole, Maj. C. B. Parkhill, Maj.
lekoper, Maj. A. R. Brindley, Maj. F. B. Johnson, Maj. C. L.
C. M. Fessenden, Maj. P. E. Coyle, Maj. R. W. Millar, Maj. E. R.
j. C. C. Tucker as assistants. (Ten clerks.)
of this division are the review of records of courts-martial; ren-
ts upon application for clemency; solution of problems relating
inary barracks and the government of military prisons; and
ring to do with the discipline of the Army, in so far as it involves
tion of this office.
s division. Room 138. Maj. E. M. Morgan, officer in charge.

of this division will be to collect all war laws and decisions affect-
est to our Military Establishment, and also to see, after conference
tive officer, that so much of it as would be valuable for their pur-
uted among all judge advocates on active duty.
of accounts, claims, contracts, commandeering property, and fiscal
144. Lieut. Col. L. W. Call in charge, with Majs. T. Ruffin,
man. and Mr. W. W. Lemmond as assistants. (One clerk.)
of this division will be to give consideration to accounts, contracts,
ditures, disbursements, fiscal affairs in general, and the com-
f property for public use.
ional and international law division. Room 138. Lieut Col.
baugh, officer in charge.
of this division will consist of the consideration of all questions
wo special branches.
ninistration division. Room 144. Lieut. Col. Edward S. Bailey

of this division will be to give consideration to all legal questions
the Bureau of Insular Affairs, in which all matters the officer in
assisted by Mr. Lemmond, and to all questions arising under the
ion of the War Department, including river and harbor adminis-
o all those questions which arise through the contact of the mili-
civil community except those falling under the constitutional and
law division.

7. Legislative division. Rooms 138 and 145. Lieut. Col. William O. Gilbert in charge, with Lieut. Col. B. A. Read and Capt. D. D. Snapp as assistants. (Three clerks.)

The duties of this division will be to give consideration to the drafting of proposed legislation, keeping in touch with, and expediting its passage through Congress.

8. Reservation division. Room 136. Mr. J. F. Defandorf in charge. (One clerk.)

The duties of this division will be to give consideration to questions affecting the titles to Government lands, military reservations, leases, permits, rents, Executive orders, etc.

9. Miscellaneous division. Room 146. Lieut. Col. George S. Wallace in charge, with Lieut. Col. Guy D. Goff and Maj. Amos R. Stallings as assistants. (One clerk.)

The duties of this division will consist of the numerous miscellaneous questions arising in the administration of the War Department and the Army which do not fall specifically within the duties of any other division of the office. It will be to the benefit of the administration of this division if the officer in charge will have frequent conferences with the executive officer or other Regular officers on duty in the department.

10. Library. Rooms 140–142. Maj. E. S. Thurston in charge. Miss N. C. Morrison, librarian.

The duties of the library are to keep available at all times a well-equipped and up-to-date law library for the use not only of the Judge Advocate General's office but for the entire War Department.

11. Personnel and property division. Room 136. William H. Keith, chief clerk and solicitor, in charge. (Two clerks.)

This division is in charge of the funds, records, supplies, property, and clerical force of the office. It will handle the estimates, requisitions, allotments, supervise and coordinate the clerical work, and will conduct the routine business of the bureau.

(*a*) Upon receipt of papers in the chief clerk's office they are stamped, numbered, precedents attached, and charged to the officer handling them. When completed they are returned to the chief clerk, where the charge against the officer is removed, thus showing the time the officer had them; then they are passed to Col. Mayes, to Gen. Ansell, and to Gen. Crowder. After approval they are sent out, either by mail or in jackets by messengers.

(*b*) Record section. Rooms 139–141. Mr. R. L. Merrick in charge. (Six clerks.)

All opinions, reports, memoranda, letters, and papers, except general courts-martial records and title papers are recorded and filed in the record rooms, Nos. 139–141.

The general courts-martial records are recorded and current records filed in room 199.

The title papers are filed in room 137.

(*c*) The stenographic section. Rooms 135–137. Mr. T. A. Smith in charge.

Except for one or two stenographers in the rooms of the chiefs of divisions, the stenographers and typewriters are located in rooms 135 and 137. Officers desiring the services of a stenographer should either phone to Mr. Smith, branch 1991, or send to him by messenger the matter they desire to have typewritten or mimeographed.

EXHIBIT 108.

NOVEMBER 17, 1917, TO APRIL 10, 1918.

107039, Dec. 3, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107045, Nov. 21, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J A. G.

107046, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107076, Nov. 16, 1917.—rev., signed Maj. E. G. Davis, Asst. J. A. G., approved S. T. Ansell, Act. J. A. G.

107084, Nov. 26, 1917.—rev., signature not shown.

107085, Dec. 17, 1917.—memo. to Secretary of War, signed Ansell, Act. J. A. G.

107086, Dec. 11, 1917.—rev., signed Maj. E. G. Davis, approved S. T. Ansell, Act. J. A. G.
107087, Nov. 26, 1917.—memo. to Secretary of War, signature not shown.
107117, Jan. 17, 1918.—clem., signed Maj. E. G. Davis.
107122, Mar. 23, 1918.—rev., signed A. E. Clark, Lieut. Col., Asst. J. A. G.
107130, Dec. 18, 1917.—clem., signed Maj. E. G. Davis, Asst to J. A. G.
107135, Mar. 18, 1918.—clem., signature not shown.
107136, Nov. 16, 1917.—memo. for Secretary of War, signature not shown, approved Ansell, Act. J. A. G.
107138, Nov. 21, 1917.—rev., signed Crowder, J. A. G.
107139, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107148, Jan. 5, 1918.—rev., signature not shown.
107153, Dec. 7, 1917.—rev., signed Maj. E. G. Davis, approved Crowder.
107163, Nov. 24, 1917.—clem., signed Maj. E. G. Davis, approved Crowder.
107168, Dec. 11, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107169, Nov. 16, 1917.—memo. for Secretary of War, signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107179, Nov. 22, 1917.—memo. for Secretary of War, signed S. T. Ansell, Act. J. A. G.
107186.—rec. in review, out of file.
107221, Nov. 21, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107222, Nov. 20, 1917.—rev., signed Maj. E. G. Davis.
107229, Dec. 8, 1917.—clem., signed Maj. E. G. Davis.
107238, Dec. 14, 1917.—clem., signed Maj. E. G. Davis.
107241, Nov. 22, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107250, Dec. 4, 1917.—memo. for Secretary of War, signed Maj. E. G. Davis, approved Ansell.
107254, Nov. 21, 1917.—rev., signed Ansell, clem.
107264, Nov. 30, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107282, no date.—rev., signed E. H. Crowder (initialed RKS–cc).
107290, Nov. 26, 1917.—record ret'd for corrective action, E. G. Davis.
107299, Mar. 6, 1918.—clem., signed Maj. E. G. Davis.
107313, Mar. 5, 1918.—clem., signature not shown.
107315, Dec. 26, 1917.—clem., sentence remitted, signed Maj. E. G. Davis.
107324, Dec. 28, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107326, Dec. 27, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107339, Dec. 28, 1917.—rec., ret'd for corrective action, signed E. G. Davis.
107346, Dec. 29, 1917.—rec., signed E. G. Davis, approved Ansell.
107361, Mar. 9, 1918.—rev., signed E. G. Davis, approved Ansell.
107376, Jan. 30, 1918.—clem., signed E. G. Davis, approved Ansell.
107387, Dec. 12, 1917.—memo. to Secretary of War, signed Ansell, Act. J. A. G.
107393, Dec. 28, 1917.—rev., signed Maj. E. G. Davis, approved Ansell, Act. J. A. G.
107395, Dec. 17, 1917.—clem., signed Maj. E. G. Davis.
107405, Jan. 8, 1918.—rev., signed Maj. E. G. Davis.
107407, Dec. 8, 1918.—clem., signed Maj. E. G. Davis.
107408, Jan. 8, 1918.—rev., signature not shown (WR–EMS).
107409, Dec. 8, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107410, Dec. 13, 1917.—rev., signed Maj. E. G. Davis, approved Ansell.
107414, Dec. 4, 1917.—memo. for Adjutant General, signed Ansell, Act. J. A. G. (initialed RKS–CWM).
107424, no date.—rev., signed Maj. E. G. Davis (initialed WBT–JLL).
107425, Dec. 15, 1917.—rev., signed E. G. Davis, approved Ansell.
107436, Dec. 3, 1917.—memo. for Secretary of War, signature not shown. (Initialed RLN–CN.)
107456, Dec. 15, 1917.—rev., Davis, approved S. T. Ansell.
107472, Dec. 28, 1917.—rev., Davis, approved Crowder.
107474, Jan. 4, 1918.—rev., Davis, approved Ansell.
107476, Feb. 18, 1918.—clem., Davis.
107479, Jan. 3, 1918.—rev., Davis, approved Ansell.
107486, Feb. 26, 1918.—clem., Davis.
107490, Dec. 5, 1917.—rev., Ansell, approved Crowell, Asst. Sec. of War.
107505, Nov. 30, 1917.—Rev., Ansell.
107507, Dec. 11, 1917.—Clem., Davis, disapproved Crowell, Asst. Sec. of War.
107510, Jan. 9, 1918.—Clem., Davis.
107534, Dec. 3, 1917.—Rev., Davis, Ansell.

107537, Dec. 1, 1917.—Rev., Davis, Crowder.
107541, Dec. 1, 1917.—Rev., Davis, Ansell.
107544, Dec. 1, 1917.—Rev., Davis, Ansell.
107545, Dec. 3. 1917.—Rev., Davis, Ansell.
107549, Dec. 12, 1917.—Rev., Davis, Ansell.
107559, Dec. 6, 1917.—Rev., initialed RKS–S, not signed.
107560, Dec. 28, 1917.—Rev., signed Davis, approved Ansell.
107564, Apr. 4, 1918.—Clem., signed Davis.
107566, Apr. 4, 1918.—Clem., signed Davis.
107571, Dec. 6, 1917.—Rev., signed Davis, approved Ansell.
107575, Dec. 28, 1917.—Rev., signed Davis, approved Ansell.
107576, Dec. 8, 1917.—Rev., signed Davis, approved Ansell.
107583, Dec. 8, 1917.—Rev., signed Davis, approved Ansell.
107591, Jan. 12, 1918.—Clem., signed Davis.
107603, Dec. 11, 1917.—Rev., signed Ansell, approved Crowell, Asst. Secretary of War.
107608, Dec. 7, 1917.—Rev., signed Davis, approved Ansell.
107608, Jan. 12, 1918.—Clem., signed Davis.
107618, Dec. 7, 1917.—Rev., signed Davis, approved Ansell.
107619, Dec. 6, 1917.—Rev., signed Davis, approved Ansell.
107709, Dec. 13, 1917.—Rev., signed Davis, approved Ansell.
107711, Jan. 5, 1918.—Rev., not signed.
107717, Jan. 5, 1918.—Rev., signed Ansell (WR–WLA).
107718, Jan. 5, 1918.—Rev., signed Ansell (WR–RLB).
107720, Dec. 11, 1917.—Rev., signed Davis, Ansell.
107721, Dec. 10. 1917, Rev., signed Davis, Crowder.
107339, Dec. 11, 1917.—Rev., signed Davis, Ansell.
107744, Dec. 12, 1917.—Rev., signed Davis, approved Ansell.
107766, Dec. 10, 1917.—Rev., signed Davis, approved Ansell.
107769, Dec. 29, 1917.—Rev., signed Davis, approved Ansell.
107774, Dec. 25, 1917.—Clem., signed Davis, approved Ansell.
107800, Dec. 15, 1917.—Rev., signed Ansell, Crowell, Asst. Sec. of War.
107802, Mar. 5, 1918.—Clem., signed Davis.
107814, Dec. 14, 1917.—Rev., signed Ansell, Crowell, Asst Sec. of War.
107828, Dec. 11, 1917.—Rev., signed Ansell, Crowell, Asst. Sec. of War.
107831, Dec. 11. 1917.—Rev., signed Davis, approved Crowell.
107848, Dec. 26, 1917.—Rev., signed Davis, approved Ansell.
107850, Dec. 15, 1917.—Rev., signed Davis, approved Ansell.
107855, Dec. 27, 1917.—Rev., signed Davis, approved Ansell.
107856, Dec. 18, 1917.—Rev., signed Davis, approved Crowder.
107873, Dec. 12, 1917.—Rev., signed Davis.
108007, Dec. 22, 1917.—Clem., signed Davis.
108009, Mar. 16, 1918.—Clem., signed Davis.
108016, Feb. 4, 1918.—Rev., signed Crowder (AEC).
108017, Jan. 10. 1918.—Clem., signed Davis.
108018, Mar. 29, 1918.—Clem., signed Ansell.
108025, Jan. 2. 1918. Clem., signed Davis.
108027, Dec. 24, 1918.—Rev., signed Davis, Ansell.
108050, Dec. 18, 1918.—Rev., signed Davis, Crowell.
108058, Jan. 7, 1918.—Rev., not signed (WR–MTD).
108059, Dec. 19, 1917.—Rev., signed Davis, Ansell.
108062, Dec. 28, 1917.—Rev., signed Davis, Ansell.
108080, Dec. 28, 1917.—Clem., signed Davis.
108081, Jan. 17, 1918.—Clem., signed Davis.
108083, Dec. 21, 1917.—Clem., signed Davis.
108——, Apr. 4, 1918.—Clem., signed Davis.
108200, Dec. 26, 1917.—Clem., Ansell (RKS).
108261, Jan. 23, 1918.—Clem., Spiller, Ansell.
108273, Jan. 28, 1918.—Clem., Davis, Ansell.
108402, Jan. 4, 1918.—Memo. for J. A. G., Davis.
108403, Jan. 4, 1918.—Rev., Davis, Ansell.
108404, Jan. 15, 1918.—Rev., Davis, Ansell.
108412, Jan. 7, 1918.—Rev., Davis.
108413, Jan. 8, 1918.—Rev., Davis, Ansell.
108050, Dec. 18, 1917.—Rev., Ansell, Crowell.
108054, Dec. 19, 1917.—Rev., Davis, Ansell.
108444, Jan. 4, 1918.—Rev., Davis.

108445, Jan. 3, 1918.—Rev., Davis, Ansell.
108452, Jan. 4, 1918.—Rev., Davis.
108453, Jan. 5, 1918.—Not signed (WEP-WLA), rev.
108479, Jan. 12, 1918.—Signed Davis, Ansell, rev.
108495, Jan. 5, 1918.—Not signed (RKS-CWM), rev.
108519, Jan. 11, 1918.—Rev., signed Crowder (AEC-RLB).
108528, Jan. 11, 1918.—Rev., Davis.
108823, Jan. 16, 1918.—Rev., Davis.
108824, Jan. 17, 1918.—Rev., Davis.
108837, Jan. 18, 1918.—Rev., Davis.
108838, Jan. 19, 1918.—Rev., Davis.
108851, Jan. 17, 1918.—Rev., Davis.
108852, Jan. 6, 1918.—Rev., Davis, Ansell.
108854, Jan. 8, 1918.—Rev., Davis.
108885, Jan. 17, 1918.—Rev., Davis.
108887, Jan. 17, 1918.—Rev., Davis.
108888, Jan. 30, 1918.—Rev., Davis, Crowell.
108921, Jan. 18, 1918.—Rev., Davis.
108933, Jan. 21, 1918.—Rev., Davis, Ansell.
108981, Mar. 7, 1918.—Rev., signed Davis, approved Crowell.
108988, Feb. 8, 1918.—Rev., signed Davis.
108990, Feb. 8, 1918.—Rev., signed Davis.
108991, Mar. 12, 1918.—Clem., signed Davis.
108994, Jan. 18, 1918.—Rev., signed Davis.
108997, Feb. 6, 1918.—Rev., signed Davis, approved Ansell.
108998, Feb. 8, 1918.—Rev., signed Davis, approved Ansell.
109909, Feb. 14, 1918.—Rev., signed Davis, approved Ansell.
109014, Jan. 23, 1918.—Rev., signed Spiller, approved Ansell.
109044, Jan. 29, 1918.—Rev., signed Davis.
109046, Jan. 19, 1918.—Rev., signed Crowder (RKS-CWM).
109047, Jan. 20, 1918.—Rev., signed Davis.
109090, Feb. 7, 1918.—Rev., signed Davis.
109095, Jan. 21, 1918.—Rev., signed Davis.
109096, Jan. 21, 1918.—Rev., signed Davis.
109097, Jan. 22, 1918.—Rev., signed Davis.
109098, Jan. 21, 1918.—Rev., signed Davis.
109099, Feb. 6, 1918.—Rev., signed Davis.
109100, Feb. 1, 1918.—Rev., signed Crowder (EGB).
109104, Mar. 11, 1918.—Clem., signed Davis.
109130, Feb. 16, 1918.—Rev., signed Davis.
109151, Jan. 28, 1918.—Rev., signed Davis, approved Ansell.
108274, Mar. 11, 1918.—Clem., signed Davis.
108297, Jan. 7, 1918.—Rev., signed Davis.
108599, Mar. 14, 1918.—Clem., signed Davis.
108583, Jan. 11, 1918.—Rev., not signed (WR-WLA).
108588, Jan. 8, 1918.—Rev., Ansell (WBB-MG) approved Secretary of War.
108328, Jan. 10, 1918.—Rev., Davis, approved Ansell.
108591, Jan. 18, 1918.—Rev., Davis.
108592, Jan. 22, 1918.—Rev., Davis, approved Ansell.
108595, Jan. 11, 1918.—Rev., not signed (WR-HAD).
108597, Jan. 2, 1918.—Rev., not signed (RKS-GPH).
108599, Jan. 12, 1918.—Rev., Ansell (RKS-MTD).
108636, Jan. 8, 1918.—Rev., Davis, Ansell.
108641, Jan. 18, 1918.—Rev., Davis.
108645, Jan. 10, 1918.—Rev., Ansell (RKS-CJL).
108861, Feb. 7, 1918.—Clem., Davis.
108668, Jan. 14, 1918.—Rev., Davis.
108715, Jan. 17, 1918.—Rev., no signature (WL-JJT).
108733, Jan. 12, 1918.—Rev., Davis, Ansell.
108735, Jan. 12, 1918.—Rev., Davis, Ansell.
108759, Jan. 12, 1918.—Rev., Davis.
108762, Jan. 16, 1918.—Rev., Ansell (PGH-CWM).
108764, Jan. 14, 1918.—Rev., Davis.
108765, Jan. 16, 1918.—Rev., Davis.
108766, Jan. 17, 1918.—Rev., Ansell (RKS-EMS).
108795, Jan. 16, 1918.—Rev., Davis, Ansell.
109156, Feb. 8, 1918.—Rev., Davis, Ansell.

109174, Jan. 26, 1918.—Rev., Davis, Ansell.
109240, Feb. 6, 1918.—Rev., Davis, Ansell.
109241, Feb. 6, 1918.—Rev., Davis.
109242, Jan. 26, 1918.—Rev., Davis.
109250, Feb. 1, 1918.—No signature (WBP), rev.
109270, Feb. 6, 1918.—Rev., Davis.
109275, Jan. 29, 1918.—Rev., Davis.
109280, Jan. 24, 1918.—Rev., Ansell (RKS).
109283, Feb. 7, 1918.—Rev., Davis, Ansell.
109285, Feb. 7, 1918.—Rev., Davis, Ansell.
109289, Feb. 9, 1918.—Rev., Davis, Crowder.
109290, Feb. 9, 1918.—Rev., Davis, Ansell.
109294, Feb. 6, 1918.—Rev., Crowder (AEC).
109320, Feb. 5, 1918.—Rev., Davis, Ansell.
109412, Apr. 9, 1918.—Rev., Davis, Ansell.
109323, Feb. 5, 1918.—Rev., Davis, Crowder.
109333, Jan. 30, 1918.—Rev., Davis, Crowder.
109334, Feb. 7, 1918.—Rev., Mayes (RKS-EGD).
109382, Jan. 1, 1918.—Rev., Davis.
109386, Jan. 31, 1918.—Clem., Davis.
109390, Feb. 1, 1918.—Rev., Davis.
109423, Jan. 30, 1918.—Rev., Davis.
109424, Jan. 30, 1918.—Rev., Davis.
109425, Feb. 26, 1918.—Clem., Davis.
109460, Feb. 2, 1918.—Rev., Davis.
109462, Feb. 1, 1918.—Rev., Davis.
109464, Feb. 1, 1918.—Rev., Davis.
109489, Feb. 22, 1918.—Rev., Davis.
109490, Jan. 31, 1918.—Rev., no signature.
109492, Feb. 4, 1918.—Rev., Davis, Ansell.
109789, Mar. 27, 1918.—Clem., Ansell.
109751, Feb. 1, 1918.—Rev., Davis, Ansell.
109809, Feb. 13, 1918.—Rev., Davis.
109810, Feb. 13, 1918.—Rev., Davis.
109531, Feb. 11, 1918.—Rev., no signature (ITW).
109566, Feb. 4, 1918.—Rev., Davis, Ansell.
109567, Feb. 4, 1918.—Rev., Davis.
109579, Feb. 7, 1918.—Rev., Davis, Ansell.
109588, Feb. 9, 1918.—Rev., Davis.
109601, Apr. 4, 1918.—Rev., Mayes.
109613, Feb. 7, 1918.—Rev., Ansell.
109618, Apr. 4, 1918.—Clem., Davis.
109620, Feb. 25, 1918.—Clem., Davis.
109621, Feb. 6, 1918.—Rev., Davis, Ansell.
109623, Feb. 5, 1918.—Rev., Davis.
109638, Feb. 19, 1918.—Rev., Davis, Crowder.
109642, Feb. 15, 1918.—Rev., no signature (PJH).
109643, Feb. 16, 1918.—Rev., Davis.
109660, Feb. 13, 1918.—Rev., Davis.
109662, Feb. 13, 1918.—Rev., Davis.
109690, Feb. 13, 1918.—Rev., no signature (WBP).
109714, Mar. 9, 1918.—Rev., Davis.
109717, Feb. 7, 1918.—Rev., Davis, Ansell.
109718, Feb. 6, 1918.—Rev., Davis.
109721, Apr. 4, 1918.—Clem., Davis.
109724, Feb. 6, 1918.—Rev., Crowder (WR).
109811, Feb. 14, 1918.—Rev., Crowder (PJH-CWM).
109813, Feb. 9, 1918.—Rev., Davis.
109812, Feb. 7, 1918.—Rev., Davis.
109814, Feb. 14, 1918.—Rev., Davis.
109815, Feb. 8, 1918.—Rev., Davis.
109819, Feb. 15, 1918.—Rev., Crowder (AEC-GPH).
109837, Feb. 28, 1918.—Rev., Ansell.
109840, Feb. 8, 1918.—Rev., Davis.
109858, Feb. 11, 1918.—Rev., Davis.
109867, Feb. 5, 1918.—Rev., Davis, Ansell.
109899, Feb. 12, 1918.—Rev., Davis.

109905, Mar. 6, 1918.—Rev., Davis, Crowell.
109906, Feb. 5, 1918.—Rev., Davis.
109908, Mar. 13, 1918.—Rev., Davis.
109912, Mar. 11, 1918.—Rev., Davis.
109945, No date.—Rev., Davis.
109989, Feb. 16, 1918.—Rev., Davis.
109994, Mar. 4, 1918.—Clem., Davis.
109992, Feb. 16, 1918.—Rev., Davis.
111018, Feb. 21, 1918.—Rev., Davis, Ansell.
111059, Feb. 16, 1918.—Rev., Davis.
110060, Feb. 15, 1918.—Rev., Davis.
110061, Feb. 15, 1918.—Rev., Davis, Crowder.
110064, Feb. 10, 1918.—Rev., Davis, Crowder.
110069, Mar. 18, 1918.—Rev., Davis.
110071, Feb. 13, 1918.—Rev., Davis.
110023, Mar. 4, 1918.—Rev., Davis.
110135, Mar. 4, 1918.—Rev., Davis.
110251, Jan. 19, 1918.—Rev., Davis.
110268, Feb. 20, 1918.—Rev., Davis.
110270, Feb. 19, 1918.—Rev., Davis.
110271, Feb. 18, 1918.—Rev., Davis.
110272, Feb. 19, 1918.—Rev., Crowder (AEC).
110285, Mar. 4, 1918.—Rev., Davis, Ansell.
110289, Mar. 19, 1918.—Clem., Davis.
110295, Mar. 14, 1918.—Rev., Davis.
110298, Feb. 20, 1918.—Rev., Davis.
110333, Mar. 10, 1918.—Rev., Davis.
110473.
110186, Feb. 26, 1918.—Rev., Davis.
110236, Feb. 21, 1918.—Rev., no signature (JPS).
110237, Feb. 27, 1918.—Rev., Crowder (AEC).
110239, Feb. 19, 1918.—Rev., Davis, Ansell.
110247, Feb. 18, 1918.—Rev., Crowder (AEC).
110346, Mar. 9, 1918.—Rev., Davis.
110350, Apr. 4, 1918.—Rev., Davis.
110352, Mar. 18, 1918.—Rev., Ansell (AEC).
110353, Mar. 12, 1918.—Rev., Davis.
110355, Mar. 9, 1918.—Rev., Davis.
110362, Apr. 9, 1918.—Rev., Davis.
110368, Feb. 28, 1918.—Rev., Davis
110378, Mar. 7, 1918.—Rev., no signature (ITW).
110394, Mar. 12, 1918.—Rev., Davis, Ansell.
110415, Feb. 21, 1918.—Rev., Davis, Crowder.
110417, Feb. 25, 1918.—Rev., Davis, Ansell.
110423, Feb. 25, 1918.—Rev., Davis.
110424, Mar. 27, 1918.—Rev., Clark.
110426, Apr. 5, 1918.—Clem., Davis.
110436, Feb. 21, 1918.—Rev., Davis, Crowder.
110437, Feb. 25, 1918.—Rev., Crowder (WR).
110438, Feb. 23, 1918.—Rev., Davis.
110524, Mar. 24, 1918.—Rev., Davis.
110526, Mar. 4, 1918.—Rev., Davis.
110527, Feb. 25, 1918.—Rev., Davis.
110528, Feb. 25, 1918.—Rev., Davis.
110529, Feb. 25, 1918.—Rev., Davis.
110530, Feb. 25, 1918.—Rev., Davis.
110531, Feb. 27, 1918.—Rev., Davis.
110532, Feb. 27, 1918.—Rev., Davis.
110533, Mar. 4, 1918.—Rev., Davis.
110534, Mar. 4, 1918.—Rev., Davis.
110535, Mar. 10, 1918.—Rev., Davis.
110536, Mar. 4, 1918.—Rev., Davis.
110537, Mar. 7, 1918.—Rev., Davis.
110538, Mar. 9, 1918.—Rev., Davis.
110544, Mar. 7, 1918.—Rev., Davis.
110545, Mar. 28, 1918.—Rev., Ansell (CBP).
110547, Mar. 6, 1918.—Rev., Davis.

110548, Mar. 9, 1918.—Rev., Davis.
110549, Mar. 12, 1918.—Rev., Davis.
110550, Mar. 10, 1918.—Rev., Mayes (MP).
110551, Mar. 10, 1918.—Rev., Davis.
110554, Mar. 1, 1918.—Rev., Davis.
110555, Feb. 28, 1918.—Rev., Crowder (EGD).
110556, Mar. 4, 1918.—Rev., Davis.
110597, Mar. 3, 1918.—Rev., Clark.
110598, Apr. 3, 1918.—Rev., Clark.
110599, Apr. 3, 1918.—Rev., Clark.
110601, Mar. 1, 198.—Rev., Davis.
110602, Mar. 29, 1918.—Rev., Crowder (CBP).
110603, Mar. 4, 1918.—Rev., Davis.
110604, Mar. 14, 1918.—Rev., Davis.
110648, Feb. 28, 1918.—Rev., Davis.
110650, Mar. 15, 1918.—Rev., Davis.
110653, Mar. 29, 1918.—Rev., Ansell (CBP).
110655, Mar. 5, 1918.—Rev., Davis.
110656, Feb. 28, 1918.—Rev., Davis.
110657, Mar. 10, 1918.—Rev., Crowder (AEC).
110744, Mar. 11, 1918.—Rev., Davis.
110745, Feb. 28, 1918.—Rev., Davis.
110746, Mar. 12, 1918.—Rev., Davis.
110750, Mar. 6, 1918.—Rev., Davis.
110768, Mar. 5, 1918.—Clem., Davis.
110783, Mar. 4, 1918.—Rev., Davis.
110784, Mar. 4, 1918.—Rev., Crowder (WR).
110786, Mar. 21, 1918.—Rev., Ansell (EGD).
110790, Mar. 1, 1918.—Rev., Davis.
110791, Mar. 1, 1918.—Rev., Davis.
110794, Mar. 7, 1918.—Rev., Davis.
110795, Apr. 8, 1918.—Rev., Ansell (AEC).
110795, Mar. 6, 1918.—Rev., Davis, Crowder.
110798, Mar. 11, 1918.—Rev., Davis.
110800, Feb. 9, 1918.—Rev., Mayes, Crowder.
110803, Mar. 9, 1918.—Rev., Davis.
110822, Mar. 11, 1918.—Rev., Davis.
110845, Mar. 7, 1918.—Rev., Davis.
110846, Mar. 16, 1918.—Rev., Crowder (ARC).
110856, Mar. 9, 1918.—Rev., Davis.
110856, Mar. 16, 1918.—Rev., Davis.
110872, Mar. 6, 1918.—Rev., Davis.
110875, Mar. 6, 1918.—Rev., Davis.
110886, Mar. 28, 1918.—Clem., Ansell (PDW).
110908, Mar. 9, 1918.—Rev., Davis.
110915, Mar. 20, 1918.—Rev., Crowder (MPP).
110917, Mar. 9, 1918.—Rev., Davis.
110920, Mar. 9, 1918.—Rev., Davis.
110921, Mar. 7, 1918.—Rev., Davis.
110928, Mar. 7, 1918.—Rev., Davis.
110943, Mar. 18, 1918.—Rev., Davis.
110952, Mar. 13, 1918.—Rev., Davis.
110953, Mar. 8, 1918.—Rev., Davis.
110972, Mar. 10, 1918.—Rev., Davis.
110992, Mar. 15, 1918.—Rev., Davis.
111005, Mar. 14, 1918.—Rev., Davis.
111023, Mar. 20, 1918.—Rev., not signed (IGW).
111029, Mar. 26, 1918.—Rev., not signed (JNC).
111045, Apr. 6, 1918.—Rev., Crowder (ACF).
111085, Mar. 7, 1918.—Rev., Davis.
111092, no date.—Rev., Davis.
111100, Mar. 22, 1918.—Rev., Ansell (ARB).
111106, Mar. 28, 1918.—Rev., Ansell (AEC).
111112, Mar. 29, 1918.—Rev., Mayes (ERK).
111146, Mar. 13, 1918.—Rev., Ansell (CAB).
111148, Mar. 12, 1918.—Rev., Davis.
111149, Mar. 12, 1918.—Rev., Davis.
111160, Mar. 12, 1918.—Rev., Davis.

111162, Mar. 7, 1918.—Letter, Davis.
111175, Mar. 11, 1918.—Rev., Davis.
111180, Mar. 12, 1918.—Rev., Davis.
111181, Mar. 12, 1918.—Rev., Davis.
111182, Mar. 19, 1918.—Rev., Davis.
111188, Apr. 9, 1918.—Rev., Crowder (CCT).
111194, Mar. 8, 1918.—Rev., Davis.
111217, Mar. 16, 1918.—Rev., Davis.
111223, Mar. 16, 1918.—Rev., Davis.
111228, Mar. 14, 1918.—Rev., Davis.
111239, Mar. 18, 1918.—Rev., Davis.
111366, Mar. 12, 1918.—Rev., Davis.
111367, Mar. 8, 1918.—Rev., Davis.
111368, Mar. 8, 1918.—Rev., Davis.
111369, Mar. 16, 1918.—Rev., Crowder (AEC).
111370, Mar. 19, 1918.—Rev., Crowder (NP).
111373, Mar. 8, 1918.—Rev., Davis, Crowder.
111374, Mar. 13, 1918.—Rev., not signed (AEC).
111388, Mar. 19, 1918.—Rev., Crowder (WBP).
111412, Mar. 11, 1918.—Rev., Davis.
111420, Mar. 11, 1918.—Letter, Davis.
111422, Mar. 18, 1918.—Rev., Davis.
111442, Mar. 24, 1918.—Letter, Davis.
111454, Mar. 15, 1918.—Rev., Davis.
111455, Mar. 8, 1918.—Rev., Davis.
111459, Mar. 21, 1918.—Letter, Davis.
111460, Mar. 16, 1918.—Rev., Davis.
111461, Mar. 18, 1918.—Rev., Davis.
111465, Mar. 14, 1918.—Letter, Davis.
111466, Mar. 14, 1918.—Letter, Davis.
111496, Mar. 6, 1918.—Letter, Davis.
111499, Mar. 20, 1918.—Letter, Davis.
111500, Mar. 16, 1918.—Letter, Davis.
111501, Mar. 16, 1918.—Rev., Davis.
111503, Mar. 25, 1918.—Rev., Clark.
111504, Mar. 25, 1918.—Letter, Clark.
111508, Mar. 16, 1918.—Rev., Davis.
111510, Mar. 16, 1918.—Rev., Davis.
111517, Mar. 25, 1918.—Rev., Clark.
111518, Mar. 18, 1918.—Letter, Davis.
111519, Mar. 19, 1918.—Letter, Davis.
111520, Mar. 14, 1918.—Rev., Davis.
111521, Apr. 3, 1918.—Rev., Mayes (WBP).
111522, Mar. 15, 1918.—Rev., Davis.
111524, Mar. 18, 1918.—Rev., Crowder (AEC).
111524, Mar. 18, 1918.—Rev., Davis.
111525, Mar. 16, 1918.—Rev., Davis.
111526, Mar. 22, 1918.—Rev., Crowder (NP).
111527, Mar. 15, 1918.—Rev., Crowder (NP).
111528, Mar. 15, 1918.—Rev., Davis.
111529, Mar. 26, 1918.—Rev., Clark (WBP).
111622, Mar. 20, 1918.—Letter, Davis.
111623, Mar. 22, 1918.—Rev., Davis.
111624, Mar. 25, 1918.—Rev., Clark (RWN.
111626, no date.—Letter, Davis.
111627, no date.—Letter, Davis.
111628, Mar. 23, 1918.—Rev., Davis.
111629, Mar. 15, 1918.—Rev., Davis.
111630, Mar. 18, 1918.—Rev., Davis.
111705, Apr. 5, 1918.—Rev., Crowder (CBP).
111706, Mar. 20, 1918.—Rev., Davis.
111707, Mar. 22, 1918.—Rev., Davis.
111708, Mar. 25, 1918.—Rev., Clark (CBP).
111709, Mar. 20, 1918.—Rev., Davis.
111710, Mar. 26, 1918.—Rev., Clark.
111728, Mar. 25, 1918.—Rev., Clark.
111729, Mar. 22, 1918.—Rev., Davis.

111730, Mar. 22, 1918.—Rev., Davis.
111731, Mar. 18, 1918.—Rev., Davis.
111732, Mar. 16, 1918.—Letter, Davis.
111733, Mar. 22, 1918.—Letter, Davis.
111761, Apr. 1, 1918.—Letter, Davis.
111776, Apr. 9, 1918.—Letter, Ansell.
111782, Mar. 21, 1918.—Letter, Davis.
111784, Mar. 22, 1918.—Rev., Davis.
111793, Mar. 26, 1918.—Rev., Clark.
111799, Mar. 23, 1918.—Rev., Ansell (CLN).
111812, Mar. 23, 1918.—Letter, Davis.
111842, Mar. 25, 1918.—Letter, Clark.
111863, Mar. 23, 1918.—Letter, Davis.
111862, Mar. 11, 1918.—Letter, Davis.
111868, Mar. 23, 1918.—Rev., Ansell (ARLee).
111881, Mar. 25, 1918.—Letter, Clark.
111885, Mar. 22, 1918.—Letter, Davis.
111886, Mar. 23, 1918.—Letter, Davis.
111888, Mar. 27, 1918.—Letter, Clark.
111890, Mar. 21, 1918.—Letter, Davis.
111892, Mar. 23, 1918.—Rev., Davis.
111893, Mar. 9, 1918.—Rev., Crowder (RWN).
111895, Mar. 26, 1918.—Rev., not signed (CAD).
111902, Mar. 11, 1918.—Rev., Clark.
111903, Mar. 25, 1918.—Rev., Clark.
111905, Mar. 26, 1918.—Rev., Mayes (MP).
111908, Apr. 8, 1918.—Letter, Davis.
111909, Mar. 30, 1918.—Rev., Clark.
111910, Apr. 18, 1918.—Rev., Mayes (WBP).
111924, Mar. 29, 1918.—Rev., Clark.
111925, Mar. 29, 1918.—Rev., Clark.
111954, Mar. 25, 1918.—Letter, Clark.
111957, Mar. 26, 1918.—Rev., Clark.
111960, Apr. 5, 1918.—Rev., Crowder (ERR).
111968, Mar. 25, 1918.—Letter, Clark.
111968, Mar. 23, 1918.—Rev., Clark.
111970, Mar. 25, 1918.—Rev., Clark.
111971, Mar. 7, 1918.—Rev., Clark.
111972, No date.—Letter, Davis.
111975, Mar. 26, 1918.—Rev., Clark.
111976, No date.—Letter, Clark.
111978, Mar. 26, 1918.—Rev., Clark.
111981, Mar. 27, 1918.—Letter, Clark.
111982, Apr. 3, 1918.—Letter, Clark.
111983, Mar. 25, 1918.—Letter, Clark.
111984, Mar. 27, 1918.—Rev., Clark.
111985, Apr. 3, 1918.—Letter, Clark.
111986, Apr. 3, 1918.—Letter, Davis.
111987, Mar. 27, 1918.—Letter, Clark. Rev., not signed (WBP).
111992, Mar. 30, 1918.—Rev., Crowder (ERK).
111993, Mar. 6, 1918.—Rev., Crowder (CCT).
112058, Apr. 2, 1918.—Rev., Davis.
112059, Apr. 3, 1918.—Rev., Clark.
112060, Mar. 25, 1918.—Letter, Clark.
112064, Apr. 3, 1918.—Rev., Clark.
112100, Apr. 2, 1918.—Rev., Mayes (NP).
112125, Mar. 25, 1918.—Rev., Clark.
112141, Mar. 30, 1918.—Rev., Davis.
112144, Apr. 1, 1918.—Rev., Davis.
112146, Apr. 2, 1918.—Rev., Clark.
112147, Mar. 27, 1918.—Rev., Clark.
112148, Apr. 6, 1918.—Rev., Davis.
112152, Mar. 28, 1918.—Rev., Clark.
112153, Mar. 27, 1918.—Rev., Clark.
112170, Apr. 1, 1918.—Letter, Davis.
112229, Mar. 28, 1918.—Letter, Clark.
112237, Mar. 27, 1918.—Letter, Clark.

112280, Apr. 8, 1918.—Letter, Davis.
112281, Apr. 2, 1918.—Rev., Davis.
112282, Apr. 2, 1918.—Rev., Davis.
112283, Mar. 30, 1918.—Rev., Clark.
112204, Apr. 4, 1918.—Rev., Mayes (ARB).
112286, Apr. 2, 1918.—Letter, Davis.
112287, Apr. 4, 1918.—Letter, Clark.
112288, Apr. 2, 1918.—Rev., Spiller.
112291, Apr. 9, 1918.—Rev., Davis.
112293, Apr. 2, 1918.—Letter, Davis.
112295, Apr. 2, 1918.—Letter, Davis.
112296, Apr. 5, 1918.—Rev., Davis.
112298, Apr. 10, 1918.—Rev., Crowder (ERK).
112299, Apr. 8, 1918.—Rev., Crowder (CCT).
112339, Apr. 4, 1918.—Rev., Davis.
112346, Apr. 2, 1918.—Rev., Clark.
112349, Apr. 9, 1918.—Rev., Davis.
112420, Apr. 3, 1918.—Rev., Davis.
112422, Apr. 2, 1918.—Letter, Davis.
112423, Apr. 10, 1918.—Rev., Davis.
112427, Apr. 3, 1918.—Letter, Clark.
112428, Apr. 8, 1918.—Letter, Davis.
112459, Apr. 1, 1918.—Letter, Davis.
112482, Jan. 10, 1918.—Clem, Ansell (Hedsster).
112492, Apr. 5, 1918.—Letter, Davis.
112496, Apr. 6, 1918.—Rev., Clark.
112497, Apr. 1, 1918.—Rev., Clark.
112500, Apr. 5, 1918.—Rev., Davis.
112536, Apr. 5, 1918.—Rev., Davis.
112553, Apr. 10, 1918.—Letter, Davis.
112554, Apr. 4, 1918.—Rev., Davis.
112555, Apr. 4, 1918.—Letter, Davis.
112604, Apr. 3, 1918.—Letter, Clark.
112605, Apr. 3, 1918.—Letter, Clark.
112609, Apr. 3, 1918.— Letter, Clark.
112610, Apr. 3, 1918.—Letter, Clark.
112623, Apr. 10, 1918.—Rev., Davis.
112625, Apr. 10, 1918.—Rev., Davis.
112626, Apr. 8, 1918.—Rev., Davis.
112627, Apr. 3, 1918.—Letter, Clark.
112708, Apr. 8, 1918.—Letter, Davis.
112723, Apr. 8, 1918.—Letter, Davis.
112726, Apr. 8, 1918.—Rev., Crowder (NP).
112730, Apr. 10, 1918.—Letter, Davis.
112731, Apr. 5, 1918.—Rev., Davis.

EXHIBIT 109.

Office memorandum, August 6, 1918.

There is hereby created in the Military Justice Division of this office a board of review, to consist of such, and as many, officers of that division as the chief thereof, after conference with the head of the office, shall designate. The duties of such board will be in the nature of those of an appellate tribunal, and shall be performed with due regard to their character as such. It shall be the duty of the board, under the general direction of the head of this office and the chief of division, to review all proceedings of all general courts-martial received in this office which at present are reviewed in writing. The preliminary review of any such case, after having been made and prepared by the officer to whom the record has been assigned, will be transmitted to the board of review, and thereupon the members of said board will proceed to consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in reaching and expressing their decisions. The board may adopt the preliminary review as its own, may modify or rewrite such review, or may direct that it be modified or rewritten so as to express their views. When a majority or more of the board agrees upon a review, the review shall show the names of those who concur, but not of any who may dissent, and the review thus agreed

upon shall be transmitted to the chief of division, with the record. Any dissenting member may indicate the reasons for his dissent, either orally or in writing to the chief of division, and in important cases, and where he so desires, to the head of the office.

The members of the board may consult freely with the officer preparing the preliminary review and the head of the division, and may discuss the case with the head of the office when that course is agreeable to him. It is preferable, however, not to discuss the case with others. When practicable, the board will be assigned sufficient room space, clerical force, and any other aid necessary and available.

S. T. ANSELL,
Acting Judge Advocate General.

NOVEMBER 6, 1918.

Office memorandum.

The board of review, Military Justice Division, created therein by office memorandum of August 6, 1918, is hereby divided into two divisions to be known as "The Board of Review, First Division," and "The Board of Review, Second Division." The present personnel of the board will constitute the first division. The chief of the Military Justice Division will, immediately after consultation with the head of the office, designate the personnel of the second division. The organization, constitution, procedure, powers, and duties of each division will be as prescribed in said office memorandum. Each division will function separately and independently of the other and upon cases assigned it by the chief of division, who will endeavor to see that cases of the same or similar character be referred as far as practicable to the same division.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 110.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 15, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Jeff Cook, Company G, Sixteenth Infantry.

1. Pvt. Jeff Cook, Company G, Sixteenth Infantry, was tried before a general court-martial on December 29, 1917, for violation of the thirty-sixth article of war.

Specification: In that Pvt. Jeff Cook, Company G, Sixteenth Infantry, being on guard and posted as a sentinel, in time of war in the face of the enemy, at France, on or about the 5th day of November, 1917, was found sleeping on his post.

2. The evidence of record discloses that the accused was posted as a sentry on the outpost of the first line, right behind the barbed-wire entanglements, at about 4 p. m., November 5, 1917, with a man next to him. It was a three-man listening post, having three men on it, of whom two men were always on guard, one slept one hour and then relieved one of the other two. In this way a man was on guard two hours and off one hour, from 4 p. m. till about 6 a. m. The accused had been on this guard duty about three nights. In the early hours of the morning of the 6th of November, 1917, probably about 3:30 o'clock, the corporal in charge of the post came around and found the accused leaning up against the bank, asleep, picked up his gun, shook him and he looked up and "I asked him what was the matter," and he said: "Nothing; just tired." When asked where his gun was he said he did not know. The testimony of the corporal is corroborated by the men on sentry duty next to the accused. The accused testified that he could not sleep at night, when off duty for one hour every two hours; and that during the day they were chopping wood in the dugout where he was and he could not get any sleep; that he was drowsy but not asleep on post; that he had been in the service seven months.

3. While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-

martial, gave in his indorsement as "Extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

4. The court found the accused guilty and sentenced him "to be shot to death with musketry," two-thirds of the members present concurring.

5. This is the second death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing, as I do, that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary. The warning of Gen. Frye, the distinguished Union Provost Marshal General of the Civil War, should be given careful consideration at this time. In the printed report of the operations of his office it is stated in effect that if the extreme penalty for desertion had been imposed in the early stages of the Civil War, the later scandal and danger for the country that arose out of this crime, as well as the death sentences that subsequently became necessary, would no doubt have been averted.

6. Attention is invited, in connection with the consideration of this case, to the accompanying cases of:

(*a*) Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, in which, under practically the same conditions, the death sentence is imposed;

(*b*) Pvt. Herbert Tobias, Company —, Eighteenth Infantry, in which a sentence of 10 years' imprisonment was imposed, the court giving as its reason for the light sentence, "The extreme penalty was not voted because of the following extenuating circumstances: The extreme youth of the accused, his age being 16 years. The fact that the accused was posted in a communicating trench, and not in front-line trenches. 3. Though * * *."

(*c*) The cases of Pvts. Dewey G. Brady, William Hindman, and Adam Floin, all of Company G, Sixteenth Infantry, who were acquitted.

7. I recommend that the sentences be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieut. Colonel, Judge Advocate.

EXHIBIT 111.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 16, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry.

1. Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, was tried before a general court-martial on December 29, 1917, for violation of eighty-sixth article of war.

Specification: In that Forest D. Sebastian, private, Company G, Sixteenth Infantry, being on guard and posted as a sentinel, in time of war, and in the face of the enemy, at France, on or about the night of November the 3d and 4th, 1917, was found sleeping on post.

2. The evidence of record discloses that the accused, who had been on gas guard the night before, was posted about 6 p. m. on the evening of November 3, 1917, as a sentinel in the front-line trenches with another private of his squad a few feet on the left of him. He was on the outpost, a double sentry post, four men to each post. Two men were supposed to be on two hours, and then to be relieved by the other two. The two men off were allowed to sit down and supposed to sleep if they could. At about 7 or 8 o'clock the corporal in charge of the post came around and found the accused leaning on the trench, which was nearly as high as his shoulders, asleep; took his rifle away, shook him, and asked him where his rifle was. The accused replied, "I don't know; you have it." The corporal then gave it back to him, telling him not only the danger he was in but that the men were depending on him. He returned between 10 and 11 and found the accused asleep again. The corporal took his rifle, told the sentry on his left to wake the accused later and to send him to him (the corporal). When the accused came he gave him his rifle,

and the accused stated "he was ashamed he had done that way, and he knew he should not have done it." The sentry next to the accused on the left corroborated the testimony of the corporal and stated that after the accused went to sleep the first time he warned him, as he did not want to see him get into trouble. He further stated that the accused was pretty tired from being on gas guard the night before. The sentry who was on gas guard with the accused the night before testified that chances to sleep in the daytime were scarce, and that the accused had had very little sleep, if any, during the day after being on gas guard.

3. While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-martial, gave in his indorsement as "extenuating circumstances: youth, and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

4. The court found the accused guilty and sentenced him "to be shot to death with musketry," two-thirds of the members present concurring.

5. This is the first death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing as I do that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary. The warning of Gen. Frye, the distinguished Union provost marshal of the Civil War, should be given careful consideration at this time. In the printed report of the operations of his office it is stated in effect that if the extreme penalty for desertion had been imposed in the early stages of the Civil War the later scandal and danger for the country that arose out of this crime, as well as the death sentences that subsequently became necessary would no doubt have been averted.

6. Attention is invited, in connection with the consideration of this case, to the accompanying cases of:

(*a*) Pvt. Jeff Cook, Company G, Sixteenth Infantry, in which under practically the same conditions the death sentence is imposed.

(*b*) Pvt. Herbert Tobias, Company E, Eighteenth Infantry, in which a sentence of 10 years' imprisonment was imposed, the court giving as its reason for the light sentence: "The extreme penalty was not voted because of the following extenuating circumstances: 1. The extreme youth of the accused, his age being 18 years. 2. The fact that the accused was posted in a communicating trench, and not in front-line trenches. 3. The * * *."

(*c*) The cases of Pvts. Dewey G. Brady, William Hindman, and Adam Klein, all of Company G, Sixteenth Infantry, who were acquitted.

7. I recommend that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

NOTE.—The above memorandum, embodying what I orally presented to the division commander as reasons for approval of the sentence, has been prepared for any use that it may serve in a further review of the case.

EXHIBIT 112.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE.
France, January 17, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry.

1. Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, was tried before a general court-martial on January 3, 1918, for violation of sixty-fourth article of war.

Specification: In that Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same.

2. The accused pleaded guilty to the specification and charge. The court found the accused guilty and sentenced him to be shot to death with musketry.

3. The evidence of record shows clearly that the accused defiantly, after full opportunity to obey, and after he had been warned that willful disobedience would lead to court-martial and a heavy sentence, committed a willful, deliberate act of disobedience.

Lieut. Logan ordered the accused, Pvt. Fishback and two others to get their packs and get ready for drill with their squad. On the refusal of the four he warned them, and two thought better of their refusal and obeyed his order. The accused, however, and Fishback persisted in their insubordination, and Ledoyen said: "I refuse to go to drill." The accused in his defense made the following statement:

"Lieut. Logan had us out on the hill the day before and we nearly froze to death, and the next day I was so stiff that I could not drill."

The accused entered the service February 3, 1917, and had been convicted by a summary court of minor breaches of discipline on four different occasions.

4. It would be difficult to find a more exaggerated case of defiance and insubordination unaccompanied by violence that the one here shown, nor one which was calculated to have a more hurtful effect on others. We have undertaken a task, the accomplishment of which requires unhesitating and implicit obedience to orders, and no insubordination can be tolerated. The time must inevitably come—if this is not the appropriate one, which it would seem to be—when the death sentence must be imposed for willful disobedience of orders.

There is already unmistakable evidence cropping out in cases coming to this office of the willingness on the part of soldiers to accept long terms of confinement in order to avoid further service, hardships, and consequent dangers which they have not earlier fully realized. Insubordination will undoubtedly be resorted to as the readiest means, and one to which they probably consider the least obloquy will be attached in later life, for accomplishing their purpose. They will no doubt feel that, at the end of the war their sentences to a long term of confinement, if such has been imposed, may reasonably be expected to be terminated through the exercise of clemency. With all the reluctance that I must be credited with feeling in recording a recommendation that goes to the length of taking a man's life, I am nevertheless constrained, under the realization than an example must be had for its deterrent effect in such cases, to recommend that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 113.

HEADQUARTERS FIRST DIVISION,
AMERICAN EXPEDITIONARY FORCES,
OFFICE OF DIVISION JUDGE ADVOCATE,
France, January 17, 1918.

Memorandum for the division commander.

Subject: Trial by general court-martial of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry.

1. Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, was tried before a general court-martial on January 3, 1918, for violation of sixty-fourth article of war.

Specification: In that Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, Sixteenth Infantry, his superior officer, to get his equipment and fall in for drill, did, at France, on or about the 14th day of December, 1917, willfully disobey the same.

2. The accused pleaded guilty to the specification and charge. The court found the accused guilty and sentenced him to be shot to death with musketry.

3. This case is on all fours with that of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, and attention is invited to the memorandum filed in that case. For the reasons therein stated it is recommended that the sentence be approved

and the record forwarded for action under the provisions of the forty-eighth article of war.

B. WINSHIP,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 114.

GENERAL HEADQUARTERS,
AMERICAN EXPEDITIONARY FORCES,
France, February 8, 1918.

From: The commander in chief.
To: The Judge Advocate General of the Army.
Subject: Trials by general court-martial requiring the action of the President.

1. I am forwarding you herewith for the action of the President four records of trial by general court-martial, in each of which cases the court has sentenced the accused to death and the sentence has been approved by the commanding general of the First Division, American Expeditionary Forces, the authority who appointed the court. In two cases the accused are convicted of willful disobedience of orders and in the other two of sleeping on post while sentinels in the front trenches and when face to face with the enemy. Each of these cases is reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division. I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

2. The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend that execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.

JOHN J. PERSHING,
General, Commanding.

EXHIBIT 115.

MARCH 29, 1918.

Memorandum for the Secretary of War.

Subject: Summary of petitions for clemency in behalf of four soldiers convicted of capital offenses and sentenced to death in the American Expeditionary Forces in France.

1. The petition asking for clemency for these soldiers proceed generally upon the assumption that all of them were convicted of sleeping on post. This is probably due to the press reports so describing the offenses.

2. The petitions take the several forms of letters from individuals, women's clubs and societies, Grand Army of the Republic posts, and other clubs. They accompany this memorandum and are thus briefly summarized:

* * * * * * *

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 116.

FIRST DIVISION, AMERICAN EXPEDITIONARY FORCES,
March 29, 1918.

United States *v.* Stanley G. Fishback, Company B, Sixteenth Infantry.

Review of record of trial by general court-martial convened at headquarters of the First Division, American Expeditionary Forces, France, January 3, 1918.

1. Stanley G. Fishback, private, Company B, Sixteenth Infantry, was arraigned and tried by general court-martial convened at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, on January 3, 1918, charged with a violation of the sixty-fourth article of war, which, so far as material in this case, reads:

"Any person subject to military law who * * * willfully disobeys any lawful command of his superior officer shall suffer death or such other punishment as a court-martial may direct."

The single specification laid under the sixty-fourth article of war reads:

"In that Pvt. Stanley G. Fishback, Company B, Sixteenth Infanty, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to go get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same."

2. Second Lieut. Black, Sixteenth Infantry, acted as counsel for the accused upon the trial. The accused pleaded guilty to the specification and to the charge. After the plea of guilty was entered the judge advocate read the several paragraphs of the manual that set out the gist of the offense with which the accused was charged and of which he had pleaded guilty. Whereupon, in accordance with the requirements of subdivision (d), paragraph 154, Manual for Courts-Martial, 1917, the president of the court made the following explanation to the accused:

"You, Pvt. Fishback, the accused, have plead guilty to the specification and to the charge, and in pleading guilty you admit that you have committed all the elements of the offense with which you are charged, the penalty for which in time of war is death or such other punishment that the court-martial may direct. In pleading guilty you stop all means that may be taken to prove yourself not guilty, although, of course, there may have been extenuating circumstances, and you make it not necessary for the judge advocate to bring witnesses before the court to prove your guilt. In pleading guilty you throw yourself upon the mercy of the court to adjudge to you the extreme penalty which I have mentioned. Having been warned in this manner, do you still wish to plead guilty?"

After this explanation was made by the president of the court, and in response to the concluding sentence, which is in the form of a question addressed to the accused, the accused answered, "Yes, sir."

3. Notwithstanding the plea of guilty, which legally established the guilt of the accused of the offense charged, First Lieut. Fred M. Logan, Sixteenth Infantry, was sworn as a witness in behalf of the prosecution. This is the officer who signed the charges and whose order was wilfully disobeyed by the accused. The testimony of this witness is short, and inasmuch as it is the only testimony in the case it will be quoted in full:

Q. Do you know the accused? If so, state who he is?—A. Yes, sir. Stanley Fishback, private, Company B, Sixteenth Infantry.

Q. State your name, rank, and organization.—A. Fred M. Logan, first lieutenant, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Pvt. Fishback an order?—A. I did.

Q. What was that order?—A. To get his equipment and fall in for drill with his squad.

Q. And he knowingly disobeyed and refused to do it?—A. Yes, sir.

Q. Did you give him this order in person?—A. I did.

Q. Did he make any reply to the order?—A. Either he or Ledoyen made the reply that they refused to go to drill.

Q. Did the accused later get his pack and go to drill?—A. No, sir; not that day.

Q. Did you immediately order him into confinement?—A. He was under guard then and placed in confinement later.

Q. Are you the accused's superior officer, his company officer?—A. I was that day.

Q. And it was a lawful order that you gave him in the performance of a military duty?—A. It was.

The defense had no testimony to offer and no statement to make. The court made the following explanation to the accused:

"Pvt. Fishback, you are to understand that you have the right to take the stand as a witness in your own behalf, in which case you will be cross-examined the same as any other witness. You also have the right to make a statement, either written or verbal, under oath, or not under oath; a statement which

may bring out extenuating circumstances. Having been instructed thus, have you anything to offer?"

In response to the concluding sentence, which was in the form of a question addressed to the accused, the accused answered: "No, sir."

The court was then closed and found the defendant guilty of the specification and of the charge, was opened to receive evidence of previous convictions which will be hereafter referred to, was again closed, and sentenced the accused to be shot to death with musketry.

4. The record recites that two-thirds of the members of the court concurred in the sentence. This recital is in accordance with the statutory requirement that a sentence of death shall not be pronounced except by a vote of two-thirds of the members of the court-martial, and it properly must be construed as a recital that at least two-thirds of the members concurred. And even though all of the members of the court had concurred in pronouncing the death sentence it would not have been proper to have so stated in the record as such recital would disclose the way in which each member of the court voted and would serve to identify each member as voting for such sentence.

5. The court was convened by Maj. Gen. R. L. Bullard, commanding the First Division of the Expeditionary Forces. The sentence was approved by him and forwarded to the commander in chief of the Expeditionary Forces for action under the provisions of the forty-eighth article of war.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who, in a memorandum addressed to Maj. Gen. Bullard, recommended that the sentence be approved, among other things saying:

"This case is on all fours with that of Pvt. Olen Ledoyen, Company B, Sixteenth Infantry, and attention is invited to the memorandum filed in that case. For the reasons therein stated it is recommended that the sentence be approved and the record forwarded for action under the provisions of the forty-eighth article of war."

Gen. Pershing reviewed this case in connection with three other cases in which the death sentence had been pronounced, coming from the First Division, and after referring to these four cases in his communication of February 8, 1918, transmitting the record in the trial of the case now being discussed and the records in the other three cases, said:

"I recommend that the sentences in these cases be confirmed, and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed—especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentence is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

6. Evidence of three previous convictions were considered by the court and the record thereof attached as Exhibits 1, 2, and 3 to the record of trial. These exhibits disclose the following:

(*a*) In France on July 18, 1918, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about the 17th day of July, 1917, the accused failed to repair at the fixed time to the properly appointed place for morning drill. The second specification alleged that on or about the 17th day of July, 1917, the accused without proper authority visited a certain city in France.

(*b*) In France on September 5, 1917, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about September 4, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill. The second specification alleged that on or about the 5th day of September, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill.

(*c*) In France on November 13, 1917, the accused was found guilty of a violation of the ninety-sixth article of war, in one specification thereunder which alleged that on or about November 12, 1917, having received a lawful order from

Corpl. John W. Leach, Company B, Sixteenth Infantry, to report for fatigue, the said corporal being in the execution of his office, the accused failed to obey the same.

7. The court was appointed December 15, 1917, by General Orders, No. 162, of the First Division. Nine officers were detailed as members of the court of the following grades: One colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on January 3, 1918, for the trial of the cause there were present six members of the court, the judge advocate, and the assistant judge advocate. Three members of the court were absent, reported sick. The accused challenged Maj. Phillip Remington, one of the members of the court, upon the ground that he had investigated the charges and had formed an opinion. Maj. Remington admitted the challenge and was excused. The accused was then asked if he objected to being tried by any of the remaining members of the court, to which he replied in the negative. The court was then organized by the members of the court, the judge advocate and the assistant judge advocate being sworn. Five members of the court sat upon the trial of the following grades: One colonel and four first lieutenants. No recommendation for clemency by the members of the court or by any other officer or person appears in the record.

8. The accused enlisted at Columbus Barracks, Ohio, February 17, 1917. His age at that time, as given in the enlistment papers, was 19 years and 2 months. He had no previous military service. The charge sheet gives the date of his arrest as December 13. 1917, which would be the day prior to the date of the alleged offense.

9. The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The fiendings and sentence are supported by the record and are authorized by law.

10. It is recommended that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 117.

FIRST DIVISION, AMERICAN EXPEDITIONARY FORCES,
March 29, 1918.

United States *v.* Olon Ledoyen, private, Company B, Sixteenth Infantry.

Review of record of trial by general court-martial convened at Headquarters of the First Division, American Expeditionary Forces, France, January 3, 1918.

1. Olon Ledoyen, private, Company B, Sixteenth Infantry, was arraigned and tried by general court-martial, convened at the Headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, on January 3, 1918, charged with a violation of the sixty-fourth article of war, which so far as material in this case reads:

"Any person subject to military law who * * * willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

The single specification laid under the Sixty-fourth article of war reads:

"In that Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, having received a lawful command from First Lieut. Fred M. Logan, his superior officer, to get his equipment and fall in for drill, in France, on or about the 14th day of December, 1917, did willfully disobey the same."

2. Second Lieut. Black, Sixteenth Infantry, acted as counsel for the accused upon the trial. The accused pleaded guilty to the specification and to the charge. After the plea of guilty was entered the judge advocate read the several paragraphs of the Manual that set out the gist of the offense with which the accused was charged and of which he had pleaded guilty. Whereupon in accordance with the requirements of subdivision (d), paragraph 154, Manual for Courts-Martial, 1917, the president made the following explanation to the accused:

"You, Pvt. Ledoyen, the accused, understand that in pleading guilty to the charges and specifications here you admit that you committed all the ele-

ments of the acts with which you are charged, and that you committed them of your own free will, and that you were not forced into doing it by any influence. By pleading guilty you make it not necessary for the judge advocate to prove these charges against you, the extreme penalty for which in time of war is death, or such other punishment as the court-martial may direct. In pleading guilty you throw yourself upon the mercy of the court to adjudge you this penalty. Having been thus informed do you wish your plea of guilty to stand?"

After this explanation was made by the president of the court and in response to the concluding sentence, which is in the form of a question addressed to the accused, the accused answered—"Yes, sir."

3. Notwithstanding the plea of guilty, which legally established the guilt of the accused of the offense charged, First Lieut. Fred M. Logan, Sixteenth Infantry, was sworn as a witness in behalf of the prosecution. This is the officer who signed the charges and whose order was willfully disobeyed by the accused The testimony of this witness is short, was given in answer to questions propounded by the judge advocate and the court, and inasmuch as it is the only testimony in the case it will be quoted in full:

Q. State your name, rank, and organization.—A. Fred M. Logan, first lieutenant, Sixteenth Infantry.

Q. Do you know the accused; if so, state his name, rank, and organization.—A. Olen Ledoyen, private, Company B, Sixteenth Infantry.

Q. On or about the 14th day of December, 1917, did you give Pvt. Ledoyen an order?—A. I did.

Q. He did not obey that order, did he?—A. No, sir; he did not. He refused and stated that he refused.

Q. What was the order?—A. He was ordered to get his pack and get ready for drill with his squad.

Q. Was there any reason why he would not obey?—A. No, sir. He did it willfully and was warned at the time.

Q. Did you give him the order in person?—A. I did.

Q. Did he say anything in regard to why he disobeyed?—A. No, sir.

Q. You may state any further facts or circumstances surrounding the case.—A. At that time, when he was ordered to get his pack and report for drill with his squad, he refused and stated that he would not go to drill. I then told him of the consequences of such an act and gave him another opportunity to go get his pack and drill and he again refused, saying: "I refuse to go to drill."

Q. You warned him of the consequences of his acts?—A. Yes, sir.

Questions by the court:

Q. State as nearly as you can remember the exact words that you used in warning the accused of the consequences of his act.—A. I told him that he was liabling himself to trial by general court-martial, which might impose a very heavy penalty. There were four who first refused to go to drill and two reconsidered and went to drill later. I asked the accused if he understood what he was doing and he and Pvt. Fishback still refused to drill.

Q. Did the accused know that a court-martial might impose a death penalty for his act?—A. I think not. I do not believe that I told him that.

Q. You stated a heavy sentence?—A. Yes, sir.

Q. Did this man offer any reason as to why he refused to drill?—A. No, sir.

Q. Was it simply a positive, flat refusal with no excuses?—A. Yes, sir.

The defense had no testimony to offer, but made the following verbal unsworn statement:

Lieut. Logan had us out on the hill the day before and we nearly froze to death and the next day I was so stiff that I could not drill.

The court was then closed and found the defendant guilty of the specification and of the charge, was opened to receive evidence of previous convictions which will be hereafter referred to, was again closed, and sentenced the accused to be shot to death with musketry.

4. The record recites that two-thirds of the members of the court concurred in the sentence. This recital is in accordance with the statutory requirement that a sentence of death shall not be pronounced except by a vote of two-thirds of the members of the court-martial, and it properly must be construed as a recital that at least two-thirds of the members concurred. And even though all of the members of the court had concurred in pronouncing the death sentence, it would not have been proper to have so stated in the record, as such recital would dis-

close the way in which each member of the court voted and would serve to identify each member as voting for such sentence.

5. The court was convened by Maj. Gen R. L. Bullard, commanding the First Division of the Expeditionary Forces. The sentence was approved by him and forwarded to the commander in chief of the Expeditionary Forces for action under the provisions of the forty-eighth article of war.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who, in a memorandum addressed to Maj. Gen. Bullard, recommended that the sentence be approved, among other things saying:

"It would be difficult to find a more exaggerated case of defiance and insubordination unaccompanied by violence than the one here shown, nor one which was calculated to have a more hurtful effect on others. We have undertaken a task, the accomplishment of which requires unhesitating and implicit obedience to orders, and no insubordination can be tolerated. The time must inevitably come—if this is not the appropriate one, which it would seem to be—when the death sentence must be imposed for willful disobedience of orders."

Gen. Pershing reviewed this case in connection with three other cases in which the death sentence had been pronounced, coming from the First Division, and after referring to these four cases in his communication of February 8, 1918, transmitting the record in the trial of the case now being discussed and the records in the other three cases, said:

"I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only, or, indeed, principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

6. Evidence of four previous convictions were considered by the court and the record thereof attached as exhibits 1, 2, 3, and 4 to the record of trial. These exhibits disclose the following:

(*a*) In France on July 21, the accused was found guilty of the following charges and specifications:

(1) Violation of the sixty-first article of war.

The first specification alleged that Pvt. Ledoyen absented himself without proper authority from 6 a. m., July 17, 1917, to about 5 p. m., July 17, 1917.

The second specification alleged that Pvt. Ledoyen absented himself without proper authority from about 6:30 a. m., July 18, 1917, until about 5 p. m., July 18, 1917.

The third specification alleged that Pvt. Ledoyen absented himself without authority from about 7 a. m., July 19, 1917, until about 6 p. m., July 21, 1917.

(2) Violation of the ninety-sixth article of war.

The first specification alleged that Pvt. Ledoyen upon being received from the guard and ordered by Corp. Carey, Company B, Sixtheenth Infantry, to go to his quarters and prepare for inspection, did fail to obey said order.

The second specification alleged that Pvt. Ledoyen did on the 17th, 18th and 19th days of July, 1917, visit a certain town in France in violation of standing orders.

(*b*) In France on August 22, 1917, the accused was found guilty of a violation of the sixty-first article of war with two specifications thereunder. The first specification alleged that on or about the 21st day of August, 1917, he did, without proper leave, go from the properly appointed place for drill after having repaired thereto for the performance of said duty. The second specification alleged that on or about the 22d day of August, he failed to repair to the properly appointed place of assembly for drill.

(*c*) In France on September 5, 1917, the accused was found guilty of a violation of the sixty-first article of war, in two specifications thereunder. The first specification alleged that on or about the 3d day of September, 1917, he failed to repair at the fixed time to the properly appointed place for

drill. The second specification alleged that on or about the 4th day of September, 1917, he failed to repair at the fixed time to the properly appointed place of assembly for drill.

(*d*) In France on December 10, 1917, he was found guilty of violation of the ninety-sixth and sixty-first articles of war. The specification under the ninety-sixth article of war alleged that upon receiving a lawful order from Edd Record, sergeant, Company B, 16th Infantry, to get up and stand reveille, the sergeant in the execution of his office, he did then fail to obey the same. The specification under the sixty-first article of war alleged that on or about the 8th day of December, 1917, the accused failed to repair at the fixed time to the properly appointed place of assembly for drill.

7. The court was appointed December 15, 1917, by General Order No. 162 of the First Division. Nine officers were detailed as members of the court, of the following grades: One colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on January 3, 1918, for the trial of the accused, there were present six members of the court, the judge advocate, and the assistant judge advocate. Three members of the court were absent, reported sick. The accused challenged Maj. Phillip Remington, one of the members of the court, upon the ground that he had investigated the charges and had formed an opinion. Maj. Remington admitted the challenge and was excused. The accused was then asked if he objected to being tried by any of the remaining members of the court, to which he replied in the negative. The court was then organized by the members of the court, the judge advocate, and the assistant judge advocate being sworn. Five members of the court sat upon the trial, of the following grades: One colonel and four first lieutenants. No recommendation for clemency by the members of the court or by any other officer or person appears in the record.

8. The accused enlisted at Columbus Barracks, Ohio, February 3, 1917. His age at that time, as given in the enlistment papers, was 18 years and one month. He had had no previous military service. The charge sheet gives the date of his arrest as December 13, 1917, which would be the day prior to the date of the alleged offense.

The record in the case of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, who was convicted of disobeying an order of similar import given by the same officer at the same time as the order disobeyed by Pvt. Ledoyen, also states that Pvt. Fishback was put under arrest on December 13, which would be the day preceding the disobedience. The record in the trial of Pvt. Fishback contains a statement of the prosecuting witness that Fishback was under guard at the time the order was given, and it also appears in that record that he and Ledoyen were together at the time the order was given.

9. The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

10. It is recommended that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect should such action meet with your approval.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 118.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 4, 1918.

In the First Division, American Expeditionary Forces, France.

United States *v.* Jeff Cook, private, Company G, Sixteenth Infantry.

Review of record of trial by general court-martial convened at headquarters First Division, American Expeditionary Forces, France, December 29, 1917. Action of the President.

1. Jeff Cook, private, Company G, Sixteenth Infantry, was tried on December 29, 1917, by general court-martial convened at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces,

France, charged with a violation of the eighty-sixth article of war, which, so far as material to this case, reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

The single specification laid under this article reads:

"In that Pvt. Jeff Cook, Company G, Sixteenth Infantry, being on guard and posted as a sentinel in time of war, in the face of the enemy, in France, on or about the 5th day of November, 1917, was found sleeping on his post."

The charge was signed by John T. Baker, first lieutenant, Sixteenth Infantry.

Second Lieut. R. P. Cooper, Sixteenth Infantry, acted as counsel for the accused. The Government was represented by a judge advocate and an assistant judge advocate. Before being arraigned the accused was given an opportunity to challenge any member of the court, and upon being asked whether he objected to being tried by any member of the court present answered in the negative. The members of the court, the judge advocate, and the assistant judge advocate were then sworn and the defendant arraigned, a plea of not guilty entered, evidence taken, the accused found guilty of the specification and the charge, and sentenced to be shot to death with musketry.

Lieut. Col. Blanton Winship, judge advocate of the First Division, reviewed the record before its consideration by the division commander, and recommended that the sentence be approved. Among other things, he said:

"This is the second death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing as I do that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that, as a deterrent, the sentence of the court is necessary."

Maj. Gen. R. L. Bullard, commanding the First Division, approved the sentence without comment and forwarded the record for action under the forty-eighth article of war.

Gen. Pershing reviewed this case in connection with three other cases, all arising in the Sixteenth Infantry, in which the death sentence had been pronounced by the same court, and after referring to these four cases, in his communication of February 8, 1918, transmitting the records of the trials, said:

"The fact that these men are clearly guilty of offenses punishable under the law with death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outposts keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post, and I believe the execution of the sentences is quite as necessary in their cases as in the others. I recommend the execution of the sentences in all these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise n the future."

2. The accused enlisted May 11, 1917, at Fort Logan, Colo., with no previous service. His age at that time, as given in the enlistment papers, was 18 years and 11 months. His residence is stated to be Wilburton, Okla. No evidence of any previous convictions for any offense, either civil or military, was submitted to the court.

3. The following is in brief the evidence offered by the Governmnt in its case in chief:

Corpl. Marcus Walentic, Company G, Sixteenth Infantry, testified that the accused was in his squad, and was by the witness posted as a sentinel on November 5; he was posted on an outpost of the first line, about 50 yards from the dugout; the accused was on duty with Pvt. M. J. Clark, Company G, Sixteenth Infantry; the witness visited the sentinels about every 45 minutes; he visited the sentinels probably between 3 and 4 o'clock in the morning, and—

Q. What did you see when you visited Pvt. Cook?—A. I found Pvt. Cook and Pvt. Clark, and Pvt. Cook was asleep.

Q. What makes you think he was asleep?—A. I picked up his gun and shook him, and he looked up, and I asked him what was the matter, and he said, "nothing, just tired," and then I said, "Where is your gun?" and he looked around and said he did not know.

Q. When you came up to Pvt. Cook, was he standing up?—A. He was leaning up against the bank.

Q. Where was his gun?—A. Lying on the parapet.

On cross-examination, by counsel for the defense, he testified in substance that the accused was standing up; that his gun was in front of him on the parapet, within probably 10 or 12 inches away to the right; that the witness came up to the accused on the left, and when witness picked up the gun the accused made no move, but had his hands folded and his face down, and when witness shook the accused the latter looked up and said he was pretty tired. When questioned by the court the witness stated that the accused was posted in an old trench just back of the barbed wire; that the sentinels had no permission to sit down.

Pvt. M. J. Clark, Company G, Sixteenth Infantry, testified that he was posted as a sentinel with the accused at the time of the alleged offense; that they went on duty at 4 o'clock in the afternoon, and their tour of duty continued until about 6 the next morning, with one hour off and two on during this time; that they were on what is called a double-sentry post, two soldiers being on duty as sentinels at the same time and place; that at the time Corpl. Walentic made the inspection when he claimed the accused was asleep, the accused and the witness were standing up on the fire step facing toward the enemy lines, and that the accused was leaning against the bank or wall of the trench. It appeared subsequently in the record that the trench was about shoulder high, and the normal position of a sentinel when on duty was to lean over against the wall of the trench with his head down so as be exposed as little as possible; and if this was done the rifle would be to the right, resting on the parapet. The accused was in this position at the time of the alleged offense. He had his head down. The witness further testified that when Corpl. Walentic came up he took the rifle of the accused from the parapet, and—

Q. Had you awakened Cook (the accused) before this time?—A. No, sir.

Q. Did you notice that he was asleep before the corporal came up?—A. No, sir. The corporal came up and told me to get down, and that was all, and I had not noticed him before, and the corporal got up and took the gun.

On cross-examination by counsel for the accused, the witness testified that they went on duty at 4 o'clock p. m., and were relieved at 6 a. m.; that during that period they got no sleep, although relieved at intervals by other sentinels during the night. Regarding this matter, he said:

A. No, sir; we was relieved, but never got any sleep, as we did not have any place to sleep.

Q. What did you do when you were relieved?—A. We went in and sat down.

Q. Describe how you and the accused were posted. Were you on the firing step?—A. Yes, sir; we were posted looking over the bank, over the front, at the enemy. He stood on one side of me.

In answer to a question by the court, the witness stated in substance that he believed the accused was asleep.

Lieut. Baker, who signed the charge, testified as follows: That he knew the accused; that he did not know exactly where the sentinels were posted; that Corpl. Walentic had two posts, and the accused was on duty with one of them. These posts were in the the front line, were listening posts, in fact; that they were what were known as three-men posts, each man being on two hours and off one during the period from about 4 o'clock in the afternoon until daylight the next morning, and that while there were two men on post all the time, neither had authority to sleep, and, of course, were required to be on the alert.

4. For the defense the accused was sworn as a witness in his own behalf. He testified that he was on duty as a sentinel; that it was a three-man post, each man on two hours and off one between the hours stated by the witnesses; that at the time it is alleged he was asleep on post he was standing up beside Pvt. Clark, the other sentinel, with his head on his hands and his poncho on the top of his helmet to cut the wind; that his rifle was on the parapet immediately to his right; that he knew Corpl. Walentic came up and took his rifle off the parapet, and—

Q. You heard him when he came up?—A. I was drowsy, but not asleep.

* * * * * * *

Q. How much sleep did you have during the day previous?—A. No sleep at all.

Q. Did you do any fatigue duty the day before?—A. No, sir.

Q. What kept you from sleeping in this dugout?—A. Wood chopping on the inside of the dugout.

Q. How many nights had you been on post?—A. Six nights.

Q. During these nights did you get any sleep at all?—A. No, sir; not much.

Q. You did not get any sleep?—A. No, sir.

Q. You say you had not had any sleep for six nights?—A. No, sir.

Q. Had you been sleeping any during the day?—A. Not much, as it was too noisy.

He further testified that he heard Corpl. Walentic tell Pvt. Clark to step down off the fire step, that the corporal came up to him from behind and reached up and took the rifle off the parapet, and that he knew he was doing so at the time, and—

Q. What made you think he had it?—A. I realized when he was there that it was he that took it, and I had the poncho around my helmet and in my hand so I would not get cold, and I never knew he was going to take the rifle.

Q. Did you feel the corporal when he shook you?—A. Yes, sir.

Q. Did you turn your head?—A. Yes, sir.

Q. Did he have your gun in his hand?—A. No, sir; he had set it down.

The accused further testified that while he had never been on special sentinel duty before, he understood that it was his duty to remain awake and be on the alert.

5. Corpl. Walentic was recalled and questioned by the court. He described the character of the post, as did the other witnesses; said that the night was dark; again described how he took the rifle of the accused from the parapet, and—

Q. Did the accused have a poncho around his head?—A. I do not know.

That he was asleep at the time in question the accused denied. However, the circumstances described by Corpl. Walentic and Pvt. Clark reasonably supports the conclusion of the court that the accused was asleep.

6. In his review of the record, Lieut. Col. Blanton Winship, division judge advocate, states:

"While not in evidence, Col. J. L. Hines, the commanding officer of the accused, who forwarded the charges recommending trial by general court-martial, gave in his indorsement as 'extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches.'"

7. It is alleged that the offense was committed on November 5. The charge sheet shows that the accused was placed in confinement on November 13. The court was appointed December 15, 1917, by General Order, No. 162, Headquarters, First Division. Nine officers were detailed as members of the court, with the following grades: One colonel, one major, one captain, and six first lieutenants. There was also appointed a judge advocate of the grade of first lieutenant and an assistant judge advocate of the grade of second lieutenant. When the court convened on December 29, 1917, for the trial of the case, there were present eight members, all of whom sat upon the trial, Lieut. Irwin, detailed as a member of the court, was absent, reported sick. No recommendation for clemency by any member of the court, by the reviewing authority, or the commander in chief appears in the record.

The court was lawfully constituted, the proceedings were regular, and the record discloses no substantial error. There is evidence supporting the findings and sentence.

8. It is recommended that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an Executive order designed to carry this recommendation into effect, should such action meet with your approval.

E. H. Crowell,
Judge Advocate General.

EXHIBIT 119.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 4, 1918.

In the First Division, American Expeditionary Forces, France.

United States *v.* Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry. Review of record of trial by general court-martial, convened at Headquarters First Division, American Expeditionary Forces, France, December 29, 1917.

1. Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, was tried at the headquarters of the Sixteenth Infantry, a part of the First Division, American Expeditionary Forces, France, by general court-martial, which convened December 29, 1917, charged with violation of the eighty-sixth article of war, which so far as here material reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

The single specification laid under this charge is as follows:

"In that Forest D. Sebastian, private, Company G, Sixteenth Infantry, being on guard and posted as a sentinel in time of war and in the face of the enemy, at France, on or about the night of November 3 and 4, 1917, was found sleeping on his post."

The charge was signed by George T. Phipps, first lieutenant, Sixteenth Infantry.

Upon the trial Second Lieut. R. P. Clark, Sixteenth Infantry, appeared as counsel for the accused. Before being arraigned the accused was afforded an opportunity to challenge any member of the court and upon being asked if he objected to being tried by any member present answered in the negative. All members of the court, the judge advocate, and the assistant judge advocate were then sworn. The accused was then arraigned, pleaded not guilty, evidence was taken, and accused was convicted and sentenced to be shot to death with musketry.

The record was reviewed by Lieut. Col. Blanton Winship, judge advocate of the First Division, who recommended that the sentence be approved. From his review the following is quoted:

"This is the first death sentence imposed in this division for sleeping on post. We are in the face of a vigilant, relentless, and ingenious enemy. Realizing, as I do, that any lack of vigilance on the part of a sentinel in the front-line trenches may reasonably bring disaster and dishonor upon our military forces and death for the offending sentinel's comrades, I can not escape the conclusion that as a deterrent the sentence of the court is necessary."

The sentence was approved without comment by Maj. Gen. R. L. Bullard, commanding the First Division, and forwarded for action to the commander in chief of the Expeditionary Forces in France under the forty-eighth article of war.

Gen. Pershing reviewed this case in connection with three other cases, all arising in the Sixteenth Infantry, in which the death sentence had been pronounced by the same court, and after referring to these four cases in his communication of February 8, 1918, transmitting the records of the trials to this office, said:

"I recommend that the sentences in these cases be confirmed and that I be advised by cable of such action.

"The fact that these men are clearly guilty of offenses punishable under the law by death is not the only or, indeed, the principal reason for my recommendation. I believe that for purely military offenses the penalty of death should not be inflicted unless there is a military necessity therefor. It is absolutely necessary for the safety of our Army that sentinels on the outpost keep continuously on the alert, and it is just as necessary for our success as a fighting force that orders be obeyed, especially among troops in contact with the enemy. Indeed, I regard the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two men who slept on post, and I believe the execution of the sentences is equally as necessary in their cases as in the others. I recommend the execution of the sentences in all cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

2. The accused enlisted April 18, 1917, at Jefferson Barracks, Mo., with no previous military service. His age at that time was given on the enlistment paper as 19 years and 6 months, his address 502 Madison Street, Eldorado, Ill., care of his mother. No previous conviction for any offense, civil or military, was submitted to the court, and Corpl. A. T. Shotwell, principal witness for the Government, testified:

"Q. Have you known the accused for some time while in the service?—A. Quite a bit.

"Q. Have you known him as a poor or good soldier?—A. Always a good soldier."

Col. J. L. Hines, commanding officer of the regiment to which the accused belonged, in his indorsement under date of November 22, 1917, recommending trial by general court-martial, said:

"Extenuating circumstances: Youth and failure of soldier to take the necessary rest while off duty on first occupation of trenches."

3. The evidence in behalf of the Government may be thus summarized:

Corpl. Shotwell testified that the accused was in his squad on the night in question and at the time of the alleged offense was posted as a sentinel on one of the outposts in a front-line trench. Two sentinels were on duty at the same time and place. The sentinels were on duty for two hours and off for an interval, whether for one hour or two hours is not very clear, from late each afternoon until the following morning. The accused went on his first tour of duty about 6 o'clock in the evening. Between 7 and 8 o'clock Corpl. Shotwell visited the accused and his companion where they were posted as sentinels; the accused then had the appearance of being asleep; witness warned him of the danger he was in; again, between 10 and 11 o'clock, witness found the accused in the same condition, took his rifle from the parapet and carried it away, the accused later coming to witness and getting it; that witness visited the same post from time to time thereafter during the night and found accused awake and alert, and—

"Q. Can you swear on oath that this man was asleep?—A. I can say that I took his rifle, and the condition he was in, but I can not swear he was asleep."

Corpl. Shotwell further testified on cross-examination that the top of the trench would about strike his shoulder; that the natural position for a sentinel standing at this post would be to lean against the wall of the trench; that the position in which he found the accused was the natural position for one on duty, and that the sentinels who were on duty laid their rifles over the parapet. This was the position of the rifle of the accused when the corporal took it upon his second visit. Further, that when he visited a post he would lay his own rifle upon the parapet and take it down from the parapet when he left; that upon each visit the accused had his helmet on; that he did not ask the accused upon either occasion whether or not he was asleep, but came up and shook him; that the night was very dark.

Pvt. George Gladwell, a witness for the prosecution, testified that he was a sentinel on duty with the accused during the night in question; that Corpl. Shotwell visited the post between 7 and 8 in the evening; that witness was then standing beside the accused on the firing step at the time of the visit; that he said nothing to the accused on the approach of the corporal; that when the corporal came up accused was leaning forward on the top of the trench and the corporal took his rifle, shook him, and told him that lives were depending upon him; that the corporal came back two or three hours later and took the rifle of the accused, and——

"Q. Did he (the accused) say anything to you about being sleepy?—A. Yes, sir.

"Q. What did he say?—A. He told me he was on gas sentry the night before and that he was very tired.

"Q. Did he make any other statement?—A. No, sir.

"Q. In regard to sleep?—A. No, sir.

* * * * * * *

"Did you talk with Sebastian (the accused) while you were on post with him? Could you tell whether or not he was about all in that night?—A. He said he was pretty tired.

"Q. Did the corporal ever place his rifle upon the parapet?—A. Yes, sir.

"Q. Would you be willing to swear that Sebastian was asleep?—A. No, sir."

In answer to questions propounded by the court, the witness further testified:

"Q. Why did you tell him to keep awake if he could?—A. I did not want to see him get into any trouble.

"Q. You believe this man was asleep at any time?—A. I can not say.

"Q. You do not know whether or not he was asleep?—A. No, sir.

* * * * * * *

"Q. Did you try to shame him?—A. I told him the first time to keep awake if he could.

"Q. Did he say he was not asleep?—A. Yes, sir.

"Q. Said he was not asleep?—A. Yes, sir."

4. The only witness called by the defense was Pvt. Eggleston, of Company G. Sixteenth Infantry. He testified in substance that he was on gas guard the first night in the trenches and that the accused was on guard with him; that they went on gas guard about 8 o'clock; that they got no sleep that night, and—

"Q. The next day when you were off duty in the morning were you given a chance to sleep?—A. If we could find a place.

"Q. Were chances to sleep scarce?—A. Yes, sir.

"Q. Why?—A. Sergt. Klien said to let the men on outpost have a chance to sleep and we could not find bunks only just the best we could.

"Q. Do you know whether the accused had any sleep the day after he was on gas guard?—A. No, sir, he did not. Very little if any.

"Q. Did you get any sleep the next day?—A. No, sir.

"Q. Were you on post the next night?—A. Yes, sir.

It may be inferred from what appears elsewhere in the record that the accused was on gas guard the night preceding the night he is said to have been found sleeping on his post.

The accused did not testify or make a statement, sworn or unsworn, in his own behalf. The president of the court properly advised the accused of his rights to testify in his own behalf or to make a statement. Counsel for the accused and the judge advocate submitted the case to the court with very brief comments.

5. The specification alleges that the offense was committed on the night of November 3–4. The charge sheet shows that the accused was placed in confinement on November 14. The record shows that the accused, after the alleged offense, finished out his tour of duty as a sentinel.

The court was appointed December 15, 1917, by General Order, No. 162, of the First Division. Nine officers were detailed as members of the court with the following grades: one colonel, one major, one captain, and six first lieutenants. There were also appointed a judge advocate of the grade of first lieutenant, and an assistant judge advocate of the grade of second lieutenant. When the court convened on December 29, 1917, for the trial of the accused, eight members of the court were present and sat on the trial. Present also were the judge advocate and assistant judge advocate. One officer of the grade of first lieutenant, detailed as a member of the court, was absent, reported sick.

6. The court was lawfully constituted. The proceedings are regular. The record discloses no errors affecting the right of the accused. The evidence and the inferences which the court was authorized to draw therefrom supports the conviction.

7. It is recommended that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 120.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 5, 1918.

MY DEAR GEN. MARCH: Here are four cases from France involving the death sentence—two for sleeping on post, two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts.

The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.

You will notice that I have not finished the reviews by embodying a definite recommendation.

It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at an early date?

E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

EXHIBIT 121.

APRIL 10, 1918.

Memorandum for Gen. Crowder.
Subject: Four cases from France involving death sentence.

1. In addition to what appears in the several reviews of these four cases, the following additional facts are called to your attention as bearing upon the justice and the expediency of carrying the sentences into effect:

(*a*) All these cases arose in the Sixteenth Infantry. Two of the accused were not brought to trial for 50 days and upward after their alleged offenses. All of these cases were tried with an expedition which does not give, on the face of the records, any appearance of deliberation. In each case the defense of the accused was so indifferent as to be practically no defense.

(*b*) Upon the trial of two of the cases but five officers sat—one colonel and four first lieutenants. These two trials lasted from 8 p. m. to 9.45 p. m.—that is, from the beginning of the first trial until the conclusion of the second trial there elapsed but 1 hour and 45 minutes. Counsel for the accused made no statement or argument in either of these cases.

In the other two cases eight members of the court sat. The first of these two trials began at 1.20 p. m. and the second was completed at 5.25 p. m. In the first of these cases counsel for the accused made an argument of six lines, and in the second an argument of eight lines.

(*c*) Two of the soldiers—Fishback and Ledoyen—were tried for willful disobedience of an order to go out and drill. It does not appear that their organization was near or in contact with the enemy. Both of these men were tried the same evening between 8 and 9.45 p. m.—two trials. Fishback was first tried, and it appears in the record of that case that both of the soldiers were together when the order was given. The lieutenant who claims to have given the order testified:

"Q. Did he (Fishback) make any reply to the order?—A. Either he or Ledoyen made the reply that they refused to go to drill."

The answer leaves it in doubt as to which refused. Clearly there was but one order given, apparently directed to both. Clearly also when the court passed upon the Fishback case it necessarily had, in practical effect, decided the Ledoyen case, which immediately followed. Notwithstanding this, counsel for the accused made no challenge.

It is alleged that the disobedience occurred on November 14. The charge sheet shows that each of these men was placed in confinement on November 13. There is evidence in the records that these men were both in arrest or under guard when the order was given. Why they were in arrest and by whom placed in arrest, and whether or not they were to be released from arrest to go out to drill in obedience to this order does not appear.

(*d*) With respect to the two men convicted of sleeping on post, one—Pvt. Sebastian—is alleged to have committed the offense on the night of November 3–4; Pvt. Cook, on the following night. Cook was put in arrest November 13 and Sebastian November 14.

The length of time which elapsed after the alleged offenses and before the men were brought to trial, the expeditious and seemingly formal manner in which they were tried, the lack of any apparent effort on the part of counsel for the accused to make a real defense, the circumstances of extenuation shown in the reviews—especially in the cases of the two men convicted of sleeping on post—all together, and coupled with the disposition made by the same court of

other cases of like nature arising in the same organization about the same time, make up a record on which it will be difficult to defend or justify the execution of death sentences by way of punishment, or upon any ground than that as a matter of pure military expediency some one should be executed for the moral effect such action may have upon the other soldiers.

(*e*) The four convicted men entered the Army by voluntary enlistment—Ledoyen on February 3, 1917, age on enlistment papers, 18 years and 1 month; Sebastian, April 18, 1917, age 19 years and 6 months; Fishback, February 17, 1917, age 19 years and 2 months; Cook, May 11, 1917, age 18 years and 11 months. None had any previous military experience.

(*f*) Reference has already been made to other cases tried by the same court. These will now be more particularly referred to.

William Hindman, private, Company G, Sixteenth Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5-6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic, and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is, in essential respects, very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head, and, as he believed, asleep, when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses, by the same court.

Adam Klein, private, Company G, Sixteenth Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. It will be noted that all these men belonged to the same organization. Lieut. D. S. McCune testified directly that he found Klein asleep. He was on duty in the front line trench. Klein was acquitted.

Dewey G. Brady, Company G, Sixteenth Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is, in essential respects, a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than that in either the Cook or the Sebastian case, in which the men were convicted. Brady was tried by the same court and acquitted.

Pvt. Herbert Tobias, Company E, Eighteenth Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz., Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical corrections, and with the suggestion that the court reconsider the case with the view to imposing a heavier penalty. Upon reconsideration the court increased the period of confinment to 10 years, and this sentence was approved.

(*g*) A number of cases have come from other organizations in France where men were convicted of sleeping on post or willful disobedience of orders. The following are some of the sentences:

Pvt. John L. Shade, United States Marine, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

Pvt. Aubroy LaLace, convicted of sleeping on post, January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for six months, and forfeiture of two-thirds of his pay for a like period. Gen. Coe reviewing authority.

Pvt. Enio J. Halonen, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

Pvt. James Hadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of these cases that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed.

A number of cases have also come in from France where men were convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, sentenced to death. The sentences run from a few months to several years.

ALFRED E. CLARK,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 122.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 15, 1918.

Memorandum for Gen. Crowder.
Re: Death penalty in the four cases from France.

1. After reading these records I said to you the other day that were I the confirming authority, I would not confirm these sentences, and that for the same reason I could not, were I you, recommend confirmation. At your request I shall now state very briefly my reasons as I then stated them to you orally.

LEDOYEN'S CASE.

He was charged with disobeying the lawful order to fall in for drill, and was convicted upon his plea of guilty. After plea and before finding, the accused formally stated in his own behalf that he "could not go to drill" because of the extreme exposure to which he had been subjected the day before; that is, that it was physically impossible for him to drill. This statement was plainly inconsistent with his plea of guilty; accordingly the court should have directed a plea of not guilty and tried the case on that issue. Surely in a capital case a plea of guilty, especially when, as in all these cases, the accused has not had competent counsel, should be accepted only when it was made with the utmost comprehension of all legal implications and of all consequences and only when the plea stands finally as the full, complete, and unmodified intelligent answer of the accused to the charge. Obviously the record in this case does not meet the test, and the proceedings should be disapproved.

FISHBACK'S CASE.

This is in all respects a companion piece to Ledoyen's case; the military authorities have treated the two as on "all fours," and ask for the death penalty in both upon common ground. There is one difference, however. The accused in this case made no statement after his plea of guilty, and so the record does not show upon its face any statement inconsistent with the plea. Considered independently, then, the record gives no basis for the destructive opposition made to Ledoyen's case. The human facts do. The facts of the two cases are the same. The conditions and circumstances of the conduct denounced in both cases are the same. This is shown by the record and conceded and acted upon by the military authorities. Disapproval need not be based upon strict legalism. Other considerations are admissible. In view of what I have said, and following the facts of record in Ledoyen's case, I could not confirm the Fishback case.

SEBASTIAN'S AND COOK'S CASES.

The death penalty in each of these cases was awarded for sleeping on post after a plea of guilty. In capital cases extenuating circumstances are matters of defense. The defense in these cases set up, formally, and without force or persuasion, however, the fact that the accused had been in the front line trench for five previous nights from 4.45 in the evening until 6 o'clock in the morning, with an actual stand in the sentry post of two hours on and one hour off. Of course, little rest and no sleep could be had in such a brief respite. Night after night of vigilance, without opportunity for sleep, must rapidly bring exhaustion unless there be chance for rest and sleep during the day. The accused in one case testified that sleep was impossible in the dugout during the day, because of the chopping of wood therein. In the other case the accused testified that little or no sleep could be had because of noise, without speaking more specifically. These are matters of extenuation, the truth of which the court made no effort to prove or disprove. A competent statement made in defense and standing unimpeached ought to be taken as true. Furthermore, in one of the cases the evidence of exhaustion is rather convincing. The accused was found evidently asleep in the early evening, around 8 o'clock. He should have been relieved then by the corporal who observed his condition. He was not relieved until discovered asleep the second time in the early morning hours.

GENERALLY.

These cases were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. I can not help recall the British rule which requires, I think, in such cases, three years' service to render an officer competent as a member of a court-martial. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (practically of none) were present. And the same court that tried Cook tried Sebastian.

The character of the record, with its brevity, is such as to leave the human understanding disturbed by the formal conviction that it carries. These were mere youth. Not one made the slightest fight for his life. Each was "defended" by a second lieutenant. Such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that means the forfeit of his life. The Government should be made to maintain its case at every point in the trial of a capital crime. Court, judge advocate, and counsel should all endeavor to see that there is a full trial as well as a fair trial, and that no matter of defense, including extenuation, be omitted.

There is another matter that, finding lodgment in my conscience, I shall express: There is an insistence upon the part of Gen. Pershing which tends to prejudice these cases. He seems to have forgotten that he is not the reviewing authority. The relation between confirming authority and the President in these cases is judicial. I do not say that Gen. Pershing may not make general recommendations as to the maintenance of discipline in his command. I know he may. But his recommendation in these cases is a special thing, specially interposed in the course of justice, and characterized by great insistence. He asks that he be advised by cable of the act of confirmation, and makes a powerful argument, the gist of which after all is to be found in his view of the necessity of exemplary punishment in these cases. It may be the punishment made especially drastic for the purpose of example at times has its place and value. But exemplary punishment is dangerous to justice. The execution of all military offenders would very likely decrease the number of future offenses and offenders. But such Draconian methods would destroy justice without which all else in human society is of no worth.

It is only right for me to say to you that the military mind will in my opinion almost unanimously approve of confirmation in these cases. I do not say that the military view is to be ignored by the Commander in Chief

of the Army. I myself would not ignore it. But when it offends against my well-considered sense of law and justice I can not follow it.

ANSELL,
Brigadier General.

Ledoyen's case, care of Mrs. Henrietta Rentz (aunt), 152 Oliver Street, Atlanta, Ga.

Fishback's case, care of Mrs. Sadie Doughty (sister), Cannelton, Ind.

Forest V. Sebastian, care of Mrs. Mary Sebastian (mother), 502 Madison Street, Eldorado, Ill.

Jeff Cook, care of Andrew Cook (father), Tutie, Okla.

EXHIBIT 123.

APRIL 16, 1918.

Memorandum for Gen. March.

Subject: Four cases from France involving the death penalty.

1. Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited.

The following four cases of sleeping on post, three of which appear to have arisen in the same regiment, namely, the Sixteenth Infantry, on approximately the same date, and one in the Eighteenth Infantry four days later, were disposed of as follows:

(*a*) William Hindman, private, Company G, Sixteenth Infantry. This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense. In the Hindman case Corpl. Walenic and Pvt. Clark were witnesses for the prosecution, as they were also in the Cook case. In each case it was said that Pvt. Clark was on duty when his comrades were found asleep. The story told by Corpl. Walenic concerning Pvt. Hindman is in essential respects very much like the story he told concerning Pvt. Cook. If anything, the evidence was stronger against Pvt. Hindman than against Pvt. Cook, because Corpl. Walenic testified that the former was sitting down with his blanket around his head and, as he believed, asleep when discovered by the corporal. In the case of Pvt. Cook, who was convicted, the evidence clearly shows that he was standing on the firing step in a natural position, with his rifle resting on the parapet at the time of the alleged offense. Cook was convicted upon the testimony of the two witnesses referred to, and Hindman was acquitted in spite of the evidence of these same witnesses by the same court.

(*b*) Adam Klein, private, Company G, Sixteenth Infantry, was accused of sleeping on post November 3, 1917. This is the same night that it is alleged Pvt. Sebastian was found asleep. Lieut. D. C. McCune testified directly that he found Klein asleep. He was on duty in the front-line trench. Klein was acquitted.

(*c*) Dewey C. Brady, Company G, Sixteenth Infantry, was accused of sleeping on post on the night of November 5. This is the same night that it is alleged Pvt. Cook was found asleep. Again Corpl. Walenic was the chief witness for the prosecution. His story of how he came upon Brady, found him asleep, took his rifle, etc., is in essential respects a replica of the story he told in the Cook case, and the evidence in support of the charge against Brady is quite as strong, if not more convincing, than in either the Cook case or the Sebastian cases, in which the men were convicted. Brady was tried by the same court and acquitted.

(*d*) Herbert Tobias, private, Company E, Eighteenth Infantry, was accused of sleeping on post in the front trenches on November 9. He was tried by a different court, appointed, however, by the same reviewing authority, viz, Maj. Gen. Bullard. The evidence was direct and positive that he was found sound asleep on his post. The accused did not take the stand and make any denial of the charge. He was tried December 15, was found guilty, and sentenced to be dishonorably discharged, with the usual forfeitures, and to be confined for three years. The reviewing authority returned the record for some clerical correc-

tions and with the suggestion that the court reconsider the case with a view to imposing a heavier penalty. Upon reconsideration, the court increased the period of confinement to 10 years, and this sentence was approved.

2. I think, perhaps, you would also like to know something of the state of discipline in other organizations in France as evidenced by the fact that in the following cases men have been convicted of sleeping on post, or of leaving post before being regularly relieved, with sentences adjudged which are, by comparison with the death sentence, almost trivial:

(1) Pvt. John L. Shade, United States Marines, convicted of sleeping on post November 19, 1917. The sentence as approved was six months' confinement and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy, reviewing authority.

(2) Pvt. Aubrey LeLace, convicted of sleeping on post January 14, 1918. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan, reviewing authority.

(3) Pvt. William F. Glidia, convicted of sleeping on post October 31, 1917. The approved sentence was confinement for one year and one month, with total forfeiture during that period. Maj. Gen. Kernan reviewing authority.

(4) Pvt. Enic J. Valoren, United States Marines, was convicted of sleeping on post December 7, 1917. The sentence as approved was confinement for three months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy was the reviewing authority.

(5) Pvt. Edward M. Wood was convicted of leaving his post before being regularly relieved on November 14, 1917. The sentence as approved provided for confinement for six months and forfeiture of two-thirds of his pay for a like period. Maj. Gen. Kernan reviewing authority.

(6) Pvt. James Sadestron was convicted of leaving his post before being regularly relieved on December 29. The sentence as approved was confinement for six months, with forfeiture of two-thirds of his pay for a like period. Maj. Gen. Bundy reviewing authority.

The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others, the records do not show where the offenses were committed.

3. In addition to the foregoing, the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement.

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience) and a first lieutenant (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them, I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 124.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 17, 1918.

Memorandum for the Secretary of War.

Herewith are the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, in which the sentence involves the death penalty. In two of these cases, namely, Pvts. Jeff Cook and Forest D. Sebastian, both of Company G, Sixteenth Infantry, the offense was sleeping on post. In the other two cases, namely, Pvts. Olon Ledoyen and Stanley G. Fishback, both of Company B, Sixteenth Infantry, the offense was willful disobedience of the lawful commands of their superior officers.

I have carefully examined the testimony in all these cases and have conferred with the Judge Advocate General concerning every phase of the legal questions involved. I am in complete agreement with the commanding general American Expeditionary Forces, in France, that the sentences should be confirmed and they should be duly executed.

Since my original interview with the Judge Advocate General, and under date of April 16, 1918, he has submitted to me a personal memorandum, herewith, in which without reopening the cases he invited my attention to cases of other men serving in the American Expeditionary Forces who were tried for similar offenses and whose sentences are not as severe as the four cases under consideration. The six cases enumerated in paragraph 2 of that memorandum refer to offenses which were not committed in the front-line trenches. The Judge Advocate General states that: "The records show with respect to some of the six cases listed above that the offenses were not committed in the front-line trenches. As to others the records do not show where the offenses were committed." I am able to state from my own personal knowledge that the reviewing authorities who are cited in the brief of the Judge Advocate General indicate that all these cases were either in training camps or in the line of communications. Maj. Gen. Kernan, who approved two of the cases, was at that time the commanding general of the line of communications or, as it is now called, the Service of Supply. Maj. Gen. Bundy at the periods indicated by the date of the offenses was in training camp. Brig. Gen. Coe, on October 31, 1917, commanded the Heavy Artillery training camp at Mailly. In none of these cases, therefore, was the death sentence an appropriate sentence.

Referring to paragraph 4 of this memorandum of the Judge Advocate General, I do not find that his statement, "I regret exceedingly that in each case the accused was allowed to make a plea of guilty," is a fact. The record shows that two of these men, namely, Pvt. Sebastian and Pvt. Cook, did plead not guilty, and in the case of the other two men, Pvts. Ledoyen and Fishback, although the accused pleaded guilty the court proceeded to take evidence in the cases in spite of that plea.

The other cases mentioned in paragraph 1 of his memorandum have not appeared before me, and I do not know what additional testimony was brought out in those cases which moved the court to acquittal, but I do not think in any case that the different action of other courts has any substantial bearing upon the cases at issue.

The American Expeditionary Forces is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company but of the entire command is absolutely dependent on the vigilant performance of his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of these offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F, of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night, that is, the night of November 3–4, 1917, Pvt. Sebastian was found sleeping on his post, and on the night of the 5th Pvt. Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of the 2d–3d. This condition of affairs presented an absolute menace, not only to that portion of the line held by the American troops but to the French troops in the adjacent sectors.

With respect to the cases of the two men who willfully disobeyed orders, these are as flagrant cases as have ever come my notice, and are without excuses or extenuating circumstances.

I recommend that the sentences of the courts in these four cases be confirmed and executed.

P. C. MARCH,
Major General, Acting Chief of Staff.

Papers pertaining to each soldier were received in Adjutant General's office with this paper. Each has the order of the President with it. All are inclosures to this.

EXHIBIT 125.

MAY 1, 1918.

MY DEAR MR. PRESIDENT: I present you herewith the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, each of which involves the imposition of the death penalty by shooting to death with musketry.

These cases have attracted widespread public interest, and with the papers are numerous letters and petitions urging clemency, most of which are of that spontaneous kind which are stirred by the natural aversion to the death penalty which humane people feel. Many of them are from mothers of soldiers whose general anxiety for the welfare of their sons is increased by apprehension lest exhaustion or thoughtlessness may lead their boys to weaknesses like those involved in these cases, which the newspapers have described as trivial and involving no moral guilt, with the consequence that sons whose lives they are willing to forfeit in their country's defense may be ingloriously taken for disciplinary reasons in an excess of severity. Many of the letters are from serious and thoughtful men, who argue that these cases do not involve disloyalty or conscious wrongdoing, and that whatever may have been the necessities of military discipline at other times and in other armies, the progress of a humane and intelligent civilization among us has advanced us beyond the helpful exercise of so stern a discipline in our Army in the present war.

I examined these cases personally, and had reached a conclusion with regard to the advice which I am herein giving before I had seen any of the letters or criticisms.

The record discloses the fact that the divisional commander, the commander in chief, Gen. Pershing, the Chief of Staff, Gen. March, and the Judge Advocate General concur in recommending the execution of the penalties imposed. The Judge Advocate General limits his concurrence to the technical statement that the proceedings in the cases are regular, and expressing regret that a more adequate conduct of the defense of the several men concerned was not provided, concurs in the recommendation of Gen. Pershing. As I find myself reaching an entirely different conclusion, and disagreeing with the entire and authoritative military opinion in case, I beg leave to set out at some length the reasons which move me in the matter.

The cases must be divided into two classes, and I will deal first with the two young men convicted of sleeping while on duty, namely, Pvt. Jeff Cook and Pvt. Forest D. Sebastian, both of Company G, Sixteenth Infantry.

These cases are substantially identical in their facts. The accusations were laid under the eighty-sixth article of war, which reads: "Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

In both cases a corporal inspecting along a front-line trench found these young men standing in the proper military position, leaning against the trench, with their rifles lying on the parapet of the trench within easy reach of their hands. Each man had his head resting on his arm, and his arm resting on the parapet. The offenses were committed, in the Sebastian case on the night of November 3 and 4, and in the Cook case on or about the 5th of November. In both cases the testimony was exceedingly brief, and showed that the night was dark and cold, that the soldiers had their ponchos and other equipment on, and in one case it was a fair inference that the poncho was drawn over the ears and trench helmet in such a way as to make it difficult for the soldier to hear the approaching steps of the corporal. In each case the corporal laid

his own rifle upon the parapet, and took that of the soldier, carrying it away with him, and instructed the other sentinel, the men being posted in this outpost duty in twos, to shake the soldier and tell him to report to the corporal for his gun. In each case the corporal shamed the soldier for his neglect of duty, and pointed out to him the fact that not only his own life but those of others were at stake, and that he should be more zealous and alert. In neither case does either the corporal or the fellow sentinel swear positively that the accused was asleep, and I confess that on all reasonable grounds, taking the circumstances into consideration, it seems to me entirely likely that both men were asleep; but it is important to note that in neither case had the accused stepped away from his proper military post to sit down or lie down; both being found standing at their post of duty in what is admitted to have been a correct military position, and if they were asleep their heads literally nodded over on to their arms without any intentional relaxation of attention to their duty so far as can be gathered from any of the surrounding circumstances.

These soldiers were both young. Sebastian enlisted into the Regular Army by volunteering on the 18th of April, 1917, having had no previous military experience, his age at that time being 19 years and 6 months. He was, therefore, slightly more than 20 at the time of the alleged offense. Cook enlisted on the 11th of May, 1917, without previous military experience, his age at that time being 18 years and 11 months. He was, therefore, at the time of the alleged offense, slightly under 20 years of age.

From the testimony it appears that both of these young men had been posted as sentinels doing what is called double sentry duty, going on duty at 4 p. m., and remaining on duty until 6 a. m., with relief at intervals by other sentinels during the night, but with no opportunity to sleep during the night because of there being no place where they could secure sleep. It further appeared that neither of them had slept during the day before after having spent the previous night on gas sentinel duty, although both had tried to sleep during the day preceding the night of the alleged offenses, but found it impossible because of the noise. In both cases the commanding officers of the soldiers who forwarded the charges and recommended trials by general courts-martial added to his indorsement as extenuating circumstances the youth and failure of the soldiers to take the necessary rest when off duty on the first occupation of trenches.

It is difficult to picture to the eye which has not seen it the situation in which these young soldiers were placed. In the month of November the section of France in which these soldiers were stationed was cold, wet, and uncomfortable in the extreme. No sort of shelter of any comfortable kind could be provided near the trenches, because it attracts enemy observation and fire. Throughout one long night they performed duty as gas sentinels; during the next day, when they perhaps ought to have sought more rest than they did seek, they found it difficult to secure any sleep because of the noise and discomfort of their surroundings. As a consequence, on the night of the alleged offenses they had reached the place at which exhausted nature apparently refused to go further, and without any intentional relaxation of vigilance on their parts they dozed in standing positions at their posts of duty.

I am quite aware of the gravity of this offense, and of the fact that the safety of others, perhaps the safety of an army and of a cause, may depend upon such disciplinary enforcement of this regulation as will prevent soldiers from sleeping on sentinel duty; and yet I can not believe that youths of so little military experience, placed for the first time under circumstances so exhausting, can be held to deserve the death penalty, nor can I believe that discipline of the death sentence ought to be imposed in cases which do not involve a bad heart, or so flagrant a disregard of the welfare of others, and of the obligation of a soldier as to be evidence of conscious disloyalty.

In both of these cases the reviewing judge advocate quotes with approval some observations of Gen. Upton, who in his work on military policy points out that action taken by President Lincoln in the early days of the Civil War, pardoning or commuting sentences in cases of death penalty led to the need of greater severity at a later period in the interests of discipline; but the cases which Gen. Upton had in mind were cases of desertion in the face of the enemy involving cowardice, and cases of substantially treasonable betrayal of the Nation, and I can see no persuasion in them as an example. Rather it would seem to indicate that the invocation of this opinion of Gen. Upton indicates a feeling on the part of the reviewing judge advocate that while these particular cases might not be deemed on their own merits to justify the death sentence, that,

nevertheless, as a disciplinary example such action would be justified. I am not, of course, suggesting that any of the military officers who have reviewed these cases would be willing to sacrifice the lives of these soldiers even though innocent; but I do think that if these cases stood alone no one of the reviewing officers would have recommended the execution of these sentences; their recommendations being, in my judgment, soldierly and in accordance with the traditions of their profession, and based upon a very earnest desire on their part to save the safety of their commands, and the lives of other soldiers; but, nevertheless, to some extent influenced by the value of the discipline of the Army of the examples which their execution would afford.

I have not sought to examine the learning of this subject, and, therefore, have not prepared a history of the death penalty as a military punishment; but I think it fair to assume that it arose in times and under circumstances quite different from these, when men were impressed into armies to fight for causes in which they had little interest and of which they had little knowledge, and when their conduct was controlled without their consent by those who assumed to have more or less arbitrary power over them. Our Army, however, is the Army of a democratic Nation fighting for a cause which the people themselves understand and approve, and I had happy and abundant evidence when I was in France that the plain soldiers of our Expeditionary Forces are aware of the fact that they are really defending principles in which they have as direct an interest as anybody, principles which they understand, approve, and are willing to die for.

I venture, therefore, to believe that the President can with perfect safety to military discipline pardon these two young men; and I have prepared and attached hereto an order which, if it meets with your approval, will accomplish that purpose, and at the same time, I believe, upon its publication further stimulate the already fine spirit of our Army in France. Such an order as I have here drawn would be read by every soldier in France and in the United States, and coming from the Commander in Chief would be a challenge to the performance of duty, quite as stimulating as any disciplinary terror proceeding from the execution of these sentences. In the meantime public opinion in this country would, I believe, with practical unanimity approve such action on your part.

In the cases of Stanley G. Fishback and Olon Ledoyen the charges are substantially identical in that each of them is accused under the sixty-fourth article of war of having "willfully disobeyed any lawful command of his superior officer." The facts show that on the 3d day of January, 1918, these two young men in broad daylight in the theater of war, at a place back of the actual line, were directed to bring their equipment and fall in for drill. Each refused, whereupon they were warned by the lieutenant who gave the order not to persist in their refusal on the ground that grave consequences would ensue. They were not warned that the penalty of disobedience was death, but were advised earnestly to comply. Both persisted in their refusal. Each gave as his reason for refusing that he had been drilled extensively the day before, that they had gotten cold, the weather being extremely severe, and that they had not yet recovered from the effects of that exposure.

Both pled guilty at the trial.

It is perfectly obvious that this order ought to have been obeyed. It was a proper military order, and it seems to me inconceivable that such obstinate refusal on so trivial a matter could have been made with any consciousness that the death penalty was the alternative. Nevertheless the disobedience was willful, undisciplined, and inexcusable, and it ought to be punished with a suitable punishment.

The Judge Advocate General, in reviewing these cases, limits himself again to the technical correctness of the proceedings, but in a subsequent memorandum he called the attention of the Chief of Staff to the fact that four cases of sleeping on post arising in the same regiment at approximately the same time resulted in acquittal of the accused on substantially the same evidence as that recited in the Sebastian and Cook cases, above reviewed, and that in six cases similar offenses committed elsewhere in France had led to very moderate penalties. The Judge Advocate General says in this memorandum: "In addition to the foregoing the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and

Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement."

In other words, the Judge Advocate General, reviewing generally the state of discipline in the Army in France and the steps taken to enforce it, reaches the conclusion that up to the time of the trial of these cases the offenses of which these soldiers were convicted had been regarded as quite minor in their gravity. The Chief of Staff, in commenting upon this memorandum of the Judge Advocate General, is able from his own recollection to add that the willful disobedience cases lately tried in France did not concur in the actual theater of war, making at least that much of a distinction. But the case still remains one in which suddenly a new and severe attitude is taken without the record disclosing that any special order had been made notifying soldiers that the requirements of discipline would call upon courts-martial thereafter to resort to extreme penalties to restore discipline.

Both Ledoyen and Fishback are young. The record shows that Ledoyen enlisted on the 3d of February, 1917, without previous military experience, his age at that time being 18 years and 1 month. Fishback enlisted on the 17th of February, 1917, without previous military experience, his age being 19 years and 2 months. Each of them at the time of the commission of the alleged offenses was therefore less than 20 years of age.

The record in the Fishback case shows that there had been previous shortcomings on his part in the matter of obedience. That is to say, he had once failed to report for drill, for which he was required to forfeit 15 days' pay; a second time failed to report for drill, penalty not stated; and a third time failed to report for fatigue duty, for which he was sentenced to one month at hard labor and to forfeit two-thirds of his pay for two months. He seems, therefore, to have found it difficult to accommodate himself to the discipline of the life of a soldier, and his offense hereunder reviewed is aggravated by this previous record.

By a very extraordinary coincidence this record discloses the fact that these two soldiers were members of a company commanded by Capt. D. A. Henckes. It is from the captain of his company that the soldier most immediately learns discipline and obedience. The captain sets the example and inculcates the principles upon which the soldier is built. Now, this particular Capt. Henckes, although for many years an officer in the Regular Army, was himself so undisciplined and disloyal that when he was ordered to France with his command he sought to resign because he did not want to fight the Germans. Born in this country and for 20 years an officer in its Army, under sworn obligation to defend the United States against all her enemies, domestic and foreign, he still sought to resign; and when the resignation was not accepted, and he went to France, the commander in chief was obliged to return him to this country because of his improper attitude toward the military service and his country's cause in this war. He was thereupon court-martialed and is now serving a sentence of 25 years in the penitentiary for his lack of loyalty and lack of discipline.

I confess I do not see how any soldiers in his company could have been expected to learn the proper attitude toward the military service from such a commander. I do not suggest that the shortcomings of Capt. Henckes be made an excuse for their disobedience, but these mere youths can barely be put to death under these circumstances, and I therefore recommend that the sentence in each case be commuted to one involving penal servitude under circumstances which will enable them by confinement in the Disciplinary Barracks at Fort Leavenworth to acquire under better conditions a wholesomer attitude toward the duty of a soldier. Orders accompanying this letter are drawn for your approval which will carry out the recommendation here made.

In view of the fact that both Fishback and Ledoyen had been previously guilty of minor offenses, as disclosed by the record, the penalty suggested is three years' confinement.

Respectfully submitted.

SECRETARY OF WAR.

EXHIBIT 126.

THE WHITE HOUSE,
Washington, May 4, 1918.

MY DEAR MR. SECRETARY: I am in entire agreement with you about the cases of Pvts. Jeff Cook, Forest D. Sebastian, Stanley C. Fishback, and Olon Ledoyen,

and have taken pleasure in signing the orders which you were kind enough to have drawn up for me.

May I not thank you for your very full and convincing letter.

Cordially and sincerely, yours,

WOODROW WILSON.

Hon. NEWTON D. BAKER,
Secretary of War.

EXHIBIT 127.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Sebastian, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

WOODROW WILSON.

EXHIBIT 128.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Jeff Cook, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Cook, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

WOODROW WILSON.

Inc. 5.

EXHIBIT 129.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans., United States of America.

WOODROW WILSON.

EXHIBIT 130.

THE WHITE HOUSE,
May 4, 1918.

In the foregoing case of Pvt. Stanley C. Fishback, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude

at the Disciplinary Barracks at Fort Leavenworth, Kans., United States of America.

WOODROW WILSON.

EXHIBIT 131.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
May 14, 1918.

Memorandum for Gen. Crowder:

I have talked over the phone with the pardon clerk in the Department of Justice. He sees no legal objection of any kind whatsoever to the method the President has here taken of granting these two soldiers a pardon. He says it is a legal pardon. He suggests, however, that a copy of the President's action should be sent to each of the soldiers and a statement obtained from them that they accept the pardon granted. The paper then to be returned to the War Department for filing in the office of The Adjutant General of the Army. It seems to me that the action of the soldiers in taking their release is sufficient to show by implication that they do accept the pardon. However, I suggest that when the order is printed the action suggested be taken by sending a copy of the printed order to each of the soldiers.

H. M. MORROW,
Lieutenant Colonel, Judge Advocate, Executive Officer.

(Notation in ink:) Approved. Take action accordingly.

E. H. C.

MAY 15.

EXHIBIT 132.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, March 27, 1919.

Maj. B. D. Spaulding; appointed from enlisted man; graduate of Maryland Agricultural School; civil engineer.

Maj. A. P. Withers; appointed from enlisted man; high school education; shipping clerk, salesman, farmer.

Maj. P. L. Ransom, graduate of University of Vermont, B. S.

Maj. Phillip Remington, former quartermaster sergeant; high school education.

Lieut. Col. J. P. Bubb, United States Military Academy, 1905.

Capt. A. F. Kingman, graduate of Harvard University; also Massachusetts Technology, electrical engineer.

Lieut. William J. Black; no professional, legal, or business training.

WM. GORDON.

WAR DEPARTMENT,
OFFICE OF THE INSPECTOR GENERAL,
Washington, March 26, 1919.

Lieut. Paul C. Green, attorney at law, graduate of law school.

Lieut. H. W. Clarke, killed in action May 28, 1918, newspaper reporter; no college.

Lieut. R. R. Cooper, chemist, high school education.

Lieut. Robert P. Clark, graduate of University of Maine; no law.

WM. GORDON.

EXHIBIT 133.

MARCH 30, 1918.

From: The Adjutant General of the Army.

To: Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, Washington, D. C.

Subject: Travel orders.

The Secretary of War directs as necessary in the military service that, accompanied by Mr. Earle L. Brown, civilian clerk, you will proceed not later

than April 1, 1918, to Ottawa, Canada, for the purpose of observing the Canadian forces, under confidential instructions of the Secretary of War, and upon completion of this duty you and Mr. Brown will return to your proper station.

Mr. Brown will be paid $4 per day in lieu of actual expenses and the Quartermaster Department will furnish him the necessary transportation.

A. G. LOTT,
Adjutant General.

EXHIBIT 134.

[Personal.]

MARCH 20, 1918.

Gen. CROWDER: 1. I am now ready to start at any time on the proposed journey for the study of the Allies' war laws and administration. I think my departure should be hastened.

2. More time will be required than I first reckoned. A rough estimate is one week at Ottawa, three or four weeks at London, three or four weeks at Paris, two weeks in conference with our own authorities, military and civil. About 20 days will be consumed in ocean travel going and returning. I could leave for Ottawa almost immediately.

3. I have from time to time had conference with members of the various foreign missions here, whereby I am satisfied I better know what is needed, and how to get it. Maj. Innes, of the British Embassy, has been the soul of courtesy, very interested, and very helpful. With great kindness he has offered to place his chambers at the Inns at my disposal.

4. My information is that the volume and the character of the work, together with the difficulty of getting the services of a stenographer abroad, will absolutely necessitate my taking along a stenographer from this office. The volume of dictation, copying, and note taking will make the continuous services of a stenographer indispensable.

5. I am sure I do not exaggerate the benefits that will result from such a tour. There have been missions for everything else, but nothing has been done to acquaint us, especially, with the war laws and administration of the Allies. Indeed, it would be difficult to exaggerate the benefits. I am quite sure that the results of such a tour and study will be helpful to the Government, to the department, and to you, and that it will be especially beneficial and I hope creditable to you, to me, and to this office. I feel that this office, thus prepared, will thereby be enabled to exert greater influence in the department and outside of it.

ANSELL.

[Confidential.]

APRIL 17, 1918.

From: The Adjutant General of the Army.
To: Brig. Gen. Samuel T. Ansell, Acting Judge Advocate General, Washington, D. C.
Subject: Travel order.

The Secretary of War directs as necessary in the military service that you proceed not later than the 20th instant to the port of embarkation, Hoboken, N. J., and thence to France and such other countries in Europe as may be found necessary for the purpose of observing the principles and practice of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. Upon completion of this duty you will return to your proper station. Report of your observations will be made in writing to the Judge Advocate General of the Army.

A. G. LOTT, *Adjutant General.*

EXHIBIT 135.

PERSONAL REPORT OF GEN. S. T. ANSELL'S TRIP ABROAD.

(Original and carbon copy of report are now in the files of the Judge Advocate General's office. C. H. P.)

AT SEA, U. S. S. "PLATTSBURG,"
July 8, 1918.

From: Brig. Gen. S. T. Ansell, Judge Advocate General, United States Army.
To: The Judge Advocate General of the Army.
Subject: Report of a study of war law and administration of the allied nations made during a recent tour of investigation.

* * * * * * *

CONCLUSION.

The scope of this report complies with, and is limited to, the terms of the order. I am prepared, if it be your pleasure, to report to you orally on the administration of our own department in France, together with my views upon the military situation.

S. T. ANSELL.

EXHIBIT 136.

MARCH 8, 1919.

MY DEAR MR. SECRETARY: I was very glad to receive your letter of March 1, calling upon me for a brief statement of the facts concerning the organization for and the practice of the administration of military justice during the war. I agree heartily with you that there has been no opportunity for our people to hear through the press more than reports of fragmentary and inflamed criticisms based on sensationalized allegations and that they are entitled to a statement of the case as it is recorded in and viewed by the department.

The circumstances that have most amazed me in my following of the press reports are that the public interest has been carried and sustained by a supposed controversy between myself and an officer of my department, Gen. Ansell, and yet that the exceedingly small margin of actual controversy is entirely lost to sight in a murk of supposed instances of harsh or unjust treatment of soldiers which bears little or no relation to Gen. Ansell's lack of concurrence with the views of the War Department. I think therefore that a clear statement of the organic basis of that difference of opinion will go far to clear the atmosphere and leave us in a position to discuss separately the allegations of harshness or injustice.

Gen. Ansell contends that there is a fault in the organic structure of the court-martial system, in the fact that after a man has been tried by court-martial, and the record of trial has been reviewed by the authority that appointed the court (usually a military officer of high rank) and by him finally approved and carried into execution, there is no further appellate body or officer who can review the appointing officer's review and modify, affirm, or reverse his action.

With this I agree and there is no controversy about it. I submitted and you approved in January, 1918, a draft of legislation vesting such a further appellate or reviewing power in the President. The draft was introduced and died in the Senate Military Committee, which no doubt considered it of less actual importance than other pressing business of the war. If this were the only alleged difference of opinion within the department, therefore it vanishes with this simple statement and it is difficult to perceive a cause for unusual interest.

The storm centers, however, about three briefs—two from Gen. Ansell and one from myself to you. Strange to say, those briefs were not addressed previously to the desirability of such a power of review. That is conceded. They were addressed solely to the question of whether that power had not actually been granted by section 1199, R. A., a law that had been on the statute books for 55 years with but a single attempt to deduce from it the grant of so broad a power in any officer of the Government. That single attempt was made in a desperate effort to obtain the release of a convicted soldier by habeas corpus. The precise question on which Gen. Ansell and I do not agree was carried into a circuit court of the United States and there decided once for all in a manner binding on all administrative officers sworn to execute the law as they find it. I shall not prolong this statement by discussion of that question. That any administrative officer would be justified in finding in the unequivocal language of a statute so old, against the reasoned judgment of a Federal court and the administrative practice of 55 years, a hidden meaning revolutionizing the entire system of military justice is simply preposterous. Gen. Ansell's argument was an eager, earnest plea for a forbidden short cut based on expediency rather

than on reason. With the desirability of such an appellate power in the President you agreed and forthwith requested it of Congress, which alone could grant it. Countenance of a plan to play ducks and drakes with a statute of the United States you refused. The briefs are in the Congressional Record or in the reports of committee hearings and they may confidently be left to the reading of any fair-minded man—lawyer or layman. That thread of the story is at an end.

But if the controversy is not over the advisability of such an appellate power and not in a substantial sense in the famous briefs, where is it? It lies in this: First, that Gen. Ansell believes that the power when granted, should be vested in the Judge Advocate General and that a complete judicial system with faithful analogies to the organization and procedure of civil courts should be substituted for the present simple and direct system of Army discipline, while the department believes that the power should be vested in the President; that with such a grant of power the faults of the existing system will be completely removed with the exercise of those powers and with the improvements that have been instituted in the last two years.

These are the real issues and the only ones.

The case is one of technical ramifications and I am sorry that limitations of space will not carry to the American people the wealth of fact and argument to be found in the files of the department. Each of the points of controversy must be discussed briefly and without available technicality.

What is proposed is to carry the principles of the civil code and civil court principles of procedure into our military system. Appeal is made to the Anglo-Saxon conviction of the net desirability for the guarded procedure, the technicalities of indictment and pleading and the stays, delays, and rights of appeal, which characterize our criminal courts. The real effect of such a charge has not been examined but it is, in fact, a divorcement of the power to control discipline from the power to command armies. Indeed an analogy has been suggested between an army and a government and it is urged that our governmental distinction and separation between the executive and judicial system must be carried into the Army and that no commanding officer should be permitted to appeal to the disciplinary measure of trial by court-martial without the concurrence of his law officer or judge advocate, who should be, and usually is, a man learned in the technicalities of civil practice. Thus if a division commander intrusted with a major part in the Argonne offensive had contumaciously declined to carry out his part of the general plan, he could not be brought to trial by Gen. Pershing unless the judge advocate of the American Epeditionary Forces concurred.

Our civil code is good. It protects our most sacred liberties, but gentlemen who contend that it should be substituted for our military code—which is also good—forget that the purposes of the two systems are diametrically opposed. The civil code is designed to encourage, permit, and protect the very widest limit of individual action consistent with the minimum necessities of organized government. The military code, and especially our military code, is designed to operate on men hurriedly drawn from the liberal operation of the civil code, and to concentrate their strength, their thought, their individual action on one common purpose, the purpose of victory.

The common purpose is the plan of action. The plan of action can not be, as we have heard it is in the Bolsheviki army, the debated sense of the Army. The plan of action is and must be the plan of the commander. Therefore individual liberty of action inconsistent with that common purpose must be restricted. The military code is designed to accomplish that purpose.

The truth is (and our people have lately seen it demonstrated in a thousand ways) that peace and war both demand sacrifices of individual liberty to a common purpose, but such sacrifices in war are infinitely greater in number and degree than they are in peace. The soldier from the day he dons his uniform must be prepared to sacrifice much of his old freedom of action, and indeed he swears to do so in his oath to obey the orders of his commander.

What is the essence of all this? It is, that for the purposes of peace we demand an intricate legal system, even at the cost of technicalities, delays and abstruse rules of law—we demand the admirable system of checks and balances, that is illustrated by the divorce of our executive from our judicial system. We intrust ourselves to these devices rather than to the fairness and justice in the hearts of men. The very nature of war is such that men forget the sordid views that made those checks and balances necessary. They give the Nation, willingly and eagerly, their fortunes and their lives, and in such a

time of patriotic exaltation, we willingly give over, and the peril is such that we must give over, this adherence to artificial safeguard of complex rules and trust our individual rights more and more to the principles of humanity, honor, and justice in the breasts of our fellow citizens who are offering their lives and fortunes, as we are offering ours, to the perpetuation of our institutions and for the common good. On this theory the soldier is remitted to the simple and direct procedure for the enforcement of discipline in the Army. His court has its inception in the old courts of chivalry and honor, and the essential principle remains. His conduct is taken before his comrades who determine whether it is the conduct of a soldier or no.

In this lies the difference between the systems for civil and military justice. The War Department naturally adheres to the latter system. It repels the thought of an army in the field with two commanders—one in charge of its discipline and one in charge of its strategical and tactical maneuver. The picture is, to the student of war or to the man with the slightest familiarity with things military, nothing less than ridiculous.

I should be willing to rest with this statement were it not that it has been said that without such a radical change as is proposed we have witnessed atrocities of injustice and that they are traceable to faults in the existing system of military justice. I have said that there is one such fault. That fault is imposed by a statute of the United States. I presented it to Congress for correction and it was not corrected. The fault lies not in the fault of a civil judicial system, but in the lack of a power to reverse, modify, or affirm the action of a military commander on the findings and sentence of a court-martial. I think we have disposed of the contention that the power should lie in the Judge Advocate General. It should lie in the President.

But what actual harm has resulted from this fault? I have covered the facts in my letter to you of February 13. I can not repeat them here. It is only the executed portion of a sentence that the present power of the President does not reach. In order that such power as he now has may reach every case of injustice, excessive sentence, and illegality appearing in a trial by general court-martial a mechanism has been created in the office of the Judge Advocate General that gives, I venture to say, a scrutiny more far-reaching and exacting than is possible under any civil system under the sun. I shall not repeat its description or its record as shown in my letter to you of February 13, but I shall content myself with an assertion that I stand upon its record and that its record is complete and open to the public.

That mechanism added to the power of final review in the President asked for over a year ago will make the system such that I am willing to stand or fall by it.

So much for the controversy that has been magnified in the press and on the floor of Congress—this statement would not be complete, however, without reference to the allegations that have shocked the Nation and in respect of which the Nation is entitled most of all to assurance. It is asserted and attempted to be established by example that the sentences of courts-martial during the war have been atrociously severe.

Let me say first of all that the criticism that they are severe is not a criticism of the system of military justice, it is not a criticism of my administration of that system. It is a criticism of the officers who imposed, for instance, sentences of death for sentinels convicted of sleeping on post, for soldiers wilfully and contumaciously refusing to obey the direct orders of their commanding officers, and for desertion in time of war, and it is a criticism of the Congress which authorized a death penalty, in plain statutory terms to be assessed on convictions for these offenses. I do not mean to say that if criticism in the connection is due I am immune. I am not. I agree with the statute, and shall defend it, but I am not responsible for it.

Considering the charges from the standpoint of the officers who assessed the sentences, let us see who they are. Are they military zealots—men ground in an iron and heartless system until the liberal views of civil practice are ironed out of their souls? They are not. They are men taken in a general dragnet through the Nation so lately that the civilian clothes they left behind them are not yet out of style. They come from every walk of life. There are 200,000 of them. They comprise a faithful cross section of our whole people and our national life.

What is this charge of severity by them? We have seen that it can not be an indictment of the system. It is simply a difference between the opinions of well-meaning and human critics far removed from the scene of the offenses

punished and with only a partisan, inadequate and highly colored statement of that case to guide them, and the opinions of men who considered the facts under the solemn obligation of an oath to be honest, impartial, and fair, who lived in the environment of the offense and were steeped in the reasons making it grave, and who assessed the sentence in the performance of the highest civic duty of man—the defense of home and country.

These men can not merit the indictment and diatribe that has been heaped upon their action. As Burke has said, you can indict a few individuals but you can not indict a nation. These men are a portion of the Nation—the portion that has been dedicated to death if need be to save the Nation from destruction. Their expression and not that of men 3,000 miles from the field of action is certainly the voice of the Nation on the punishments that should be meted out to men who imperil its honor and its safety.

Why should the offenses by a soldier of sleeping on a post of the guard, desertion, disobedience of orders be punishable by death? Because cities and fortifications and armies have been lost through the drowsiness of sentinels; because armies have been disintegrated and nations humbled by desertion; because battles have been lost and peoples sold into captivity by the disobedience of soldiers.

I can not enter this discussion further. To us at home, in comfort and in present peace, it is next to impossible to reconcile the almost unanimous view of soldiers in the theater of war on the gravity of these and many other lesser offenses by their comrades. Therefore the execution of not one sentence of death for these things has been approved by me and not one such sentence has been executed. Also, as I showed you in my letter of February 13, heavy sentences have been reduced comprehensively and uniformly. But even with that said I can neither condemn the 100,000 officers who assessed sentences, nor the law of Congress, nor the system under that law that made them possible.

There, Mr. Secretary, are the main issues of principles. I shall discuss at this place neither individual cases nor minor principles that have been put in issue. They all come back to the essential bases that are here stated. I am willing at the proper time to take up either subject or any variation under either. I can defend them all to the satisfaction of any fair-minded citizen.

Hostile critics will undoubtedly assert that the observations I have submitted commit me to a support of excessive sentences, which of course is not true. I only speak the probable viewpoint of the officers who have assessed these sentences. But it may be said with entire accuracy that on the day the armistice was signed, November 11, 1918, no person was serving the sentence of a general court-martial who had on that date entered upon the execution of the excessive portion of his sentence. As you are aware, shortly after my resumption of full charge of the office of the Judge Advocate General, I recommended the convening of a board of clemency to undertake with the greatest expedition the adjustment of war-time punishments to peace-time standards and that an admonition was issued, upon my recommendation, to courts-martial and reviewing authorities, both at home and abroad, to conform, unless special reasons influenced them to a contrary course, to the limits of punishment observed in time of peace.

I come now, with the utmost reluctance to a few distasteful paragraphs of personal vindication. My motives and my actions have been attacked, even my veracity has been insinuated against, and I have been advertised as having hampered the efforts of Gen. Ansell. I have been set off against him as reactionary.

It has been said that the present military code is archaic. I merely say that I began what proved a tedious and heart-breaking task of years to obtain a complete revision of the old military code early in my service, personally conducted that task beginning with my appointment as Judge Advocate General and at the end of four annual disappointments obtained its complete revision in 1916.

During much of the time Gen. Ansell was one of the most promising and trusted officers in my office. During all the time that the code was in revision he never suggested to me nor, so far as I can learn, to anyone else any of the changes he is suggesting now. He participated in preparing the manual for courts-martial which was based upon the new code, but he advanced none of these new views.

Indeed, the first time that I was advised of such a view was in November, 1917, on the occasion of his presenting to you—not through me and entirely without consulting me—the first of the elaborate briefs about which so much has been made. It has been charged that, as a result of that brief an order

designating him as Acting Judge Advocate General was revoked, and further that he was relieved from his duties of supervising the administration of military justice. Nothing could be further from the truth. He was never relieved from his duties supervising the administration of military justice except to take a trip to France, which he was eager to do, and this was considerably after the submission of the brief and after the revocation of the order appointing him Acting Judge Advocate General and relieving me of my functions. That order was killed before I knew anything about the brief. It had never been published. It had been obtained by him from the Chief of Staff without consulting you and without your knowledge, and it was revoked by you because it was contrary to your wishes.

Gen. Ansell asked me in a formal written memorandum to help him secure an order appointing him Acting Judge Advocate General in charge of my functions. I did not wish to be relieved, but did not wish to embarrass you. I therefore replied in writing that he could take the matter up directly with the Secretary of War in his own way. He did not take the matter up with the Secretary of War at all. He took it up with the Acting Chief of Staff with the remark that I concurred. Upon this showing the Chief of Staff marked the draft of an order that Gen. Ansell had prepared for suspended publication. By accident I learned of this order. This was before I had an intimation from any source of the preparation of the first brief, or any intimation that Gen. Ansell had reached a conclusion as to the desirability of an appellate power in the Judge Advocate General. I called your attention to the circumstance, and you directed that the order be not published.

While it is true that Gen. Ansell's attempt to secure an order giving him my functions as Judge Advocate General was concurrent with his preparation of a brief urging a revolution in the military system, and his circulation of a document of such grave consequence among every officer in my office without giving me the slightest information of his efforts, it is not true that I knew of the brief until after you directed the rescinding of the unpublished order appointing him Acting Judge Advocate General.

It is also true that from that time forth the feeling of trust and confidence that I had in Gen. Ansell was shaken and that you asked me to spend more of my time in the Judge Advocate General's office and less at the office of the Provost Marshal General, both of which offices were under my supervision and were my responsibility. It is not true, however, that I relieved Gen. Ansell of his duties in supervision of the administration of military justice, nor is it true that he was hampered in any reforms or improvements possible under the law as Congress gave it. Except that he was disappointed in his effort to secure a revisory power in the Judge Advocate General by finding, against the decision of a Federal court and the administrative practice of 55 years, such a power in the existing statute, nothing was done to decrease his responsibility for the administration of military justice or to hamper his freedom of action. That he did not feel himself so hampered is shown by his submission, without my knowledge, of General Order 84, 1919, enlarging the revisory powers of the Acting Judge Advocate General in France, so as to give him, by delegation, the very power which you had declined to deduce from 1199 Revised Statutes.

It is further true that the brief itself did not tend to increase my confidence in Gen. Ansell. A decision was referred to a statute, quoted only in part, which, when read in full, rendered the decision of no value to the proposal it was invoked to support. Dicta, in a compendium of judicial definition, concerning the word "review" were cited from a page upon which were found more pertinent definitions absolutely refuting his view, and no reference made to the more pertinent definition. It was urged from the vantage point of the seat of the Civil War records that the power which it was contended had been granted by the statute had been used during the Civil War and for a considerable period thereafter, when the most cursory review of the records was convincing that such was not the case. It was stated that the question had not been addressed by the Federal courts, when the most frequently consulted volume in the office disclosed that such was not the case and referred directly to the instance in which the question had been addressed and the contention overruled, and further the case was found pasted in our office file of the Federal Reporter. Finally, it was urged unequivocally that such a power resides in the British judge advocate general, when exactly the reverse is true, the actual point having been authoritatively decided in a point opinion of the attorney and solicitor general of Great Britain in 1873.

When it was remembered that this was in no sense a controversial brief, but a memorandum addressed to you by an officer who stood in the rôle of your legal advisor, and that it was intended to commit you to a course as revolutionary as any ever taken by an administrative officer, I think I may be justified in the feeling of caution that replaced my former implicit trust.

I think I can fairly say, however, that this feeling of caution did not disturb my relations with Gen. Ansell and was in no way permitted then, or at any time thereafter, to interfere with the full use of his conceded talents in the task to which he had been assigned.

Except for his absence of about 90 days in France (April–July) as senior officer in my office, he has had abundant opportunity—indeed, it was his duty—to introduce improvements in procedure and to remedy the harshness of individual cases; but, notwithstanding his present protestations, the fact is that he made but sparing use of these opportunities, having personally signed, for example, the documents refusing to recommend clemency in three of the cases recently cited on the floor of Congress as examples of excessively severe sentences.

Attacks on the existing system and the furor that has been designed to shake the confidence of the American people in the system of military justice find their genesis in an article published by the correspondent, Mr. Rowland Thomas, January 19, 1919, and in press reports of a speech made by Gen. Ansell in Chicago, January 26, 1919, near the date of my resumption of the duties of the office of Judge Advocate General. From that time forward the fire of criticism was fed by an agitation contained in newspaper articles too consistently connected and too instinctively based on distorted accounts of matter on record in the Judge Advocate General's Office to allay the thought that a bitterly partisan propaganda rooted in this office was being conducted by some one therein. I do not say, I do not wish to be taken as intimating, that it was Gen. Ansell, but I do say with the utmost confidence that I am correct, that the propaganda was being fed into the hands of the press by those seeking not a reformation of the code but the accomplishment of ulterior motives.

If it were difficult for an officer of my department to obtain a hearing with me or with the Secretary of War; if there was a single reason why any situation requiring legislation should not be presented to Congress with my approval if I concurred, frankly without it if I did not concur; if any attempt had ever been made by me to make my records difficult of access to any properly accredited person entitled to inspect them, then I could understand a recourse to the bitter and unusual course that has been followed in this instance. None of these hampering contingencies exists, and therefore I can not understand the course. When there might have been a fair hearing of an honest difference of opinion in any form yet addressed, there has been an attempt by furtive and demagogic methods to inflame a public opinion against the truth. No such attempt ever succeeded and I have no fear that it will succeed in this instance.

E. H. CROWDER.

EXHIBIT 137.

JANUARY 3, 1919.

Memorandum for the Chief Military Justice Division.

1. I have heretofore advised you frequently and informally, and I take this occasion to advise you more formally, of certain views of mine which I believe to be worthy of consideration and perhaps observation by those who have to do with the administration of military justice; indeed, in my judgment, must be observed generally in the establishment, if that administration is to be what justice requires it to be and what thoughtful public opinion would like it to be. I advise you thus that my views may not be misunderstood and that they may furnish you with a general guide in the review of proceedings and constitute your authority for action in which you and others may not personally concur.

2. Courts-martial are courts, tribunals for the doing of justice, as much so as any tribunals in the land, and they must be fairly and impartially constituted and they must fairly and impartially function. Judicial fairness in the case of courts-martial should be tested not only by the letter of the Articles of War but by those principles established in our jurisprudence which are designed to secure fair and impartial trial and which are applicable to all hearings of a judicial character.

3. The former military view, which had received in this country considerable judicial support, was that courts-martial performed only executive functions, and passed in an administrative way upon the military aspect of the misconduct of one subject to military law. The legal view, now judicially established, is quite the opposite, and is that courts-martial have full and complete jurisdiction over the conduct of all who are subject to military jurisdiction, with full power to try them not only for military offenses but for crimes against the general public law. This should bring to us in the Army, and most especially to those of us more directly interested in military justice, new appreciations. Murder, for instance, tried before a court-martial, is none the less than murder tried before a civil court and jury, with none the less serious consequences for society and the accused, and should be tried with none the less thoroughness and fairness. Thoroughness and fairness of courts-martial should be determined with less inclination to regard courts-martial as tribunals sui generis, and with greater regard for those fundamental safeguards with which the law beneficently surrounds every person placed in jeopardy. Articles of war having to do with rights of the accused therefore should be construed, both with respect to what they provide and what they fail to provide, more and more in the light of, and in comparison with, those constitutional principles which touch the rights of an accused in a criminal prosecution. Those principles should apply to courts-martial, except where clearly inapplicable to the military system.

4. I wish to speak now more specifically and give the general views above enunciated concrete application:

(*a*) My views are in conflict with the view advanced at times in argument by members of the board of review, to the effect that in determining the principles of fairness and impartiality to be applied to test courts-martial those principles should be sought in the analogy of a Roman chancellor or judge. Courts-martial are criminal courts administering criminal law; they consist of from 5 to 13 members, and thus the very law of their constitution denies the analogy of the single trier of law and fact found in Roman jurisprudence, and clearly establishes on the other hand their analogy to the common-law court and jury for the trial of criminal offenses; it is in that analogy, therefore, that we must seek the principles by which the fairness and impartiality of courts-martial must be tested. Applying these principles to a case now in hand, they serve, in my judgment, to prohibit the successive trial by the same court of several accused charged with the same or similar offenses, involving the same transaction, state of facts, and evidence.

(*b*) I further disagree with the view that article 37, as it exists in the military code, was designed to have, or does have, the curative effect which the board of review seems to me at times to attribute to it. That article does not permit us to register a legal conclusion that there was subsantial error committed, and then to overcome it with the personal conclusion of the guilt of the accused gathered out of the entire case. No revisory power and no appellate court should ever reverse or disapprove, except for prejudicial error. The substance of the article appears nowadays frequently in civil codes, in which position it was clearly predicated upon the evil found in the disposition of some appellee tribunals to reverse for meticulous and fanciful errors, and was, therefore, designed to correct a bad judicial habit appearing in some places. It can not be truthfully said that the Army was ever given to meticulous disapproval, or that there has ever been a tendency in the establishment to indulge too freely the power of disapproval. The contrary was quite true, in my judgment, and in this view I must think general public judgment concurs. This article, as it appears in the military code, is rather more of a grant or power than a limitation.

(*c*) In my judgment punishments awarded by courts-martial during this war are properly criticisable in general for their undue and inexplicable severity. Frequently they are such as to shock the conscience. Such punishments violate justice and serve no proper end. They invite and merit public reproach. We frequently have to confess that nobody expects such punishments to be served. Such a confession, while true, is an admission of the injustice of the punishments and is bound to bring courts-martial into disrepute.

I wish you would help me in determining the course which this office ought to take in making an effort to see that these unjust and severe penalties may be brought within the bounds of reason and justice.

5. The review of proceedings should be expeditious. The result should be made to turn upon substantial error, so tangible that we may have no great

difficulty in discovering the principles touching it. To such, and not to inconsequential, error should our consideration be invited, and upon such should the case turn. With such error, however, justice will not permit us to compromise either by a resort to any assumed curative capacity of the Thirty-seventh article of war, or any other consideration.

6. My sense of applied law and justice, however, with which others of course may differ, requires me to enunciate these views clearly and unmistakably, and ask you to be governed by them until they may be superseded.

S. T. ANSELL,
Acting Judge Advocate General.

EXHIBIT 138.

JANUARY 11, 1919.

Memorandum for the Secretary of War.

1. I have just finished reviewing the general court-martial cases from Camp Dix, under General Order 7, which have been presented to me to-day by the Chief of the Military Justice Division of this office. Those cases relate, of course, to that command alone, but I fear and have reason to believe that they evidence a situation that is much more general. This condition is directly due to a failure upon the part of the court-martial—a failure which in this case appears to be absolute—to appreciate the high character of their judicial functions and a similar failure upon the part of the convening and reviewing authority. Under the limitations of law, regulations, and orders, as construed in the War Department, this office was limited to advising the reviewing authority as to whether the record of trial was "legally sufficient to sustain the findings and sentence of the court," and was not otherwise concerned with the quantum of punishment; this upon the view, of course, that the jurisdiction of the convening authority is final and beyond review. Nevertheless, impelled by the irresistible evidence found in the great number of unjust sentences passing through this office, I have presumed, with a hesitation which the delicacy of the situation demands, to invite the attention of convening authorities to the great severity of the punishment in those cases in which the punishment has appeared to be so disproportionate to the offense as to shock the conscience. In the light of what is transpiring at Dix, and doubtless elsewhere, I do not regard that such an administrative course, taken in specific instances, is sufficient to achieve and establish military justice.

2. The cases to which I now invite your attention have all come to me to-day as a part of the day's work. The officers who have handled them in this office and I are of one mind as to what they reveal and as to the necessity for the application of curative measures. I will give you a brief summary of them:

(*a*) In the case of Pvt. Sanford B. Every, Forty-ninth Company, Thirteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted simply of having a pass in his possession unlawfully. He was sentenced to be dishonorably discharged, with total forfeitures, and to be confined at hard labor for 10 years. The reviewing authority reduced the confinement to three. We consider this a trivial offense, and this office will doubtless go so far as to suggest to the convening authority that, inasmuch as this soldier has already been in confinement about two months, the entire sentence should be remitted.

(*b*) In the case of Pvt. Clayton H. Cooley, Thirteenth Company, Fourth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of absence without leave from July 29 to August 26, 1918, and from September 1 to September 8, 1918; failing to report for duty; escaping from confinement September 1, 1918. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor for 40 years. The reviewing authority reduced the confinement to 10 years. The man has evidently been in confinement since last July. Even as so reduced the sentence is altogether too severe, and this office, in returning the record to the convening authority, will so comment upon it.

(*c*) In the case of Pvt. Charles Cino, Seventy-first Company, One hundred and fifty-third Depot Brigade, the accused was tried for disobeying an order "to take his rifle and go out to drill," on November 1, 1918, and on escaping from confinement on November 4. He was sentenced to be dishonorably discharged the service and confined at hard labor for 30 years, which period of confinement the reviewing authority reduced to 20. In this case the accused claimed that he was sick, and doubtless he was suffering somewhat from venereal trouble. It

may be that he was a maligner. In our judgment the sentence, even as reduced, was entirely too severe, and this office will so comment upon it to the convening authority.

(*d*) In the case of Pvt. Calvin N. Harper, Company A, Four hundred and thirteenth Reserve Labor Battalion, the accused was charged with desertion and convicted of absence without leave from the 12th day of August to the 13th day of November, 1918. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for 20 years, which period of confinement the reviewing authority reduced to 10. The period of confinement, even as reduced, is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company Thirty-six, Ninth Training Battalion, One hundred and Fifty-third Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife and a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, Fifty-eighth Company, Fifteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of disobeying the order of his lieutenant to "give me those cigarettes," behaving in an insubordinate manner to one of his sergeants by telling him to "Go to hell," and behaving himself with disrespect toward his lieutenant by saying to him that he, the accused, did not "give a God damn for anybody." Of course, there can be no question but that such conduct can not be tolerated, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was a company rumpus, which, in my judgment, might have been otherwise dealt with or, under the circumstances of its commission, merited no very long term of confinement. There was no evidence of previous misconduct. The court sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, Forty-ninth Company, Fourteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, Base Hospital, tried at Camp Grant for insubordinate conduct, which at worst could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages in his review to show that such punishment was well merited.

3. If these were isolated examples they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

4. If the courts are blameworthy the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to

apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this found in a camp order which provides as follows:

"Absence without leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court."

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction, *the court must realize* (italics my own) that it has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this—and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543) and Grafton *v.* United States (206 U. S., 333). There are numerous other decisions to this effect. The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.

This order contains, in effect, and was intended to convey, the following directions:

(*a*) All absences without leave will be tried by court-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay. (The limit of punishing power of a special court.)

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed—at least I believe I have observed—during this war.

EXHIBIT 139.

JANUARY 13, 1919.

MY DEAR GEN. CROWDER: I inclose herewith memorandum submitted to me by Gen. Ansell. It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose: First, very unequal degrees of punishment; and, second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

I am not able to gather from Gen. Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order it would seem that it ought to be immediately prepared and issued, so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

Maj. Gen. ENOCH H. CROWDER,
Judge Advocate General.

EXHIBIT 140.

HEADQUARTERS SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex., January 24, 1919.

Bulletin No. 2.

The following telegram from the War Department is published for the information and guidance of all concerned:

WASHINGTON, D. C.,
January 22, 1919.

COMMANDING GENERAL SOUTHERN DEPARTMENT,
Fort Sam Houston, Tex.:

In view of the cessation of hostilities and the reestablishment of conditions approximately those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of court as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges, and reviewing authority approves, punishment in excess of the limits desired in said Executive order, the reasons for so doing will be made a matter of record. Trial by general court within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the One hundred and fourth Article of War, would be under all the circumstances of the case clearly inadequate.

By command of Maj. Gen. Cabell:

W. T. JOHNSTON,
Colonel, General Staff, Chief of Staff.

Official:
A. S. MORGAN,
Colonel, Adjutant General, Department Adjutant.

EXHIBIT 141.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 28, 1919.

(*Office order.*)

Under date of January 13, 1919, the Secretary of War, in returning a memorandum submitted to him by Acting Judge Advocate General of the Army, remarked as follows:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose, first, very unequal degrees of punishment; and, second, perhaps generally, a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased."

In response to this memorandum, the undersigned proposed, as a means of preventing any further accumulation of cases in which a clemency would be necessary to prevent harshness and severity which are unnecessary from the point of view of present disciplinary requirements, the issue of the following order:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

This order was approved and has been promulgated. To meet the past situation the undersigned proposed that the Judge Advocate General's Office should classify sentences imposed, and proceed, under approved rules, to equalize punishment through recommendation to clemency, which was approved by the Secretary of War.

In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment but to adjust that punishment to present disciplinary requirements, a board, to consist of (1) Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department; (2) Col. John H. Wigmore, judge advocate; (3) Maj. Stevens Heckscher, judge advocate, is appointed to undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him. The board will meet at the earliest practicable date and submit for approval a plan of procedure looking to a speedy prosecution and completion of the duty imposed.

E. H. CROWDER,
Judge Advocate General.

PLAN FOR CARRYING OUT WORK BY CLEMENCY BOARD APPOINTED UNDER OFFICE ORDER OF JANUARY 28, 1919.

1. In all cases of general prisoners the records of general courts-martial for offenses committed since the beginning of the war, excepting the cases to be reported upon in accordance with this plan by the commandants of the Disciplinary Barracks and its branches, will be examined in the first instance by a force of clerks and examining officers in the office of the Judge Advocate General, and form hereto attached will be filled out in triplicate for each case by the clerk in charge, except items 27 and 41; item 27 will be filled in by the officer examining the record, and item 41 by the board.

2. The several commandants of the United States Disciplinary Barracks and its branches at Fort Leavenworth, Alcatraz, and Fort Jay, will make a report at the earliest practicable moment to the Judge Advocate General of the Army in the case of every prisoner confined under his charge for the conviction of an offense committed since the beginning of the war, which report will be upon said form hereto attached, which will be filled out, in triplicate, in each case except as to items 27 and 41; item 27 will be filled in by the examining officer in the office of the Judge Advocate General, and item 41 by the board.

3. When the form in any case shall have been completed in the office of the Judge Advocate General, except for item 41, it, in triplicate, together with the court-marial record in the case, will be immediately transmitted to the clerk assigned to service with the board and by him placed before the board. The clemency board will thereupon make its study of the case, enter its recommendation on the form under item 41, and place the form before the Judge Advocate General for signature or other action and for transmission to the Secretary of War. In case the board is not unanimous any disagreeing member may file a briefly expressed nonconcurring recommendation.

4. As soon as the clemency board has been provided with the necessary assistance it shall proceed to give consideration to the cases of the prisoners confined in the penitentiaries and also to the cases transmitted to the office by the commandants of the Disciplinary Barracks and its branches as nearly as possible in the order in which they are received. It is understood that said commandants will give precedence of consideration to cases as the cases may in their judgment merit it. It is believed, however, and so recommended, that said commandants should consider and transmit to this office cases in the following order of precedence: (*a*) Those in which, because of the present information of the commandant, he believes the prisoners should be immediately released; (*b*) cases of desertion in which the prisoners surrendered; (*c*) cases in which the offenses were committed within the first four months of the prisoners' first service in the Army of the United States.

5. It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examination of the cases of those serving sentences of confinement within the United States, since it is thought that the obtaining of the necessary information and the relationship of the offense to the theater of war are considerations which would concur in such postponement.

6. The personnel to assist the clemency board in this work must consist at the outset of not less than 7 officers and 10 clerks. It is not at all certain that this number of officers and clerks will be found to be sufficient. The importance of this task is such, and so much depends upon its expeditious performance,

that an inadequate commissioned clerical personnel is bound to embarrass if not render abortive the entire undertaking.

S. T. ANSELL,
JOHN WIGMORE,
S. HECKSCHER,
Members of the Clemency Board Appointed by the Judge Advocate General.

Approved.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 142.

WAR DEPARTMENT,
Washington, D. C., July 28, 1918.

From: Headquarters American Expeditionary Forces.
To: The Adjutant General, Washington.

Copies furnished as noted: Number 1521, July 27.
Paragraph 5. For the Chief of Staff.

* * * * * * *

Subparagraph B. It is highly desirable in the interests of justice and the speedy administration of the same that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend appropriate legislation to that end. (Pershing.)

* * * * * * *

PERSHING.

To the Judge Advocate General for recommendation.

EXHIBIT 143.

JUDGE ADVOCATE'S OFFICE,
France, 24 June, 1918.

DEAR GENERAL: I am going to write you a letter about several things, and utter a cry for help. Divisions, as you know, have been arriving in great numbers, and several corps are now being organized. I have asked that Hunt be assigned as judge advocate of the Second Corps, and have named Taylor for the Fourth. I expect soon to recommend Brown for the Third, and have in mind Gullion for the Fifth, if he is not taken for general staff or line work, which I very much fear. I expect to recommend Winship for judge advocate of the First Army. The policy appears to be to impose as little administrative work on corps headquarters as possible. Corps judge advocates will perform about the same kinds of duties as division judge advocates, except that I want the corps judge advocate to supervise the division judge advocates in his corps. He will be in close touch with their offices, and should be able to give them any assistance in the way of advice needed. To that end, I hope to utilize the regular judge advocates as corps judge advocates as far as possible.

I have visited many of the divisions, in order to find out as much as I can about the disciplinary conditions, and to get the division judge advocates to do everything in their power to promote speedy trial and to adopt such policies as experience shows to be best in the American Expeditionary Forces. We must do everything we can to try our cases immediately here. We are necessarily delayed at times by the difficulty of getting the witnesses from the front-line trenches, and there has been delay in some divisions due to the difficulty of obtaining officers to sit on courts-martial, though this will, I hope, be avoided in the course of time by the appointment as members of convalescents and others fit for light duty. One division turned in 91 general court-martial records within a few days after its arrival here. The cases were tried two or three months before in the United States, and there appears to have been delay even in the trial of many of the cases. I have not been able, as yet, to find out the reasons for this very tardy administration of justice. I send you a copy of General Order 56, of these headquarters, which I drew in consultation with Hull and Winship. It is resulting in a very material reduction in the number of general court-martial trials. All capital cases must, under the law, still be tried by general court-martial, though many of them may be punished adequately with six months'

hard labor or less. I may submit a recommendation before long that the special court be given jurisdiction in such cases, subject, of course, to its present limitations as to punishment.

I am endeavoring to have the policy adopted in each division of having the assistant division judge advocate prosecute practically all of the general court-martial cases. This is the only way we can have thorough trials and perfect records. We can not educate the line officers of this temporary force to observe all of the requirements of the law in the matter of trials, and I regard the presence of a skillful trial judge advocate, who shall be to the court what the law originally intended him to be, as necessary here. I think it will be practicable for the assistant division judge advocate to prosecute all, or nearly all, of the cases in his division.

There has been some difficulty in obtaining court reporters, especially in the Regular Army divisions, where stenographers are not so abundant as in the others. Of course, stenographers are in demand at the various regimental, brigade, and other headquarters, and objection is generally made by their commanders to their being taken for duty as a reporter. In a number of divisions, however, the cases are reported by one of the noncommissioned officers of the judge advocate's office, and this I hope to see done in all of the divisions before long. With both the trial judge advocate and the reporter in the division judge advocate's office, the whole matter is under one roof, and we should have few defects in our records. The three noncoms of a division office will be sufficient to dispose of the office work and report the general court trials.

The demands of the General Staff for every officer who has a knowledge of line or general-staff work are very insistent. As you know, I rescued McNeil, but have just lost Howze, and hardly hope to hold Gullion, and, of couurse, I may be compelled to give up a number of others.

Hull has an immense task as director of the renting, requisitions, and claims service, in addition to his duties as judge advocate of the S. O. S. I have done everything I could to supply him with the necessary personnel for the reason that the R. R. and C. Service is extremely important, must have the best of men, and must take charge of a vast amount of work at once.

Just at present my greatest need is for competent assistants in my own office. Due to the coming of so many troops, the work is piling up at a rapid rate, and I must have assistants who can relieve me from even seeing a great many of the papers that come into the office. At present, I have Boughton, McNeil, and Lieut. King, of the firm of King & King. King declines appointment in our corps for the reason that he is a machine-gun expert, is young and unmarried, and wants his chance, for a while at least, at the front. He must, therefore, be relieved before long, and I expect to send a cable requesting that you send me a good man from your Financial Division. McNeil is probably as capable an assistant as I can obtain from the regulars available here, though he has not had sufficient experience to relieve me of as much of the responsibility as I should like. I was away recently on a trip to London for more than a week, and shall probably have to go again early in July. More and more it becomes absolutely necessary to have a man to take charge of the office while I am gone, and to relieve me of a portion of the work when I am present. Numerous questions come in every day from the various sections of the General Staff, and other bureaus, and, of course, they must be disposed of here. We are too far from Washington to send questions up, especially in time of war when there must be prompt action. Mayes is the man, above all others, who would fit the requirements here, and I hope you may be able to send him very soon. The work in this office is of entirely different kind from that of the various tactical commands. It is more nearly like the work in your office, and it must be disposed of promptly. As the work grows, this office should be recruited from yours so far as the same may be done without serious detriment.

There have been a number of death sentences recently, requiring the confirmation of the President, but the cases were not of such a character as to justify, in Gen. Pershing's opinion and mine, the execution of the death sentence. In view of the time it would take to send the cases to Washington, we have sent the cases back to the courts for the imposition of a milder sentence. In one case, the court could not be reconvened, and, the evidence not being as conclusive as we thought it ought to be, the division commander, under our advice, disapproved the sentence. It would greatly facilitate the administration of justice, I think, if Gen. Pershing had the power to commute death sentences, not only in cases where he may confirm them, but in those cases requiring the President's confirmation. I have not suggested the matter to Gen. Pershing as

yet, but expect to do so soon, and, if he agrees, a cable requesting the necessary legislation will probably be sent. I am aware of the view that has prevailed, that, under the Constitution, the President only may commute a sentence, but I believe that, under the power to make rules for the government of our land forces, Congress may vest military commanders with the power to commute sentences imposed by military courts, and that an exercise of this power by Congress would, undoubtedly, be held to be constitutional. An Army commander in the field should also have power to commute sentences of dismissal of an officer. Gen. Pershing is withholding confirmation of dismissals now and then, where it would be well if he had the power to commute to a forfeiture.

Very sincerely,

BETHEL.

EXHIBIT 144.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, September 5, 1918.

Memorandum for The Adjutant General.

Subject: In cable No. 1521, paragraph 5, subparagraph "b," Gen. Pershing says:

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

1. The above dispatch is referred to this office for its recommendation. The proposition involves considerations deeper than those that may first appear. Commutation, unlike mitigation and remission—all of which are artful words—is a pardon granted on a condition subsequent that the offender undergo a punishment of a different nature. As such it involves the pardoning power of the President. It is established as a general proposition that the power of pardon belongs to the President alone, and that Congress is constitutionally incompetent to exercise it itself or to confer it upon another. Whether the power of pardon for military offenses, by reason of the expressed power of Congress to make rules and regulations for the government of the Army or any other power of Congress over the Army, is subject to a different rule and may be conferred by Congress upon subordinate military commanders, has never been before the courts or decided by any authority or, so far as I am aware, been the subject of serious discussion. I personally believe that Congress has such a power. But the theory of legislation and the practice of Government seems to be to the contrary. The question is, to say the least, full of doubt.

2. There is no evidence before this office, except that inferable from the request itself, that existing law imposes difficulty upon the maintenance of discipline. Under the Articles of War the commanding general of the American Expeditionary Forces, presumably as "commanding general of the Army in the field"—and in this respect he has the same powers as a territorial department or division commander—may confirm (*a*) death sentences in cases of murder, rape, mutiny, desertion, and spies, and (*b*) dismissal of officers below the grade of brigadier general. All other cases of death and dismissal must go to the President for confirmation. Such difficulty as the commanding general apprehends or may have encountered may be assumed to be this: He disagrees with the sentence of death or dismissal imposed by a court, which adheres, however, to its view and sentence in proceedings in revision or which can not be reconvened for reconsideration. In such cases, inasmuch as such sentences yield only to commutation and not to mitigation or remission, the alternative is to disapprove or to approve for the purpose of transmission to the President—as must be done in all cases expressly requiring the President's confirmation—in order that the President, if he is so disposed, may exercise the power of commutation. The elements involved in the assumed difficulty are (1) the time consumed in obtaining the action of the President, and (2) the inability of the commanding general to substitute his judgment for that of the President as to whether in such cases punishment other than death or dismissal should be imposed.

3. The time lost, in view of the gravity of the cases and their comparative infrequency, does not, to me at least, appear to be such as seriously to affect "the interests of justice and the speedy administration of the same," and besides, there is room for argument to the effect that a case which involves such serious considerations and in which the court, after considering the commanding general's views, firmly adheres to its sentence, might better, on considerations of high public policy, be sent to the Commander in Chief of the Army, the supreme source of power in such cases. It is beside the point to say that commutation in such cases will always operate to the benefit of the offender; the public, the Army, has an interest in the punishment once guilt is established, the protection of which is of no less importance than is the pardon for the accused.

4. The recommendation is, in its logical effect, a request for a very considerable enlargement of the power of confirmation in the commanding general. The power to commute is, rationally, a larger power than to confirm. It involves the power of confirmation of the sentence awarded and, in addition, the substitution therefor of a different punishment. Commutation necessarily involves confirmation though the converse is never true. The power of commutation has never been given to any military commander in any case, not even in those wherein he has full power to approve or disapprove, or to mitigate or remit the sentence awarded. Such a power affects and seriously modifies the judgment of the court as to the kind of punishment merited, on the one hand, and involves the constitutional powers of the Commander in Chief on the other. Whether such power has never been attempted to be taken out of the hands of the President and conferred upon another is due to congressional views of policy or of constitutional limitations, or both, is only a matter for speculation.

5. The power to commute is the power to say that the sentence awarded, when considered in the realm of pardon, ought not to be executed, but that another and different penalty should be. The power to decide that a sentence should not be executed necessarily involves the power to decide, in a proper case, that it should be executed. The authority to decide what should not be done may also decide what should be done. The same judgment and discretion are involved in both instances. Therefore, the power sought by the commanding general could not logically be limited simply to commutation or confirmation for the purpose of commutation. The judgment to determine that commutation should be had, should be equally competent to determine, when convinced of the justice and advisability of that course, that commutation should not be had and that the sentence awarded should be executed.

6. The existing statute, in this respect at least, deals with fundamental principles which do not undergo modification with every change of circumstance; it is old, has stood for a long time substantially unmodified, and in the absence of a considerable showing of its lack of wisdom or workability, is entitled to deference. It pretends to discriminate as to the power of confirmation of death and dismissal sentences, and in the absence of evidence must be assumed to do so intelligently. It should be changed, if in the respect sought it can be changed, only upon thorough consideration and in the light of conclusive experience.

7. I have difficulty to find logical limitations in this request. In the light of what I have said, if this particular commanding general should have the power to commute the sentences of death and dismissal which under existing law fall within the President's power of confirmation, for even stronger reasons, of course, should he have the same power of commutation in those cases of death and dismissal falling within his own power of confirmation; and if he should have the power of commutation in such serious cases as death and dismissal, it might be well said that he should have the same power in all cases falling within his power to confirm or to approve or disapprove. The request leads logically at least, to the consideration whether any convening authority with the power to approve or disapprove a sentence, should not, when his sound judgment and discretion dictate such a course, have the power to resort to commutation. Of course, the particular sentences under discussion—that is, death and dismissal—may be thought to be distinguishable from other sentences, in that they can not be mitigated, except by way of commutation. But even here, the policy of the law has established a single penalty to be awarded, and it can be departed from only upon considerations equally high with those that justify departure in the less serious and ordinary cases. Then, again, I find difficulty in limiting the power to this particular commanding general. I see no circumstance surrounding him that would justify conferring upon him such a power, *that* would not be equally justified in reposing a like power in any convening

authority similarly situated with respect to the seat of government, as, for instance, the commanding general of the Siberian Expeditionary Forces, in which case much more time would be consumed in the transmission of such proceedings to the President.

8. The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army by existing law, if not, indeed, by the Constitution. It is a matter, therefore, of such importance as to require consideration by the highest authority, and I wish my views understood with deference to that fact. Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request.

9. This office is not called upon to draft the proposed legislation. If legislation should be drafted, I take the liberty to suggest the advisability of so drafting it as to confer this power upon such commanding generals in the field as the President may himself designate.

S. T. ANSELL,
Acting Judge Advocate General.

[First indorsement.]

THE ADJUTANT GENERAL'S OFFICE,
September 7, 1918.

To the Chief of Staff.

J. S. J.

EXHIBIT 145.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, September 19, 1918.

Memorandum for the Chief of Staff.

Subject: Amendment of the Articles of War with reference to power to commute sentences.

1. Herewith is an opinion of the Acting Judge Advocate General based upon Gen. Pershing's cable No. 1521, paragraph 5, subparagraph (*b*). The cable in question reads as follows:

"It is highly desirable, in the interests of justice and the speedy administration of the same, that I be authorized to commute both the sentences which I am authorized to confirm, and those which must be forwarded to the President for confirmation. I recommend proper legislation to that end."

The Judge Advocate General in his opinion argues to the following conclusion:

"The power here sought concededly involves and derogates from the power established solely in the Commander in Chief of the Army by existing law, if not, indeed, by the Constitution. It is a matter, therefore, of such importance as to require consideration by the highest authority, and I wish my views understood with deference to that fact. Inasmuch as I have no evidence of the necessity or advisability for such enlargement of the powers of the commanding general in question, and because of the other considerations heretofore mentioned, for the present at least, I can not concur in the request."

2. In order to understand clearly the situation here presented it is necessary to set out and have before us the provisions of existing law with reference to this matter.

The forty-sixth article of war provides:

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court, or by the officer commanding for the time being."

The power to approve the sentence of a court-martial, as required by the forty-sixth article of war, is by the forty-seventh article made to include:

"(*b*) The power to approve or disapprove the whole or any part of the sentence."

The forty-eighth article of war deals with the confirmation of sentences of general courts-martial. Its effect, in part, is to confer on the commanding general of an army in the field and the commanding general of any territorial department or division the power to confirm sentences of death awarded in

the "cases of persons convicted in time of war, of murder, rape, mutiny, desertion, or as spies." It also empowers the same officers in time of war to confirm a sentence of dismissal of any officer below the grade of brigadier general.

Under the forty-ninth article of war the power of confirmation conferred by the forty-eighth article of war is made to include:

"(*a*) * * * * * * *

(*b*) The power to confirm or disapprove the whole or any part of the sentence."

The fiftieth article of war deals with the mitigation or remission of sentences. That article reads as follows:

"ART. 50. *Mitigation or remission of sentences.*—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

The fifty-first article of war deals with the suspension of sentence of dismissal or death. It provides that:

"The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial shall immediately be transmitted to the President."

The fifty-second article of war as amended by the act of July 9, 1918 (Public 193, 65th Congress), is as follows:

"ART. 52. *Suspension of sentences.*—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted. The death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence."

3. It will be observed that the word "commute" or the word "commutation" is not used in this or any other article of war. It will be observed, moreover, that the fiftieth article of war speaks of the "mitigation" or "remission" of sentences of death or of dismissal of officers. Inasmuch, however, as the mitigation of either of these sentences requires a substitution of some other and distinct form of punishment, "mitigation" in such a case becomes in fact the "commutation" discussed in the opinion of the Acting Judge Advocate General.

Considering the articles of war as they now stand, the following limitations and inconsistencies may be pointed out:

Under the forty-eighth article of war the commanding general of an army in the field or the commanding general of a territorial department or territorial division may, in time of war, execute a sentence of dismissal of an officer below the grade of brigadier general, or a sentence of death in cases of persons convicted in time of war, of murder, rape, mutiny, desertion, or as spies, but he can not remit or mitigate these sentences. In other words, he may exercise the greater power but is denied the lesser.

No sound reason can be advanced why an officer who is given power to approve and carry into effect a sentence of death or of dismissal of an officer, without reference to higher authority, should not be given the lesser power of commuting such a sentence to one of lower degree.

Again, as the articles now stand, the commanding general of an army in the field or of a territorial department or division may, in a particular case, believe that a sentence of death or of dismissal of an officer is clearly excessive, but may believe that the accused has been legally convicted and that he deserves some lesser punishment. Ordinarily, he may refer the case back to the court-martial for a reconsideration of its sentence and may thus succeed in obtaining a sentence which he can, in good conscience, approve and execute, or mitigate or remit. In cases, however, where the court adheres to its original sentence, as well as in those where, owing to the exigencies of the service, it can not be reconvened, the commanding general is placed in the position of being forced to disapprove the sentence of the court where he believes a complete disapproval is not warranted, or to approve the sentence as pronounced by the court, even though he may be very much opposed to it in fact, and incur the risk that the President will not concur in his recommendation for mitigation. Should the President, notwithstanding the recommendation for mitigation, carry into execution the original sentence imposed by the court-martial, the commanding general is placed in the situation of having made it possible, by his formal approval (required by the forty-sixth article of war) of a sentence which he does not approve in fact, for the President to direct that the same be carried into execution.

It does not meet this situation to suggest that the President almost invariably follows the recommendation of the commanding general who makes it. If he does, much unnecessary paper work and administrative action are imposed on the department; and the commanding general, in so far as such cases are concerned, is reduced to a mere automaton. What good reason can be assigned why he should not directly exercise the power of mitigation without reference to the President?

Again, under the fiftieth article of war, as it now stands, no sentence of dismissal of an officer may be remitted or mitigated by any authority inferior to the President. Under the fifty-second article of war, however, as recently amended, the authority competent to order the execution of such a sentence may at the time of approval suspend the execution thereof, and having suspended it he may later remit it. He may thus do indirectly under the fifty-second article of war what he can not do directly under the fiftieth. These articles are inconsistent, and should be reconciled. The present fifty-second article of war, being the later expression of Congress on the subject, may be taken to represent the present policy of the law, and the fiftieth article should be amended to correspond therewith.

A strong argument in favor of making the suggested amendment, not considered by the Acting Judge Advocate General, is the great saving of valuable time and effort which would result. Under the law as it now stands the commanding general who must act on a sentence of death, which he does not desire to disapprove but which he can not mitigate, will probably begin by an effort to obtain a modified sentence from the court. To the time given the reconsideration of the sentence by members of the court must be added, in the event of its adherence to the original sentence, the time given the case by the Judge Advocate General and the officers of his department, by the Chief of Staff, by the Secretary of War, and, finally, by the President himself. Since all this will result ninety-nine times out of a hundred merely in confirming the recommendation made by the commanding general who submits the case, it is clear that it represents time lost in adherence to a formalism which no longer has any meaning or significance. Many cases of this character are known to have occurred during the present war and many more will doubtless arise.

4. From these considerations the War Plans Division is of the opinion that notwithstanding the fact that the law has long existed in the form in which it now stands, no sound reason has been advanced why it should not be changed in the manner suggested by Gen. Pershing. It goes without saying that any change adopted should be general in its character and not be made to apply to any particular commanding general, notwithstanding the nature and extent of his command, but should apply to all commanding generals similarly circumstanced. In the opinion of the War Plans Division the power of mitigation may safely be conferred upon commanding generals of armies in the field or of territorial departments or divisions. In cases which require the approval

of the President before sentences may be carried into execution, it will be well to provide that these officers shall exercise this enlarged power of mitigation, amounting as it does to the commutation discussed by the Acting Judge Advocate General, only when specially empowered so to do by the President. This will be a recognition of the pardoning power conferred upon the President by the Constitution, and will remove in large part any legal basis that may exist for an argument that the amendment of the article herein suggested may be in derogation of the constitutional powers of the President.

5. The War Plans Division is of the opinion that the recommendation made by Gen. Pershing can be complied with and that the inconsistencies in the present Articles of War, above pointed out, can all be remedied by amending the fiftieth article of war. As that article now stands it consists of three paragraphs. The first paragraph should be amended to read as follows:

The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole, or any part of the sentence.

It will be noted that this proposed amendment omits the following words: "But no sentence or dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President."

The effect of this change will be to place it in the power of any convening authority to mitigate or remit a sentence which he may order executed. In practical effect it will operate only to confer upon a commanding general who may now order the execution of a sentence of death or of the dismissal of an officer the power to mitigate or remit such sentence.

The second paragraph of the fiftieth article of war should be amended by making that part of it following the semicolon read as follows:

But no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

The practical effect of this change will be to make the paragraph conform with the first paragraph, as herein proposed to be amended, and with the fifty-second article of war as it now stands. It seems obvious that no sentence which has been approved or confirmed by the President should thereafter be mitigated or remitted by any inferior authority. So, also, where the sentence involves a loss of files and has not been suspended under the authority of the fifty-second article of war, it is clear that no authority inferior to the President should be authorized to thereafter mitigate or remit the sentence. Following the second paragraph of the fiftieth article of war a new paragraph should be inserted which should read as follows:

When empowered by the President so to do the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President before the same may be executed.

The effect of this insertion will place it within the power of the President to authorize General Pershing, or any other commanding general similarly situated, and the commanding general of any territorial department or division to commute a sentence of death or of the dismissal of an officer which now requires the confirmation of the President before the same may be carried into execution. In other words, it provides the legal authority under which the President may make it unnecessary for such commanding generals to send to him for his action cases in which such sentences are involved and in which they do not believe that the sentences should be executed, but do believe that they should be mitigated, or, more technically speaking, commuted.

If the fiftieth article of war should be amended, as herein suggested, it would read as follows:

ART. 50. *Mitigation or remission of sentences.*—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

An unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss

of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do the commanding general of the Army in the field or the commanding general of the Territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which under these articles requires the confirmation of the President before the same may be executed.

The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.

It should be noticed that under the fiftieth article of war any sentence fixed by a commanding general under the enlarged power herein proposed is always subject to correction by superior authority by further mitigation or remission. It is difficult to see wherein this power would or could be abused or wherein it would or could lead to results which are inconsistent with results obtained under the present system. That the administration of justice would be expedited in certain cases and that the general burden of administrative work would be lessened has been shown above.

6. The War Plans Division therefore recommends that these papers be filed in the office of The Adjutant General and that favorable action be taken looking to the amendment of the fiftieth article of war. It submits herewith appropriate letters, containing draft of a bill designed to carry this recommendation into effect, addressed to the chairman of the Committee on Military Affairs, United States Senate, and the Speaker of the House of Representatives.

LYTLE BROWN,
Brigadier General, United States Army,
Director, W. P. D., A. C. of S.

EXHIBIT 146.

WAR DEPARTMENT,
Washington, September 19, 1918.

The CHAIRMAN COMMITTEE ON MILITARY AFFAIRS,
United States Senate.

SIR: The following is a draft of a bill amending the fiftieth article of war:

..ted by the Senate and House of Representatives of the United States of America in Congress assembled, That article 50 of section 1342 of the Revised Statutes of the United States, as amended by the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,' approved August 29, 1916, be, and the same is hereby, amended to read as follows:

"'ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

"'Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President except as provided in the fifty-second article.

"'When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which, under these articles, requires the confirmation of the President before the same may be executed.

"'The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.'"

This amendment is designed to confer upon the commanding general of an army in the field or of a territorial department or division the power to mitigate or remit any sentence of death or of dismissal of an officer, which he now has the authority to approve and execute, without referring the same to the President for his action; and also to confer upon the President the authority

to empower such commanding general to mitigate or remit sentences of death or of the dismissal of an officer in those cases where the sentence can, under the forty-eighth article of war, be carried into effect only upon the approval of the President. It is found in actual practice that whenever a commanding general does not approve a sentence of death or of the dismissal of an officer, and recommends mitigation thereof, the action of the President is generally in accordance with such recommendation. Moreover, it appears unsound to deny a commanding general the power to mitigate a sentence which he has the authority to approve and execute.

Gen. Pershing has recommended the changes herein proposed. They have been found necessary, also, in so far as a sentence of dismissal of an officer is concerned, for the purpose of reconciling the fiftieth article of war with the fifty-second article, as amended by the act of Congress approved July 9, 1918 (Public, 193, 65th Cong.) Under the fiftieth article of war, as it now stands, no reviewing authority inferior to the President can mitigate or remit a sentence of dismissal of an officer. Under the fifty-second article, as recently amended, any such convening authority can suspend any sentence of dismissal of an officer. Under the fifty-second article, as recently amended, any such convening authority can suspend any sentence of dismissal of an officer, and having suspended it may later mitigate or remit it. These two articles are inconsistent as they now stand, and it is hoped to reconcile them by the proposed amendment of the fiftieth article of war submitted herein.

It is hoped that this matter may receive the early and favorable consideration of your committee.

Respectfully,

BENEDICT CROWELL,
Acting Secretary of War.

EXHIBIT 147.

(PUBLIC—No. 311—65TH CONGRESS.)

[H. R. 13037.]

[AN ACT TO amend the fiftieth article of war.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That article 50 of section 1342 of the Revised Statutes of the United States, as amended by the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, be, and the same is hereby, amended to read as follows:

"ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

"When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit, and order executed as mitigated or remitted, any sentence which under these articles requires the confirmation of the President before the same may be executed.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

Approved, February 28, 1919.

EXHIBIT 148.

ATLANTIC BRANCH UNITED STATES DISCIPLINARY BARRACKS,
Governors Island, N. Y., April 15, 1919.

From: The commandant.
To: Memorandum for the Inspector General, attention Col. Charles H. Patterson.
Subject: Disciplinary barracks, Governors Island, N. Y.

The military offender.—Upon the admission of a convicted offender to the disciplinary barracks two courses of action toward him are possible—one punitive, the other reconstructive.

The first means the applying of the strictest discipline and the placing of the offender at tasks which will cause him, if possible, to regret most thoroughly his ever having become involved in trouble. The other involves the relaxation of military discipline to some degree and the education of the offender by suitable methods so as to equip him the better to avoid offending in the future.

The treatment of the military offender at these barracks has been along reconstructive lines, and this course has been followed for several reasons. First, offenders are in a great majority of cases not sent to the disciplinary barracks for their first offenses. Their records usually show several previous offenses due to maladjustment to military discipline. The imposition of a stricter and harsher discipline, while it would control the offender for the time being, at the same time would not hold out assurances that the relaxation of it after release would have accomplished the desired result, namely, normal adjustment to the demands of civil or military life. This is more clearly demonstrated by our second consideration, the study of the man behind the offense.

Every military prisoner upon admission is given a thorough mental and physical examination. In addition, a correspondence field study is employed. Every possible source of information is made use of to obtain a complete history of the offender, so that at the end of a month or six weeks we are in a position to make a reasonably accurate estimate of the kind of man we are dealing with, what his requirements are, what his abilities, and are in a position to make at least a tentative prediction as to his future possibilities.

Resulting from these studies we find that some offenders are medically sick men, such as the insane, the epileptic, the feeble-minded, the drug addict, and in some cases the alcoholic. Others show character defects which have resulted in an antisocial attitude—the criminals—or an inability to adjust themselves to any environment, as shown by truancy in school life and lack of persistence in employment, nomadism, etc.

A relatively small number can be said to be normal or accidental offenders, whose delinquencies are chargeable to social or economic conditions.

Third, to treat military offenders in accordance with up-to-date recognized methods.

The first or punitive method of treatment should be the method prevailing in a regular organization and carried out by that organization, resulting in short, disagreeable sentences in the post guardhouse. It is not possible nor desirable to employ the reconstructive method of treatment in a regular military organization. However, if the repeated infliction of short punishments for offenses does not result in the permanent correction of an offender he then become a candidate for the reconstructive method of treatment as practiced in the disciplinary barracks.

The treatment of the military offender in the disciplinary barracks has a twofold object—first, to return him to the colors a better soldier, or, secondly, if unfitted for military service, to return him to civil life, if possible, a better citizen.

The disciplinary battalion.—Any prisoner, regardless of his offense or the length of his sentence, is eligible to this battalion who, after a thorough study of him as outlined above, appears capable of resuming his place in the military service. The battalion is removed from the general barracks population and is quartered in a cantonment building such as have been used during the war at the various camps. While the discipline in the battalion is very strict—in fact, much more so than in the average organization—still the members of the battalion are given considerable liberty on the theory that it is wiser to detect those who are lacking in self-control before rather than after restoration. The battalion barracks has neither bolts nor bars; the battalion cooks and serves its own rations and does its own guard duty. It is under the supervision of one commissioned and several noncommissioned officers.

If after three months of intensive military training a member of the battalion is certified as capable of taking his place in a regular military organization, he is recommended for restoration to the service.

Numbered men.—The numbered men consist of those whose examinations show that they are not desirable for the disciplinary battalion, although some after further observation may prove to be so. The treatment of these men is along educational and vocational lines. Fully 40 per cent of them show the need of education. Classes in primary subjects are conducted during the morning hours by experienced Y. M. C. A. teachers for this class. In the afternoon the same organization conducts classes for more advanced work. In the evening classes of a vocational and educational nature, such as electrical installation, vocal and instrumental music, etc., are in session.

In the vocational work advantage is taken of the existing shops. Others will be added, in which to place prisoners after examination, where some useful trade may be acquired.

The honor association.—Included in our educational system we have instituted an honor system among the prisoners. In the study of our offenders it was found that such a large percentage had shown themselves incapable of continuously adjusting themselves in a normal manner to the demands of civil as well as military, life that it was deemed wise to create among them a tangible social organization. It was recognized that wherever a body of men are in close contact for any length of time the prevailing feeling or tone of that body will be determined by the more assertive members. In prisons and other penal institutions where there is no authorized and recognized organization the antagonistic, antisocial and habitual criminal element is more in evidence. Accidental offenders and those who strive to avoid further trouble are inclined to keep by themselves and to serve out their sentences without associating much with others, even with those of their own kind. The lawless element are naturally attracted to each other and, in reality, possess the nucleus of an organization, which quickly crystallizes when any advantage can be gained. When thus crystallized the weaker characters are easily prevailed upon to follow and others are forced to join them by means of threats and other methods of intimidation. A disciplinary barracks is never free from this danger. Consequently, if a recognized organization with the better element in control of it, and subject to the supervision of the officers, can be formed the lawless and antagonistic element is placed at a disadvantage and the possibility of their quickly organizing and attracting others is reduced to a minimum. The educational value of such an organization is based on the theory that members will realize that individual misbehavior reacts unfavorably on the whole body. The association has its rules and regulations and its tribunals for the trial and punishment of its own offenders. In this way members of the honor association are taught while in the barracks a respect for constituted law and order. Certain privileges are given for good conduct and certain punishments are prescribed for misbehavior, so that it is to the advantage of the organization to keep "barracks offences" down to a minimum. It is hoped that the lessons learned in their own organization will be applied to the larger social order upon their release.

The honor association includes all but 30 prisoners. Every new arrival is met by a member of the association and is made acquainted with the benefits of its membership. In this way new arrivals are immediately brought in contact with the better element, whereas in the past it was the disgruntled and antagonistic element which first approached the new comer.

The association has regular weekly meetings. It has its own constitution, by-laws, rules and regulations and standing committees. It pledges itself through appointed sergeants at arms to maintain good order in and about the barracks and to be careful of all sanitary and other regulations. If any member of the association detects another breaking any rule of the barracks he is in honor bound to report the offense to the organization. The offending member is then brought before the association's tribunal and if found guilty is asked to sign a statement requesting that he undergo the punishment prescribed by the court.

The association has a grievance committee which meets the commandant weekly to present to him matters of interest in the association and possible grievances. As a result, no matter of dissatisfaction is harbored amongst the prisoners without the commandant's knowledge. Recently, this committee notified the commandant that the organization was having some difficulty with its offending members. These members preferred trial by the prison

l of trial by the honor court for the reason that the punishments
r were less severe than by the latter. It was requested that the
prescribed by the prison court be made equal in severity to those
ation's court.

ts of this association both to the prisoners and to the barracks
Gambling has been eliminated from the institution, the number of
son court has decreased fully 75 per cent. Better order prevails
all, the yard, in fact, the whole tone of the barracks is improved.
more contented and misbehavior is reduced to a minimum.

—Appropriate recreation is enjoyed by prisoners, consisting of
res and other shows at regular intervals, and athletic games out

—Much has been said in newspaper articles recently about the
severity of courts-martial sentences and, unfortunately, nothing
l about the practical working out of these sentences in the disci-
acks. The man behind the sentence is considered here more than
itself. In fact, every sentence is indeterminate and indefinite. It
and has happened, that prisoners sentenced to serve upward of
e been restored to the colors in fewer months. In fact, it is pos-
risoner with a life sentence to be restored to a regular organiza-
months. In the case of numbered men, recommendations for their
been made for various reasons—on account of youth, mental in-
dequate personality, nervous instability, and the financial condi-
dependents—so that in the case of these prisoners, as well as
men, the sentence really cuts but little figure. This practice of
g prisoners for release, as outlined above, was the general policy
ution months before the present clemency board was appointed.
er of fact we are confronted by a much greater administrative
the short sentences now imposed than by the longer ones. Men
entences are generally apathetic as to restoration. Six months
th good-conduct time deducted, releases a man by expiration of
in five months, too short a time for the corrective and disciplinary
plied to him to become sufficiently effective to warrant restoration.
entence than six months, and some are shorter, practically pre-
ossibility of extending restoration. There are two or three cases
cently come to my attention of positive victims of short sentences.
s been continuously in the hospital with ear trouble, and no cor-
sciplinary measures could be applied before the expiration of his
his is especially so on the entrance to the institution of a short-
le may, at first, not desire to work for restoration, but later on he
his mind, but when this decision is made it frequently happens
such a short period left as to render impossible the restoring of
the usual way.

hould be sent to the disciplinary barracks for a shorter period
ar. Men with longer sentences have something definite to work
not the case with shorter-term men. The longer sentence awakens
to a healthy, laudable endeavor, while the shorter sentence stifles
The short-term prisoner sits back and waits for the end of his
ls to work for restoration fall on deaf ears, and the morale of the
s in consequence lowered.

—One of the vexatious problems with which we have to contend
by the ex-convicts, some of whom were released from prison to
my. Such men are considered bad risks for restoration. Usually,
unds exist on which recommendation for clemency in their cases
l. In consequence of their realizing that they can not be restored
they become disgruntled and are a very disturbing element. Fur-
is not at all desirable to have the ordinary military offender, often
mpressionable, come in contact with this class of men. They are
subjects for the disciplinary barracks and should have been sent
possible, to a Federal penitentiary. At least some provision should
they are to be held in custody, for their proper segregation.

JOHN E. HUNT,
Colonel of Infantry.

AMOS T. BAKER,
Captain, Medical Corps, Psychiatrist.

ATLANTIC BRANCH, UNITED STATES DISCIPLINARY BARRACKS,
April 15, 1919.

The foregoing article has been prepared and written by the following members of the executive committee: Edward M. Hancock (5379), George S. Schuyler (5820), Abraham Henschel (5617), Edward Schwartz (6122), Harry Lee (6033), Hyman Zimmerman (4868), Louis G. Lemley (5706). With feeling of the deepest gratitude do we hereby submit this article to the commandant, Col. John E. Hunt, United States Army.

OUR HONOR ASSOCIATION.

As men have always risen to the highest pinnacles amongst oppressing circumstances, so have we, the inmates of Castle William, in our darkest hours of life, conceived and promulgated the ideals set forth in this preamble to our constitution.

In obedience to the voice of nature, which inspires men to perfection, in compliance with the dictates of the human mind, which prompt men to activity, the honor association was organized January 26, 1919, to avoid the evils of disorganization toward what is just and right.

The objects of this organization are to create a local sentiment which will condemn local wrongdoing, to teach the men to be intolerant of evil, to obey the rules and regulations prescribed for our general conduct and discipline, to respect the authorities and to heartily aid them by a most earnest cooperation, and to be honor bound individually in the accomplishment of these aims: finally, to upbuild and uplift the character of the men, so that they be better fitted to occupy their positions as free moral agents in society.

Previous to the organization of this association, discipline was maintained and enforced by the strictest measures. This form of discipline had been known as the iron rule. Under this régime men were at all times compelled to work under duress. Minor infractions of prison regulations were drastically dealt with. The men refrained from doing wrong because of the fear of punishment, not because they had any desire to do right. This system of force only tends to make criminals out of petty offenders, instead of better citizens, because there was no appeal to the men's sense of honor.

One day toward the close of 1918, a group of inmates gathered in an assembly and discussed how they could help themselves best, the result of which formed the nucleus of the present organization. From time to time as the development of this nucleus became visible there appeared, though gradually, the opportunity for selfish advantage by some of the organization's officials, rather than for the betterment of its members as a whole. It was revealed that the men intrusted with the leadership of this organization were trying to prostitute its principles, in order to further their own personal ends. The inevitable result was that each one of these selfish leaders tried to outdo the other one in gaining every possible advantage through his position of trust. This culminated in the leaders bringing their personal affairs and grievances before the legislative assembly and attempting to sway the members by dilatory practices. The legislative body reacted in a manner hardly anticipated by these selfish leaders; the members, however, realized that in order to maintain the principles upon which the organization was created they would have to remove this dangerous element, and reconstruct the organization on a firmer basis to eliminate the possibility for individuals to use the association for furthering their personal interests.

Through the unceasing efforts and splendid example set by the members of the executive committee, there was instilled into the minds of the members the realization that discipline could be gained through the sincere cooperation of all with the officials of the institution. Ultimately the ideals embodied in the preamble became manifested materially in the deeds of the men. Gradually there evolved a spirit drawn about by the zealous efforts of the three branches of the association, namely, legislative, judicial, and executive. The resultant mental development caused members to more fully understand their duties and obligations, and more to perform these same duties and meet their obligations and responsibilities at all times under all conditions. The legislative assembly elects 10 men to sit in executive council for the purpose of representing the inmates before the officials of the institution and to convey to them their needs. The association has a judicial branch in which is embodied the honor court and the judiciary committee, the former to try all violators of the institution's rules and regulations properly brought before them, and the

latter to form and from time to time revise the court-martial manual of the honor association. This honor court is one of the greatest helps to the prisoners and the authorities. It is a help to the inmates in that they do not lose good time when tried by it, nor do they get a black mark against their record. If an offense is committed and the offender discovered by one of the members of the association, the man is brought up for trial and sentenced with his consent. The main office is absolutely ignorant of the fact that an offense has been committed or that a sentence has been meted out. It is a great help to the authorities in that it lessens by 75 per cent the number of courts-martial by their court, thus making it possible for them to conscientiously recommend more men for clemency and restoration. It protects the inmates in that they commit less offenses and take pride in the knowledge that they are law-abiding; it protects them from the brutality of medieval disciplinary methods. Since the establishment of the honor association approximately 5 per cent of the total population of this institution have been tried by the honor court for minor infractions of rules and regulations. Of these brought to trial, 60 per cent have been found guilty and sentenced to various punishments, such as sleeping three nights in solitary, a loss of privileges gained by the honor association for a prescribed period of time. It is the duty of every member to report even the smallest violation of regulations to the sergeants at arms, who prefer charges against the offenders. The same are then tried by the honor court, which is so conducted that the interests of the accused and the honor association are equally safeguarded in every possible manner. The small violations being thus promptly attended to, the more serious ones become a rare occurrence or disappear entirely. Thus the strictest discipline is maintained, based upon honor and intelligence and not on fear. The gaining of discipline without the officials of the instituton being troubled with it causes them to be more kindly disposed toward the inmates.

Through the rapid growth of the association and expansion of its activities in several fields, particularly educational and recreational, there was arranged a more elaborate program than anything heretofore attempted in the annals of an institution of this kind. Through the efforts of the executive committee all men are enabled to avail themselves of the opportunity to pursue any course of study of their election. Men are given relaxation from the day's work by being provided with wholesome entertainment.

We owe a debt of gratitude to the officials of this institution for the assistance they have rendered us in accomplishing our ideals, and we sincerely hope that the facts and conditions as described in this article will serve as an inspiration and incentive to the inmates and officials of institutions of similar character throughout our beloved United States.

THE HONOR ASSOCIATION,
Per EXECUTIVE COMMITTEE.

Therefore, in the early part of January, 1919, a new executive committee was elected, consisting of men possessing qualities which rendered them more fitted to the positions of trust to which they were elected. This committee was delegated to draft a new constitution for the organization, henceforth to be known as the honor association. This constitution was completed on January 26, 1919, submitted to and adopted by the legislative body on same date. The following is a true copy of the constitution and its amendments to date:

CONSTITUTION OF THE HONOR ASSOCIATION.

ARTICLE 1. This organization shall be known as the honor association, headed by a president elected by the executive board. The executive board shall also elect a vice president to discharge the duties of president in case of his absence, inability, or recall.

ART. 2. The organization shall be divided into three branches: (*a*) Legislative, (*b*) executive, (*c*) judicial.

The legislative branch shall be composed of the governing body, comprising all the members of the organization.

The legislative branch shall meet every Sunday evening.

The legislative branch shall enact all the laws of the organization by a majority of votes.

Any member of the association may submit to the legislative assembly, through the judiciary committee, bills necessary for the welfare of the organization.

The judiciary committee will pass on their constitutionality and report its findings.

A quorum of the legislative branch shall consist of a majority of the members.

The executive branch shall be incorporated in a board elected by the legislative body.

The executive branch shall execute all measures acted upon by the governing body and shall appoint such officers, committees, and personnel as may become necessary.

The executive branch shall function through the following committees: (*a*) Entertainment committee, (*b*) initiation and classification committee, (*c*) committee on law and order, (*d*) complain committee, (*e*) educational committee, (*f*) judiciary committee.

Members of the executive committee shall individually be appointed as heads of the respective committees.

The judicial branch shall be embodied in a committee appointed by the executive committee.

The judicial branch shall have charge, through its subdivisions, of the maintenance of law and order and the punishment of infractions thereof.

ART. 3. The executive committee shall be composed of 10 members (5 company men and 5 numbered men), who shall be elected by secret ballot by the members of the legislative body from 20 proposed candidates, i. e., 10 from the company and 10 from the numbers, 1 of each 5 being a colored man. to represent his race.

Each voter will be provided with a ballot with the two lists of 10 men, 1 from the company and the other from the numbers. Each man will designate 5 men from each list of 10 by making a cross opposite the names of 10 candidates he wants to elect, sign his name and number, and hand the ballot in to the collector.

All vacancies that may occur on the executive committee shall remain unfilled until the legislative body's earliest convention, with the exception of numbered men going into the company or company nfen going into the numbers, in which case they will hold their office until the expiration of their terms, when new members will be elected as aforesaid.

The term of office for a member elected to the executive committee shall not be less than four months, beginning from date of election.

Members of the executive confmittee shall be eligible for reelection.

In the event of an executive committee member being transferred from the numbers to the company, or vice versa, such member shall continue to represent that division from which he was elected.

Any member of the executive comnfittee who is convicted of any violation of the Constitution or is proved to be incapable for the continuance of said office shall be subject to recall.

The executive committee shall meet the Thursday before the convention of the legislative body and the Monday following.

The executive committee shall review all matters pertaining to the welfare of the organization and present same to the president of the legislative body for presentation to the said body and to the commandant.

A quorum of the executive committee shall consist of a majority of the members.

ART. 4. An honor court shall be appointed by the executive committee, composed of five members of the legislative body.

A president of the honor court shall be appointed by the executive committee.

There shall be three supernumeraries appointed to fill respective vacancies that may occur on the honor court.

When the president of the honor court is absent the members of said court shall be empowered to elect a president pro tem.

There shall be a judge advocate, who shall have an assistant; both shall be appointed by the executive board.

There shall be a recorder appointed by the executive committe to assist th judge advocate.

ART. 5. The entertainment committee shall classify all theatrical and athletic talent of honor association, for the purpose of private entertainment and amusement.

The initiation and classification committee shall interview all newcomers and acquaint them with the honor association in all its details, and shall classify the men desiring membership.

The committee of law and order shall enforce all laws and acts as passed by the legislative body.

The chairman of the committee of law and order shall be known as the sergeant at arms.

The complaint committee shall hear all complaints pertaining to discipline, preservation of order and efficiency of any department or member thereof.

The educational committee shall: (*a*) Classify talent; (*b*) provide lecturers; (*c*) assist in general enlightenment; (*d*) encourage and conduct educational classes.

The judiciary committee shall be empowered to form and revise the Court-Martial Manual and set maximum and minimum sentences to be submitted to the executive committee for them to tender to the legislative body for their approval.

The personnel of the various committees shall be subject to the approval of the executive committee before appointment.

No man shall serve at the head of two committees except executive committee members.

The heads of the respective committees shall render a full report once a month to the executive committee.

ART. 6. The president shall call the meetings of the governing body.

The president shall not remove the chair automatically.

The president shall have charge of the correspondence of the association.

The president shall report to the legislative body once a week the doings of the executive committee.

The executive committee shall be represented at all interviews with the commandant by the president and two other members, excepting such times when the commandant should request the presence of the entire committee, or any specified member thereof.

The judiciary committee shall pass on the constitutionality of all measures before they are presented to the legislative body for enactment.

ART. 7. The members of the honor association shall consist of all those whose names appear on the roster of the initiation and classification committee.

There shall be roll call at every meeting of the legislative body; all members who absent themselves from three consecutive meetings shall forfeit their membership for a period of one month, unless such absence shall be shown to have been unavoidable.

ART. 8. Amendments to the constitution shall be passed by a two-thirds vote of the legislative body.

AMENDMENTS TO THE CONSTITUTION OF THE HONOR ASSOCIATION.

ART. 3. The executive committee shall consist of 10 members elected by the legislative body by secret ballot. There shall be one member from each disciplinary company and eight members from the numbers, one of whom shall be a colored man.

All vacancies that may occur on the executive committee shall remain unfilled until the legislative body's earliest convention.

The term of office for a member elected to the executive committee shall be four months, beginning from date of election, with the exception of numbered men being transferred into the disciplinary battalion and men of the disciplinary battalion being transferred back into the numbers, in which event their terms shall automatically expire on date of transfer.

Any member of the executive committee who violates any article of the constitution or any of the rules and regulations of the association or who is found incapable of continuance as an executive committee member, shall be subject to recall by a majority vote of the legislative body.

Recalls must be founded on some grounds and tangible facts. After a recall is moved and seconded by 20 members, a special board of 10 members not holding office in the association will be formed by the legislative body's election. This board will investigate the charges against the accused executive committee member, examine and cross-examine all the witnesses, and report its findings, with its recommendations, to the succeeding legislative body convention. This convention will act according to the light thrown upon the question by the labors of the special board.

The recall of the president of the association from that office shall be by secret ballot of the executive committee with majority of opinion concurring. Should it become incident upon the recall of the president from that office, a question as to his retention on the executive committee, action will be taken as specified above.

ART. 6, PAR. 6. The president shall at all times be guided by the opinions of the other members of the executive committee. He shall veto no measures without the approval of the executive committee, nor shall he sign any measures that the committee has disapproved of.

Should the president for any reason fail to sign a measure within 10 days after it has been passed by the legislative body, it shall automatically become a law.

ART. 8. Executive committee and members of the committee on law and order shall wear a distinctive badge of office. This shall be subject to the approval of the prison authorities.

All nominations for executive committee members must be seconded by a minimum of 20 members of the legislative body.

EXHIBIT 149.

UNITED STATES DISCIPLINARY BARRACKS,
Governors Island, N. Y., April 19, 1919.

From: The commandant.
To: Inspector General of the Army. (Attention Col. Charles H. Patterson.)
Subject: Memorandum of restored men.

1. Memorandum for the Inspector General of the Army of men restored to duty from this institution from April 18, 1918, to April 17, 1919, with length of sentence and average time actually served.

	Length of sentence, years.	Average time actually served to restoration, months.		Length of sentence, years.	Average time actually served to restoration, months.
Number of men restored:			Number of men restored—Con.		
48	1-2	7	70	5-10	7
51	2-3	8	6	10-20	[illegible]
43	3-4	8	1	(1) 30	5
8	4-5	8			

[1] Or over.

JOHN E. HUNT, *Colonel Infantry.*

UNITED STATES DISCIPLINARY BARRACKS,
Fort Leavenworth, Kans., April 26, 1919.

From: The commandant.
To: The Inspector General of the Army.
Subject: Memorandum of restored men.

Memorandum for the Inspector General of men restored to duty from this institution from April 18, 1918, to April 17, 1919, with length of sentences and average time actually served.

	Length of sentence, years.	Average time actually served up to restoration.			Length of sentence, years.	Average time actually served up to restoration.	
		Months.	Days.			Months.	Days.
Number of men restored:				Number of men restored—Con.			
190	1-2	6	5	111	5-10	8	17
93	2-3	6	27	51	10-20	8	[illegible]
10	3-4	9	.....	32	(1)	8	[illegible]
163	4-5	7	27				

[1] Over 20.

R. C. WILLIAMS,
Colonel, Infantry, Acting Commandant.

[Night Letter.]

APRIL 22, 1919.

COMMANDANT PACIFIC BRANCH,
UNITED STATES DISCIPLINARY BARRACKS,
Alcatraz, Calif.

Wire immediately direct Inspector General, 510 Mills Building, this city, following data for year ending April 17, 1919: Number of men restored to duty and average time actually served prior to restoration where the sentences originally imposed were as follows: One to 2 years, 2 to 3 years, 3 to 4, 4 to 5, 5 to 10, 10 to 20, 20 to 30, above 30. Each class should be stated separately so as to permit tabulation under three columns as follows: Number of men restored, length of sentence, average time actually served prior to restoration.

HARRIS.

ALCATRAZ CALIF., *April 24, 1919.*

INSPECTOR GENERAL,
510 Mills Building, Washington.

Re tel. your wire relative to restored men. Total number restored to duty, 146. One to two years, 69 men; average time served, 7 months. Two to three years, 36 men, average time nine months; 3 to 4 years, 11 men, average time eight and one-half months; 4 to 5 years, 2 men, average time 10 months; 5 to 10 years, 23 men, average time, nine and one-third months; 10 to 20 years, 4 men, average time 11 months; 20 to 30 years, 1 man, proceedings set aside one month; 30 years and over, none.

GARRARD.

	Length of sentence, years.	Average time actually served to restoration, months.		Length of sentence, years.	Average time actually served to restoration, months.
Number of men restored:			Number of men restored—Con.		
69	1- 2	7	23	5-10	9⅓
36	2- 3	9	4	10-20	11
11	3- 4	8½	1	20-30	[1] 1
2	4- 5	10			

[1] Proceedings set aside.

EXHIBIT 150.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 22, 1918.

Memorandum for Gen. Crowder.

A study of the records of trial by general court-martial received in this office shows the following:

Many of our judge advocates in the field fail properly to scrutinize charges referred for trial, with the result that many trials are being held on irregular or insufficient specifications.

Entirely too many men are being tried by general court-martial. I think it conservative to state that at least 25 per cent of the cases tried by general court-martial could be properly disposed of by minor courts or by administrative punishments under the one hundred and fourth article of war.

The actual trial of cases is, in many respects, poorly planned. Joint offenders are separately charged and separately tried by the same court in cases where there should undoubtedly be a joint trial. Important cases are frequently referred to incompetent trial judge advocates. In many divisions entirely too much time is allowed to elapse between arrest or confinement and trial, and in many there are long delays between trial and action by the reviewing authority.

More important, however, is the evident failure on the part of judge advocates to understand the policy of the department with reference to the conservation of man power. Men are still being tried and dishonorably discharged

the service for trivial offenses, which could be otherwise adequately punished. In many divisions there seems to be an unsympathetic use of the power to suspend sentences of dishonorable discharge. It is my view that, during this war at least, in every case where confinement is to be in a disciplinary barracks the dishonorable discharge should be suspended and the officers of the disciplinary barracks made responsible for saying that the man should not ultimately be sent back to serve with the colors.

In proposing corrective action for the difficulties outlined above, I think it may be accepted as fundamental that there should be the closest possible cooperation and understanding between this office and its representatives in the field. That this office should know the circumstances under which judge advocates in the field have performed their duty and that the latter should understand fully what this office is trying to accomplish and be able to work in sympathy therewith.

There should be a unity of purpose and understanding between this office and the commanding officers of the disciplinary barracks on the question of restoration to duty, in order that in time of war as many men as possible shall be given an opportunity to redeem themselves through actual service.

To accomplish these ends it is my opinion that nothing else could be productive of so much good as personal conferences and instruction. A good plan would be to hold a conference of all judge advocates for the purpose of discussing these problems, and others which might arise, and suggesting practical solutions. This, however, would seem to be impracticable. The next best plan would be to have a representative of this office make a visit of inspection and instruction to the various division and department headquarters. Since this would take him by the disciplinary barracks, there should also be included in the itinerary a conference with the officers of these institutions. You suggested yesterday that if anyone made a trip of this kind you would want me to make it. I think myself that if I am to remain on this desk during the war I should be the one to go. I have phrased and formulated the instructions that have been sent out as the policy of the department with reference to the conservation of man-power, and I think I am in position to bring judge advocates to understand how an intelligent application of that policy would reduce the number of trials and save men to the service. It would also help immeasurably in the work of the disciplinary desk if the officer in charge had personal knowledge of the conditions which exist in the field.

Such a tour would be of value in another direction. It would enable me to make a personal report on each judge advocate and his assistant. This report, together with other valuable data, might well be made the basis of special recognition in certain cases and of getting rid of undesirable or inapt officers in others.

When this visit has been made for the purpose of inspecting those who are at present acting as judge advocates of departments and divisions, I should strongly recommend that thereafter no new man should be sent to duty as the judge advocate of a command unless he had previously had a course of training in this office. This would give him a viewpoint of the service as a whole which many of our present judge advocates seem to lack.

It would take about five weeks to make this trip properly. As to whether I can be spared from the office at this time, I suggest that I could well make arrangements to leave in about 10 days or two weeks. By that time the new men will have been pretty well broken in and the work brought up to date. I think Col. Clark could carry on the work without difficulty. There could be no question except as to purely military or administrative matters, and he has these remarkably well in mind at the present time. On any question of doubt he could take advice and need not go wrong.

As a corrollary of the matter here under question, I suggest that if you decide to authorize this trip of inspection and instruction, that Col. Clark's hands might be strengthened by bringing in Maj. Barnwell for duty in this office. He is now on duty as judge advocate of the Southeastern Department. I have several times noted the quality of his work. He seems to be a splendid lawyer. His opinions are always clear and convincing. If you decide to give Maj. Hamar a position as judge adovcate, he might be sent to the Southeastern Department, relieving Maj. Barnwell for duty here.

As to the expense involved, it would be insignificant compared with the direct benefits that would be almost immediately realized. If I could reduce the number of trials by general court-martial by a substantial percentage the expense of the trip would be saved many times over each month, to say noth-

ing of the saving to the country if we can obtain a systematic treatment of the policy of conserving and using the man-power of the country which has been brought into the service.

E. G. DAVIS,
Lieutenant Colonel Judge Advocate,
Assistant to the Judge Advocate General.

EXHIBIT 151.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington.

Memorandum for the Chief of Staff.
Subject: Amendment of the forty-eighth article of war.

1. The following cablegram has been received from Gen. Pershing, requesting action be taken amending the forty-eighth article of war, so that he may be able to confirm all death sentences and order their execution:

"Paragraph 1B, cablegram No. 1059, dated May 5, 1918. In order that prompt exemplary action may be taken in necessary cases, I recommend that forty-eighth article of war be so amended as to authorize me to confirm all death sentences and order their execution. Full power as to death sentences in French Army and British Army in France is vested in military authorities. (Pershing.)"

2. The President has already acted upon this cablegram and has stated that he declines to recommend to Congress action looking to conferring power of confirming death sentences upon commanding generals in the field further than they have at present. A cablegram to Gen. Pershing, embodying the President's views, drafted in the office of the Judge Advocate General, has been or will shortly be sent to Gen. Pershing. There remains, therefore, nothing to be done in regard to this matter.

LYTLE BROWN,
Brigadier General, N. A.,
Director, W. P. D., A. C. of S.

MAY 16, 1918.

Memorandum for the Chief of Staff.

1. I recommend the following cablegram be sent Gen. Pershing:

"Reference your 1059, paragraph 1B. The President has decided not to urge upon Congress any extension of the present authority of commanding general of an Army in the field as to death sentences."

E. H. CROWDER,
Judge Advocate General.

MAY 17, 1918.

Memorandum for The Adjutant General.
Subject: Death sentence.

1. The Secretary of War directs with reference to paragraph 1B, cablegram No. 1059, from the commanding general American Expeditionary Forces, that a reply be sent by cable as follows:

[Cablegram sent May 20, 1918.]

PERSHING,
American Expeditionary Forces, France.

No. _____.
Paragraph _____.

"Reference paragraph 1B, your 1059, the President has decided not to urge upon Congress any extension of the present authority of commanding general of an army in the field as to the death sentences. (March.)"

PEYTON C. MARCH.

Exhibit No. 152.

Consolidated report of general prisoner cases.

DISPOSED OF FOR THE WEEK ENDED APR. 26, 1919.

	Fort Leavenworth Disciplinary Barracks.	Atlantic Branch.	Pacific Branch.	Penitentiary.	Posts.	Total.
Unexpired part remitted	69	3	2	2	.....	76
Portion remitted	157	17	21	20	.....	215
Restored to duty	59	2	1	.....	1	63
Discharged (A. R. 139)	16	3	.....	.....	.....	19
Total	.....	.....	.....	.....	.....	373
Transfer from Penitentiary to Disciplinary Barracks	2	.....	.....	.....	.....	10
Transfer from Penitentiary to Disciplinary Barracks and part of confinement remitted	8					
Transfer from Disciplinary Barracks to Penitentiary	1	.....	.....	.....	.....	.....
Total	11	.....	.....	.....	.....	383

CONSOLIDATED REPORT FOR 6 PRIOR WEEKS.

Unexpired part remitted	599	50	9	23	2	683
Portion remitted	1,216	78	46	83	1	1,424
Restored to duty	292	47	12	7	.....	358
Discharged (A. R. 139)	44	2	1	.....	.....	47
Total	.....	.....	.....	.....	.....	2,512
Transfer from Penitentiary to Disciplinary Barracks	10	47	.....	.....	.....	47
Transfer from Penitentiary to Disciplinary Barracks and part of confinement remitted	37					
Transfer from Disciplinary Barracks to Penitentiary	1	.....	.....	.....	.....	1
Total	48	.....	.....	.....	.....	2,560

For week ended Apr. 26, 1919	383
Prior weeks	2,560
Grand total	2,943

Exhibit 153.

War Department,
Office of the Judge Advocate General,
Washington, January 2, 1919.

From: The Office of the Judge Advocate General.
To: The Adjutant General.
Subject: Recommendation that Brig. Gen. Samuel T. Ansell be presented a distinguished-service medal.

1. I recommend that Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, United States Army, be presented the distinguished-service medal for exceptionally meritorious service to the Government as acting head of the Judge Advocate General's Department during this war.

2. Gen. Ansell's services have been, in my judgment, preeminently of the kind that the statute contemplates thus to be awarded. His duties have been of fundamental importance and great responsibility, and he has shown himself exceptionally qualified in the performance of them. His legal ability, his general qualifications and attainments, his personality, energy, and capacity for scientific organization and vigorous administration, his judgment and prevision, enabled him at the outset to appreciate and encompass the legal duties involved in the raising, maintenance, and administration of a vast military

establishment, and to organize the department for the proper performance of those duties. Those same qualities have enabled him at all times to perform them in a way that has appreciably contributed to victory.

3. His hundreds, even thousands, of thoughtful opinions on the records of the department show that he has been a powerful instrument in aiding in the organization of the new establishment within the law, in keeping it within its proper relation to civil instructions and the law of the land, in conforming military administration to the requirements of law, and in maintaining law and justice within the Army. This he has done without placing impediments in the way of rightful administration, but instead, such administration has been given legal direction and effectual impulse.

4. His leading opinions have enunciated many great principles of law fundamental to military administration, a few of which are those which had to do with—

(*a*) The conclusiveness, as against judicial inquiry, of the legislatively established administrative methods of the selective-service system.

(*b*) Military jurisdiction over the civil personnel auxiliary to military activities.

(*c*) Restriction of the rule against the redelegation of power as necessitated by modern military administration.

(*d*) The general adjustment of peace-time legislation to war conditions.

(*e*) Unification of variant and sporadic legislation, and adapting the whole to a single organizational system.

(*f*) Military unity—"there is but one Army, the Army of the United States, of which the variously designated forces are but components."

(*g*) The modern legal concept, that courts-martial are tribunals for the trial of conduct as crime in violation of the general law of the land, and not only in its military aspect, requires that the Articles of War be construed with more and more regard to the Constitutional principles governing criminal prosecutions.

5. In view of the above, I recommend the award of the medal.

E. H. CROWDER,
Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, January 18, 1919.

Memorandum to The Adjutant General of the Army:
Subject: Recommendation for award of distinguished-service medal to Brig. Gen. Samuel T. Ansell.

1. The above officer having been awarded the distinguished-service medal prior to receipt of the attached communication, the letter is returned to you for file.

HENRY JERVEY,
Major General, General Staff, Asst. to the Chief of Staff, Director of Operations.
By P. P. BISHOP,
Brigadier General, General Staff, Chief, Personnel Branch, General Staff.

EXHIBIT 154.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, March 24, 1919.

From: Col. B. A. Read.
To: The Inspector General of the Army.
Subject: Present organization of the Military Justice Division of the Office of the Judge Advocate General.

1. The Military Justice Division passes upon questions that arise in the administration of justice by courts-martial, courts of inquiry, and military commissions and the reviews of all records of trial by general courts-martial. Its duties include the preparation of reports upon application of clemency; the solution of problems relating to the disciplinary barracks and the government

of military prisons, and all matters having to do with the discipline of the Army, in so far as it involves the administration of the office of the Judge Advocate General.

2. This division is divided into eight main sections, as follows:

(1) A board of review consisting of two sections, whose duties are in the nature of those of an appellate tribunal. The board of review, under the general direction of the head of this department and the chief of this division, reviews all proceedings and all general courts-martial received in this office which are reviewed in writing. The preliminary review of any such case, after having been prepared by the officer to whom the record has been assigned and after it has been reviewed and passed upon by the chief of his section, is transmitted to the proper section of the board of review, and thereupon the members of this section of the board consider the preliminary review jointly and concurrently in the manner similar to that employed by appellate tribunals in rendering their decisions. The board of review may modify or rewrite such review or may direct that it be modified or rewritten so as to express their views.

The first section of the board of review reviews all cases of officers who are dismissed from the service and all cases where the sentence of the court is death.

The second section of the board of review reviews all cases of officers not involving dismissal and cases where the sentence is to a penitentiary, and such cases as may be sent to it from the Disciplinary Barracks section, or the retained in service section, where a written review is prepared. In the present press of work this section of the board is also reviewing certain cases involving the death penalty and the dismissal of officers.

(2) *Opinions section.*—This section drafts opinions and prepares indorsements and memoranda on such miscellaneous questions as may be assigned to it by the head of the division; drafts charges against alleged offenders in special instances and examines and revises reviews of general courts-martial records on trials of conscientious objectors, written by other officers of the division.

(3) *Dismissals and capital sentences section.*—The officers of this section examine records and write reviews of such records in all trials by general courts-martial with sentences imposing dismissal, or dismissal and confinement of an officer, or death of a soldier, officer or other person subject to military law. When an officer in this division has examined the record and prepared his written review thereof, it is examined and reviewed by the chief of the section, who, if he does not agree therewith or for any reason may desire further consideration of the matter in the section, may assign the record to a third officer for his examination and review.

(4) *Penitentiary sentences and officers' cases not involving dismissal section.*—The officers of this section examine and prepare written reviews of all trials by general courts-martial, which have resulted in sentences imposing confinement in the penitentiary or punishment of officers not involving dismissal, and the procedure is similar to that had in the dismissal and capital sentences section.

(5) *Disciplinary barracks sentences section.*—The officers of this section review the records of trial by general courts-martial resulting in sentences imposing dishonorable discharge and confinement in the disciplinary barracks or in any of its branches. These records are carefully checked to see that they are legally sufficient, and if so found they are sent to the record room for filing. If, however, for any reason substantial legal error appears in the record, a review is written thereon and the procedure thereafter is similar to that in the dismissal and capital sentences section.

(6) *Retained in service sentences section.*—The officers of the section examine and review the records of general courts-martial where the sentences provide for the retention of the accused in the service, including sentences with suspension of dishonorable discharge. The procedure in this section is similar to that had in the disciplinary barracks sentences section.

(7) *Clemency and restoration section.*—The officers of this section consider all appeals by prisoners, their relatives, or friends for clemency or restoration to the colors and prepare in writing for the head of the division their recommendations upon such appeals. In preparing these recommendations, mitigating circumstances in the commission of the offense, the good conduct of the prisoner prior and subsequent to the offense; his mental or physical deficiency, and other similar matters are weighed and considered. This section also considers recommendations for clemency referred to it my officers of other

he Military Justice Division, who, in reviewing a case as to its
eve it to be a proper case for the exercise of clemency.
tical section.—The duties of this section are to record and tabulate
cal information regarding the administration of military justice
le the head of the department to prepare his annual report to
y of War, and to enable him to obtain at any time the state of
the Army as shown by the court-martial records.
tion to the main sections above enumerated, this division main-
d room in which are filed all records of trials by general courts-

sonnel of the Military Justice Division as at present constituted is

of division: One colonel with one captain and one first lieutenant

l of review: Three lieutenant colonels with one major as an as-

ard of review: Three majors with one first lieutenant as an as-

ection: One lieutenant colonel, three majors, and one second lieu-

and capital sentences section: Five majors.
y sentence and officers' cases not involving dismissal section:

y barracks sentences section: Seven majors, two captains, and two
nts.
n service section: Eight majors, five captains, and four first lieu-

section: One major, two first lieutenants, and a number of civilian
ants.
and restoration section: One major, two captains, and two first

B. A. READ,
Colonel, Judge Advocate.

EXHIBIT 155.

APRIL 2, 1919.

1 for Col. Patterson, Inspector General.
ing judge advocate generals or senior assistants from January 1,
917, to date.

judge advocate generals or senior assistants from January 1, 1917,
been as follows:
A. Bethel, senior assistant from January 1 to May 16, 1917, when
the Secretary of War to report to The Adjutant General of the
ed for field service. He was assigned to duty as judge advocate,
peditionary Forces, by verbal orders of the Secretary of War.
Winship, senior assistant, from May 16, 1917, when he succeeded
ethel, until August 29, 1917, when he was ordered to the Forty-
ion at Camp Mills, Long Island, by Special Orders, No. 201, para-
ar Department, August 29, 1917.
T. Ansell, senior assistant from August 29, 1917, to April 20, 1918.
ember 9, 1917, Order No. 201, confirming action of S. T. Ansell as
e Advocate General. November 19, 1917, letter from Secretary
nced that he had directed the Chief of Staff to revoke this order
ction.)
J. Mayes, senior assistant from April 20, 1918, to July 15, 1918,
period of Gen. Ansell's absence in France.
T. Ansell, senior assistant from July 15, 1918, to the time of demo-
e of lieutenant colonel, effective March 10, 1919.
W. Call, senior assistant from March 10, 1919, to March 14, 1919.
Kreger arrived from France.
l A. Kreger, Acting Judge Advocate General from March 15, 1919.
ported per Special Order 57-O paragraph 38, War Department,
h 10, 1919, assigning him as Acting Judge Advocate General on
United States.

8. The above information is as accurate as to dates as it is possible to obtain from the files of this office.

By direction of the Acting Judge Advocate General.

WM. S. WEEKS,
Colonel, Judge Advocate, Executive Officer.

EXHIBIT 156.

FEBRUARY 19, 1918.

Memorandum for Capt. K. S. Wallace, War College.
Subject: The Judge Advocate General's Department of the Army.

1. In compliance with the request from your office for a brief statement showing the history and conduct of this department, Gen. S. T. Ansell has hurriedly dictated the following memorandum, which is furnished you for such use as you may see fit to make of it:

This department is older than the Government, having been established during the War of the Revolution. Its duties have grown immeasurably, both in scope and volume, and its personnel has increased from that of a single officer in the beginning to its present proportions. Before the existing war was declared the department consisted of one Judge Advocate General and 12 other officers, a force which was sufficient to administer to the small establishment then existing, but with the creation of the new Army the volume of work has increased more than proportionally with the increase in the Army itself. Today the commissioned personnel of the department approximates 200.

The duties of this department are little understood, even in the Army. It is ordinarily conceived to be simply the law department of the Army. It is that, and much more. The title itself is significant and is indicative of the quasi-judicial character of the duties of this office. Those duties may be divided into three classes: The department is adviser and counselor of the Army as an institution of government, and of all the individuals thereof, from the Secretary of War to the most recently joined recruit; it is also in a very real sense the judge of their official conduct; lastly, and of very great importance, it must see that justice under law is done each individual of the Army in the maintenance of discipline.

The department itself consists of the office of the Judge Advocate General, which is a bureau of the War Department at Washington, and all the officers belonging to the Judge Advocate General's Department on field duty attached as judge advocates to the various field commands. Each commanding general of a division or department or larger organization has upon his staff a judge advocate who performs in the first instance for that command the duties which will be described herein as those for the department in general; but such field work is ultimately and finally revised in the office of the Judge Advocate General.

The personnel of the office at Washington consists of a Judge Advocate General with the rank of major general, 1 assistant with the rank of brigadier general, and 20 other assistants of lower grades. Immediately upon the outbreak of war the bureau was reorganized for the purpose of meeting the war demands into the following divisions and duties:

1. The executive division, the function of which is the superntendence of the general administration of the bureau. Its chief must have an intimate knowledge of the working of all the divisions, that he may advise the head of the office regarding them.

2. Military justice, which attends to the review of records of courts-martial, renders reports upon applications for clemency, addresses itself to the problems of the disciplinary barracks and military prison, and all matters having to do with the discipline of the Army.

3. War law. The duty of this division is to collect all war laws and decisions affecting or of interest to our establishment and distribute so much of such matter to judge advocates in the field as would be helpful to them.

4. Titles, accounts, claims, and fiscal affairs: The duties of this division will be to give consideration to accounts, claims, expenditures, disbursements of fiscal affairs in general; contracts, leases, and questions of military reservations and public property.

5. Constitutional law: This division has to do with the consideration of the questions falling under these two special branches of the law, including the law of war.

6. Legislative drafting: The duty of this division is to keep in touch with all pending legislation in Congress and draft all legislation proposed by the department and all regulations and orders submitted to the office.

7. General administration division, which gives attention to the numerous miscellaneous questions arising in the administration of the War Department in the Army, which do not fall specifically within the duties of any other division.

8. Civil administration division: The officer in charge of this division is counsel for the Bureau of Insular Affairs, the Philippine Government, and the Government of Porto Rico. It is the duty of the division to give consideration to all legal questions submitted by the Insular Bureau and involving insular questions and to all questions arising under the civil jurisdiction of the War Department, including river and harbor administration, reservations, and all litigation in the department, the Army, or any of its officers.

9. Personnel and property division: This division is charged with the funds, records, supplies, property, and clerical force of the office and routine business of the bureau.

Each of these divisions, except the one last named, is presided over by a senior commissioned officer who is aided by the necessary number of assistants.

An idea of the great growth of the work to be performed by this bureau may be fairly indicated by comparing the present conditions with those obtaining immediately before the war. Then there were 13 officers in the department; now there are nearly 200. Then there were in the bureau at Washington 4 officers; there are now 30 officers. Then the Army consisted of less than 100,000; now of 1,500,000. The annual appropriation and expenditures which was then in the millions, to-day reaches into the billions. The volume of work of this department is easily 10 times more than it was before war began. The war has given rise to questions involving a sui generis nature. These questions grow out of an exercise of war power, and give rise to questions which few, if any, ever contemplated; and in this field there are few judicial decisions to guide us. Military activity has now touched every other activity in the land. Neither the legal phase of this contact nor the formula for guiding it are clear. Persons and property are subject to jurisdiction which, in this country at least, is not well defined or understood. Fundamental rights are involved; military jurisdiction is to be exercised with care and caution; yet, with cautious regard which must be exercised with certainty and sureness. This office has called to its aid some of the most distinguished lawyers of the country. They are continuously engaged, not only in the usual opinion writing, but they must stand ready day and night to administer what, by proper analogy, may be termed first aid to the legally wounded. Scores of requests for advise of counsel from the world over reach this office daily and must find response without that time for reflection which should, and normally does, characterize the giving of legal advice.

Not only does this bureau advise and counsel individual members of the Military Establishment in the performance of their duties, but, looked at in the aggregate and in a fundamental way, it is the immediate legal agency whereby the Military Establishment itself is kept subordinate to the civil principles of government and all of its activities kept conformable to the law of the land. The above indicates in a general way the duties of this bureau as the legal department of the Army.

But it is as a bureau of military justice that the functions of the department touch personally and individually each offense and enlisted man of the establishment. The rights, duties, and obligations of all military persons are established and regulated by a military code consisting of both written and unwritten law. A member of the establishment is required to conform not only to this special code, but also to the general law of the land, and such conformity may in a general way be designated as discipline. Discipline is maintained in the last analysis by the exertion of military power through regularly established military tribunals which function in accordance with a penal code, technically known as the Articles of War. This code is enacted by Congress under its power to make rules and regulations for the government of the Army. An offender against it is charged, arrested, tried, sentenced and punished in strict accord with the articles. The code is a complete code of penal law, both substantive and adjective. Discipline must be maintained in strict accordance with the code, and with justice.

The proce[illegible] of every case tried by court-martial must be accurately and completely r[illegible]d and forwarded to the office of the Judge Advocate General for review, [illegible] hat authority makes necessary revision in order that justice may be done [illegible]ry accused man. All human tribunals are imperfect and especially i[illegible]ct will be the military tribunals of our newly created Army. The officers [illegible]luting the court have not been experienced in the school of war and in military law, but have only recently come from civil life. Besides, this is the first democratic Army that America has ever raised. Its members come from the fields and factories; from every class of society, and from every walk of life. Both officers and men alike are unnured to military methods and requirements. The spirit of such an army is bound to be of the highest quality, notwithstanding there will be abundant opportunity for the exercise of authority upon the part of those who have it, and for numerous infractions of discipline upon the part of men who have had no opportunity to acquire the necessary appreciation of discipline. Courts-martial may be expected to be rather frequent and errors in procedure numerous. The review enjoined by law to be carried out in the office of the Judge Advocate General must be made with all the more cautious regard for the rights of individuals so strangely circumstanced in a [illegible]ion. This the people will demand; this in justice to the Army and [illegible]duals thereof this office must do; and this this office is equipped to d[illegible]

R. K. SPILLER,
[illegible] and Colonel, Judge Advocate,
[illegible] to the Judge Advocate General.

[illegible]7.

[illegible]

WAR DEPARTMENT,
O[illegible]E OF THE INSPECTOR GENERAL,
[illegible]ashington, D. C., March 17, 1919.

No. 369—Confidential.
To: Biddle.

Reference to Gen. Ansell's memorandum of November 6, 1917, and General Order of November 8, assigning him to duty as Acting Judge Advocate General, and subsequent cancellation of that order, request following information by cable: Was memorandum presented to you by him in person and what statements, if any, were made to you which caused you to direct the issuance of this order without reference to the Secretary of War.

J. L. CHAMBERLAIN,
Inspector General.

EXHIBIT 158.

[Cablegram.]

MARCH 22, 1919.

No. 2263—Confidential.
From: Headquarters American Expeditionary Forces.
To: The Adjutant General, Washington.

Reference confidential cablegram 369, transmitted to these headquarters from London on March 18, was referred to Maj. Gen. John Biddle. His reply is as follows:

"My recollection is that memorandum was presented to me by Ansell in person after having been shown Secretary of War. I do not remember the details of conversation with him, but was directed by Secretary of War to publish the order. After a few days it was found that order did not give satisfactory results and cancellation was desired. I am certain that all action taken by me was with the knowledge of Maj. Gen. Enoch H. Crowder and by direction of Secretary of War. I do not remember discussing the memorandum with Maj. Gen. Enoch H. Crowder, but clearly understood it had his sanction. I recollect positively that I discussed the cancellation with him. Without having the memorandum at hand it is hard to recall all circumstances. Biddle."

PERSHING.

EXHIBIT 159.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 13, 1918.

Memorandum for Col. Read:
Subject: Designation of place of confinement under long-term sentences.

1. Col. Davis has prepared a separate memorandum for Gen. Ansell, dated August 1, 1918, on the subject of "Designation of the place of confinement by the reviewing authority," which you have referred to me for examination and comment.

2. In it he withholds concurrence, in an accompanying joint memorandum of the same date for Gen Ansell, upon the subject of confinement of general prisoners in France, saying: "I do not concede that this office was not advised of what was, in effect, a change in the provisions of the manual with respect to the designation of the Disciplinary Barracks as the place of confinement. On the contrary, this office originated and suggested the change."

The memorandum then reviews the course of some suggestions and recommendations originating in this office respecting sentences for long terms of confinement, particularly, in regard to an accompanying dishonorable discharge; and which resulted in the following confidential instructions to the service by direction of the Secretary of War on December 22, 1917:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the Disciplinary Barracks. When the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

It will be observed (1) the instructions make no discrimination between general prisoners in France and in this country, and (2) it is only "when a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement," that "the reviewing authority should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs." The instructions do not contain anything to indicate a change in the policy of the War Department that general prisoners, under sentences of long terms of confinement, should be confined either in the penitentiary or in the Disciplinary Barracks. On the contrary, paragraph (*b*) expressly provides that this course be followed.

The question giving most concern is what shall be deemed a "long period of confinement." It may be conceded that the instructions contemplated a longer term than the period of six months provided for in the manual; and it may also be assumed that it was intended to allow some discretion to division and other commanders in the matter of determining, in particular cases, what should constitute the long period of confinement required to send a general prisoner to a penitentiary or to the Disciplinary Barracks. The memorandum in reference calls attention to a letter from this office to the judge advocate of the Eastern Department, under date of February 11, 1908, which, while "declining to express an opinion as to the proper duration of this term * * *," said, referring to a suggestion that one year be fixed as the period, if "you have erred in either direction, the term as fixed by you is too short, in the opinion of this office, rather than too long." This letter was written by Col. Davis, signed by Gen. Crowder, and a copy sent February 16, 1918, to all department and division judge advocates. From it an inference may be drawn that the interpretation (therein) by this office of the instructions of December, 1917, was that reviewing authorities were given discretion as to the places of confinement to be

designated for prisoners under sentence of dishonorable discharge with periods of confinement of as much as one year; and to that extent, at least, the requirements of paragraphs 397 and 398 of the Manual for Courts-Martial, 1917, were modified by the instructions of December, 1917, above referred to.

What has been said above, however, affords little assistance in determining what course should be pursued in regard to sentences that include dishonorable discharge and full forfeiture, with terms of confinement of from three to five years, such as were involved in the French cases that brought up the present question.

The French cases, may, however, be laid aside, conceding that the cablegram to Gen. Pershing, April 6, 1918, referred to in the papers in reference, made an exception as to those cases and gave to the reviewing officers in Europe an unlimited discretion to retain for punishment prisoners tried and convicted there, regardless of the length of the periods of confinement. It may be observed, however, that the memorandum in reference points to no record evidence that this office was advised of the contents of that cablegram prior to the time of the present investigations, and the fact that it was deemed necessary by Gen. Pershing to ask for, and by the War Department to issue, this special authority as to prisoners in France, would show that the previous policy of the War Department, as reflected in the provisions of the Manual and in the instructions of December 22, 1917, did not authorize the action desired to be taken in France in respect of general prisoners there. Paragraph (*b*) of the confidential instructions of December 22, 1917, requires that prisoners under sentence of dishonorable discharge, accompanied with a long term of confinement, be confined "in the penitentiary or in the disciplinary braracks"; while the cablegram to Gen. Pershing authorized that such prisoners who would otherwise be confined in disciplinary barracks be retained in Europe.

It may be that this authorization was pursuant to the general policy first suggested by this office, yet that fact does not carry with it the imputation of knowledge to this office that pursuant to that policy this special provision had been authorized as to general prisoners in France. It will further be observed that the cablegram to Gen. Pershing was expressly limited in its application to prisoners in France "who would otherwise be confined in the disciplinary barracks." As is clear from its terms the language used carries the inference that such prisoners in this country should be sent to the disciplinary barracks, and brings us back to what is really the question to be definitely determined, which is: what constitutes such a "long period of confinement" accompanied with dishonorable discharge as to require the sending of prisoners in this country to the disciplinary barracks and depriving the reviewing authority of the discretion to retain such prisoners for confinement and punishment at a post, station, or camp. In support of the contention advanced in the memorandum in reference that the instructions of December 22, 1917, suspended for the period of the war the provisions of the Manual requiring confinement in the disciplinary barracks in all cases where the sentence imposed exceeded six months, reference is made to the letter of February 11, 1918, which scarcely goes further than to say that reviewing authorities were thereby given an enlarged discretion in the matter, and that a period of one year is too short to be regarded as a "long term period of confinement." What, then, as to a period of, say, five years, imposed upon a soldier in this country, with full forfeitures and dishonorable discharge? Shall he be kept at a post guardhouse, without even his allowances to take care of pressing needs?

On January 17, 1918, the following letter to the judge advocate of the Southern Department, was written by Col. Davis, signed by Gen. Crowder, and a copy sent to the judge advocate of each general court-martial jurisdiction:

"1. I am just in receipt of your letter of the 10th instant, in which you discuss the above subject, apparently upon the assumption that, under recent instructions from the War Department, soldiers serving sentences of confinement, but retained with their organizations, are intended to be kept in post or camp guardhouses, under the old custom and be thus removed from military training and discipline during the time they are undergoing sentence. Nothing could be further from the fact as I understand it. It is my understanding that the instructions referred to contemplate that a soldier sentenced to serve punishment shall be required to attend drills and to perform military duty generally, in so far as this is considered safe and advisable, and that the hard labor feature of the sentence shall be applied during hours when other soldiers are off duty, thus insuring that military punishment will

not result in a relaxation of discipline or a cessation of military training. The very purpose, I might add, of these instructions is to provide that enlisted men undergoing punishment shall be held with the colors and their training for service be made continuous, in order that the man-power involved may be saved to the country and not be frittered away through confinement and detachment from training and service, except in cases where offenders are of that character that they have not within them the capacity for efficient military service, or their offenses involve such a measure of moral turpitude that imprisonment at hard labor for a long period is the only adequate punishment."

The policy outlined in this letter, if consistently carried out, would remove some of the objections to the service in garrison prisons of sentences in excess of six months, but with the execution of this policy, should go the saving to the prisoner of at least some part of his pay or allowances to meet those personal needs but which are not provided for at his station, as is the case with prisoners in a penitentiary or the disciplinary barracks.

3. Soon after I came on duty, in May, 1918, observing that some reviewing authorities were not respecting the provisions of the Manual in regard to the class of cases under consideration, I brought the matter to the attention of Lieut. Col. Spiller and asked for instructions, and was directed to hold the cases under consideration; and, pending this, was directed later to make a draft of a memorandum to The Adjutant General, drawing attention to the question raised by these records, and asking for instructions from the War Department. This I did, and the memorandum redrafted by Maj. E. M. Morgan, was under date of June 18, 1918, sent to The Adjutant General (J. A. G. O., 250.3—Place of confinement). A copy of that memorandum, together with a copy of the only acknowledgment and reply from the office of The Adjutant General, dated June 21, 1918, is hereto attached. Shortly thereafter I was instructed by Lieut. Col. Spiller, and have more recently been explicitly directed by Col. Mayes, to apply the provisions of the Manual to the class of cases in question, and also to apply in the review of such cases in this office, the general limitations of Article III of the Executive Order of December 15, 1916, Manual for Courts-Martial, page 167, it being recognized that, while these general limitations are not legally binding upon reviewing authorities, they reflect the policy of the War Department, in respect of the matters set out therein. This course has been followed for the past month, in reviewing the "retained in service" records that have come to Room 597, and it may be pertinent to note that, until these provisions of the Manual were applied to the cases from France, none was returned from The Adjutant General's Office with an indorsement showing declination to concur in the recommendations of this office. From this course of action it may be inferred that the requirements in the Manual reflected the policy which the War Department desired should be observed by this office.

More recently there have been returned from the office of The Adjutant General to this office for further comment, two cases which that office had pursuant to recommendations from this office, referred to commanding generals "for the necessary action," and which were returned by them, with indorsements inviting attention to the facts of the particular case and requesting further instructions. In one of these cases, C. M. No. 115350—Floyd—Confinement "at hard labor for two years and forfeiture of two-thirds pay per month for a like period" was imposed and ordered to "be executed at the station of his command." This office recommended "that so much of the sentence * * * as is in excess of six months and forfeiture of pay as imposed for a like period be remitted." The commanding general, in returning the record for further instructions, quoted from the letter from this office of July 11, 1918, the paragraph which expressed the opinion that one year should be considered too short for periods of long confinement, from which, this particular commanding officer concluded, that the two-year terms imposed, in the cases referred to "meets the requirements of the above quoted paragraph."

In the other case, so returned, C. M. 117138—Carter, a sentence of "confinement for six months and reduction to ranks" was imposed and the station of his command designated as the place of confinement. This office recommended that, because of the failure to include hard labor and some forfeiture of pay in the sentence, "the unexecuted portion of the sentence imposed in this case in excess of the reduction to ranks, be remitted." The indorsement of the commanding general called attention to the thirty-seventh article of war giving him authority "to require hard labor as part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishment," not-

withstanding the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement, and further called attention to the particular facts of the case showing allotments and extenuating circumstances tending to justify the failure of the court to impose any forfeiture of pay.

A letter to this office from the division judge advocate of the Thirty-first Division, dated August 5, 1918, directs attention to the recommendation of this office, in the case of Pvt. Roscoe Floyd, C. M. No. 115350, above referred to, to the letter of February 11, 1918, and states that after conference with the "commanding general" two years has been fixed as the time which should constitute a "long period of confinement," and that between February 11 and June 22, 1918, 31 cases had been forwarded from his office to this office where the period of confinement was in excess of six months, that 12 additional such cases had been so forwarded since June 22, 1918, that his office holds 10 more such cases awaiting reply from letter of the commanding general to The Adjutant General of the Army, dated July 20, 1918, and concludes with the inquiries (*a*), "Is it the policy of the War Department that dishonorable discharge should accompany all sentences of more than six months?" * * * and (*b*), "In the 10 cases now held in this office should that portion of each sentence in excess of six months be remitted before the records are forwarded to Washington?"

The perplexity which confronts the judge advocate of the Thirty-first Division, and the course taken by the two cases returned to this office last above referred to, illustrate the importance of having reduced to definite form the requirements and policies that the War Department desires to be observed both by courts-martial and by the Judge Advocate General's Department; as well as of having those requirements together with a statement of such policies specified in the Manual for Courts-Martial and so insure their systematic and permanent distribution to the rapidly expanding forces of the Army.

The records of trials coming to this office show a steadily increasing divergence from anything approaching uniformity in the apprehension or interpretation of the instructions from the office of The Adjutant General or from this office, and some of these records disclose that the courts trying the cases apparently did not know of the instructions or orders effecting the changes in the Manual for Courts-Martial.

It will be noted that the memorandum of June 18, 1918, from this office, for the Adjutant General, citing the requirements of section 397 of the Manual for Courts-Martial that confinement be executed in a disciplinary barracks, or one of its branches, in cases where confinement for six months or more is imposed, and, where the confinement is not to be executed in a penitentiary, states: "This office knows of no instruction of the War Department modifying this requirement." That memorandum of June 18, 1918, made no reference to the confidential instruction of December 22, 1917, for which failure I was responsible, and the memorandum in reference of August 1, 1918, makes no reference to the memorandum of June 18, 1918, nor to the reply thereto from the office of The Adjutant General dated June 21, 1918.

The memorandum of June 18, 1918, referred to some suggestions made and considered for modifications of the requirements of section 397, and suggested that the end in view "might be accomplished by announcing to the service, through amendments to paragraphs 340 and 397 of the manual, the course to be followed was thus clearly indicated that it was the view of this office that such changes, if made, should be put into effect through amendment of the manual." The memorandum concluded with a request that this office "be advised whether the War Department has formulated, or has in contemplation, the formulation of any policy with reference to the above matter, and whether compliance with the requirements of section 397, Manual for Courts-Martial, is to be insisted upon. This information is necessary to enable officers reviewing records of trial in courts-martial cases to properly dispose of cases of the class above mentioned." In the reply from The Adjutant General of June 21, 1918, this office was informed: "No statement can be made at this time as to the future policy of the War Department with respect to the designation of places of confinement of general prisoners."

4. In July, 1918, there was referred to this office, from the office of the Adjutant General, an inquiry from the commandant of the United States Disciplinary Barracks, Fort Leavenworth, Kans., requesting information as to

tion should be made by him of a soldier sentenced to be confined r for one year and six months and to forfeit all pay and allow- to become due, without dishonorable discharge, where the United plinary Barracks, Fort Leavenworth, Kans., had been desig- : reviewing authority as the place of confinement. The indorse- ly from this office, written by Lieut. Col. Weeks and signed by referred to paragraphs 397 and 398, Manual for Courts-Martial, pressed, "The opinion of this office that prisoners not sentenced ble discharge should be held with their organization * * *." ection it should be noted that, in the opinion of this office, a olving confinement at hard labor for more than six months should ed, unless accompanied by some forfeiture of pay." In conclusion, was expressed that there was no objection to granting the com- nited States Disciplinary Barracks, the authority requested, to ldier and other such soldiers under sentence without dishonorable the stations of their commands for confinement. (J. A. G. O., 8, 253 Miscl.)

ecutive order of December 15, 1916, prescribing the maximum e of peace of punishment of soldiers, has been held by this office ative in time of war, except as to Articles V and VIII thereof. is given in a letter from this office to the judge advocate of the Division, Camp Meade, Md., dated February 20, 1918. (J. A. In that letter it was said:

d question in your communication is, which articles of the Execu- December 15, 1916, are now operative? You are advised that 8 are operative and that the other articles are inoperative. The e War Department in this regard is stated in the following tele- vent out on June 20, or June 21, 1917:

NG GENERAL SOUTHERN DEPARTMENT,
t Sam Houston, Tex.

5 and 8, Executive order, remain effective, but except for these utive order ceased to be effective upon declaration of war.

"'McCAIN.'"

ticle III, defining the general limitations of sentences, is not now ng upon courts-martial or reviewing authorities, but if it is sug- hese general limitations, as set out in this article, do not reflect the War Department, as carried into execution through the exer- uthority of remission, it is highly desirable that some definite the general limitations to be observed in respect of the matters his article, should be formulated for application by this office, in f records of trial by general courts-martial unless the War De- sired to allow to reviewing authorities an unfettered discretion d. The course last mentioned would not tend to uniformity in ration of justice in the Army courts.

my appropriation bill, approved July 9, 1918, amended the fifty- fty-third articles of war, "so that the authority competent to order of the sentence of a court-martial may, at the time of approval of es suspend the execution, in whole or in part, of any such sentence extend to death, and may restore the person, under sentence, to such suspension, a sentence, or any part thereof may be remitted, in part, except in cases of persons confined in the United States Barracks, or its branches, by the officer who suspended the same, ssor in office, or by any officer exercising appropriate court-martial over the command in which the person under sentence may be he time, and, subject to the said exceptions, the same authority the order of suspension at any time and order the execution of , or the suspended part thereof, in so far as the same shall not reviously remitted." It will be observed that this amendment very ges the discretion and power of commanding officers in the matter ol of the execution of sentences, and may be taken to reflect a cy of allowing a larger discretion to such officers in respect of ad- punishments. Nevertheless, it appears wise, as a matter of policy interests of uniformity, to prescribe some limits for such discre- is highly important that any such limitations or other changes in ns of the Manual for Courts-Martial should be made specifically

as changes in the manual and promulgated as such, in order that they may have the widest possible systematic distribution to the service in a readily and permanently accessible form, thus keeping the manual complete, as far as practicable, as a guide for military officers and tribunals.

7. Sunmarizing, it is found that on November 29, 1916, the War Department promulgated the Manual for Courts-Martial for the information and guidance of all concerned, the provisions of this manual being ordered effective on and after March 1, 1917. The declaration of war in April, 1917, rendered inoperative, until the return of peace, the maximum limitations of punishment set out in the Executive order of December 15, 1916, and published in the manual; but Articles V and VIII of the said Executive order remained in full effect while Article III, general limitations, has been observed as reflecting a policy of the War Department until changed.

On December 22, 1917, confidential instructions were issued to the service, by direction of the Secretary of War, for the purpose of discouraging the awarding of dishonorable discharges where the offender has within hinf the capacity for military service, but provided that a sentence of dishonorable discharge should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks; and when a sentence of dishonorable discharge is unaccompanied by a long period of confinement, the dishonorable discharge should be suspended or remitted, and the offender held for service and punishment with his organization. It has been inferred from the language used in these instructions that the period of six months, contemplated by section 397 of the Manual for Courts-Martial, 1917, as the minimum long-termf period that should be accompanied by dishonorable discharge, was intended to be lengthened; but no authoritative statement has come from the War Department indicating what shall be considered a long period of confinement within the intendment of the confidential instructions. A letter from the office of the Judge Advocate General, dated February 11, 1918, declines to give an opinion as to what should be considered such a long period of confinement except to say that one year is too short rather than too long for such a period. These confidential instructions have been interpreted by some commanders and others to change by inference the requirements of the manual and the custom of the service that general prisoners, having terms in excess of six months, should not be required to serve them at a post, station, or camp.

On June 18, 1918, this office addressed a memorandum to the Adjutant General, requesting instructions as to the policy that the War Department might wish to be followed in the review of records in respect to the place of confinement, and was advised, under date of June 21, 1918, by the office of The Adjutant General of the Army, that "no statement can be made at this time as to the future policy of the War Department with respect to the designation of places of confinement of general prisoners."

The present state of the law and procedure in the cases under consideration appears to be, having due regard to the Manual for Courts-Martial and the ruling of this office, that the provisions of the former and the customs of the service not in conflict therewith, are to be observed except (*a*) as to prisoners in France by the terms of the cablegram of April 6, 1918, to Gen. Pershing—"all prisoners who would otherwise be confined in disciplinary barracks (may) be retained in Europe." (*b*) By the terms of the confidential instructions the provisions of paragraph 397 of the Manual for Courts-Martial, 1917, conflicting therewith, only sentences of dishonorable discharge accompanied with a long period of confinement not to be served in a penitentiary, may, and should, be served in the disciplinary barracks, except as to prisoners in Europe.

The opinion of this office, as reflected in the letter of February 11, 1918, is that a term of confinement must be in excess of one year to warrant its being regarded as a "long period of confinement."

(*c*) The Executive order of December 15, 1917, is not in force in time of war except as to Articles V and VIII thereof, and except that the general limitations set out in Article III thereof, while not mandatory in time of war, may be observed as reflecting a policy of the War Department, as may also the custom of the service that a sentence involving confinement for more than one month should not be approved unless accompanied by some forfeiture of pay which may also be gathered from the acceptance by the War Department of the recommendations from this office made in the light of the general limitations and custom referred to.

8. The suggested changes in the Manual for Courts-Martial would involve changes in paragraph 311 thereof, as changed January 31, 1918 (C. M. C. M. No. 3, Jan. 31, 1918), and in paragraph 397.

If paragraph 311 is to be changed, it is suggested that it be also so changed in the matter of forfeitures affecting allotments as to conform to the comptroller's decision of April 23, 1918, in respect thereto.

If such changes are to be made it is suggested that the following forms be considered:

Paragraph 311, and the note thereto, to be as follows:

"311. Sentences for soldiers.—For soldiers, the legal sentences, depending on the nature of the offense and the jurisdiction of the court, include death, dishonorable discharge, confinement at hard labor, hard labor without confinement, forfeiture of pay, detention of pay, and reprimand; for noncommissioned officers, reduction to the ranks, for privates, first class, reduction to second-class privates and privates; for cooks of the Quartermaster Corps (where sentence is imposed by a general court-martial), reduction to the ranks; and for those holding a certificate of eligibility to promotion, deprivation of all rights and privileges arising from such a certificate. That portion of pay which is required to be allotted to dependent relatives of class A under the provisions of Article II of the war-risk insurance act of October 6, 1917, and that portion allotted to dependents of class B under the same act, Liberty loan allotments, and premiums on war-risk insurance are not subject to be forfeited by sentence of courts-martial. A sentence imposing forfeiture of a part of pay means the forfeiture of the specified part of that portion of the pay which is not so allotted.

"NOTE.—1. Confinement without hard labor should never be imposed.

"2. Sentences involving confinement for more than one month should include some forfeiture of pay.

"3. A sentence that does not include dishonorable discharge should not forfeit allowances and should specify such part of the pay as may be forfeited thereby in proportional parts of such pay per month and not in specified amounts.

"4. No sentence of dishonorable discharge should be imposed (*a*) where the offender has within him the capacity for military service; (*b*) where any other form of punishment is sufficient to meet the requirements of the particular case; (*c*) where the period of confinement is less than 18 months.

"5. A court should not by a single sentence, which does not include dishonorable discharge, adjudge against a soldier:

"(*a*) Forfeiture of pay at a rate greater than two-thirds of his pay per month.

"(*b*) Forfeiture of pay in an amount greater than two-thirds of his pay for 18 months.

"(*c*) Confinement at hard labor for a period greater than 18 months.

"6. A court should not, by a single sentence, adjudge against a soldier:

"(*a*) Detention of pay at a rate greater than two-thirds of his pay per month.

"(*b*) Detention of pay in an amount greater than two-thirds of his pay for six months.

"(*c*) Hard labor without confinement for a period greater than six months.

"7. Where that portion of a sentence that imposes confinement is suspended, or where the portion of a sentence that imposes dishonorable discharge is suspended and the disciplinary barracks is not to be designated as the place of confinement, the portion remaining should be brought within the general limitations above recommended.

"8. Convicted prisoners confined at military posts, stations, camps, or cantonments should be required to attend drills, to perform military duty generally, in so far as is considered safe and advisable, and to perform hard labor during the hours when other soldiers are off duty, to the end that military punishment may not result in a relaxation of discipline nor a cessation of military training.

"9. For forms of sentences see Appendix 9."

Paragraph 397 to be as follows:

"397. When confinement in disciplinary barracks will be directed: The United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, will be designated as the place of confinement of all general prisoners other than residents of Porto Rico, the Canal Zone, Hawaiian Islands, of the Philippine Islands, and other than general prisoners of any American Expeditionary Forces, who are confined for 18 months or more and who are not to be confined in a penitentiary pursuant to the preceding paragraph. From time to time detailed instructions will be issued as to which

of the barracks shall be designated and as to when the prisoners shall be transferred to them."

The adoption of the foregoing and the promulgation thereof as amendments to the manual would tend to make clear what is now in confusion and would supply to the service a uniform guide in terms sufficiently liberal to afford the larger discretion, it is desirable that commanding officers should have in the matters of discipline in their commands, and would at the same time, safeguard the interests of individuals against the caprice or neglect of courts-martial that might, even unthoughtfully, deprive them of such parts of their pay and allowances as are necessary to maintain their self-respect, so long as they shall not have committed offenses warranting their discharge from the service.

The course here suggested would not be out of line with the insistent contention of this office that the man power of the country be conserved through the saving to the service of many soldiers who, under the former practice, would be lost by the too frequent imposition of sentences of dishonorable discharge.

If the service under the confidential instructions of December 22, 1917, is to be released from all restrictions except the individual discretion of reviewing authorities in respect of what should be considered a "long period of confinement," and if the declaration of war has, as it has, rendered inoperative the general limitations of Article III of the Executive order of December 15, 1916, and they are not to be replaced by, at least, some admonitions of the policy of the War Department, in respect of the subject matter of those general limitations, the resulting confusion and lack of uniformity in the result of trials by general courts-martial in the class of cases under consideration will grow beyond all the bounds of an orderly administration of military justice.

On the other hand, it is possible at least to advise, if not to fix except through the power of remission, such limitations upon the discretion given as to hold it within the bounds of wise experience, without depriving it of adaptability to varying conditions in the Army.

9. The rapidly accumulating number of records of cases tried by general courts-martial, reviewed in this office and then laid aside, pending explicit determination and direction from the office of The Adjutant General as to the policy to be observed by this office in making recommendations in the class of cases under consideration, makes it highly important that early consideration be given the questions raised by these records.

10. It is recommended that a memorandum be prepared by this office for The Adjutant General calling attention to the memorandum of June 18, 1918, to the confidential instructions of December 22, 1917, and to the cablegram of April 6, 1918, to Gen. Pershing, referred to, with the request that this office be explicitly advised whether, in reviewing records of trials by general courts-martial, it shall be guided (1) by the requirements of paragraphs 396, 397, and 398 of the Manual for Courts-Martial, 1917, (2) by the general limitations of Article III of the Executive order of December 15, 1916, Manual for Courts-Martial, 1917, page 167, and (3) what different rules, if any, shall be observed in reviewing records of trials had in Europe.

It is also further recommended that such memorandum to The Adjutant General shall, in the interests of clearness and uniformity, include the suggestion that all amendments and orders which effect changes in provisions of the Manual for Courts-Martial, as now written, be carried into the Manual as formal changes thereof, and that they be promulgated as such changes. If deemed advisable, such changes might be limited in operation to the period of the present war.

It is further recommended that such memorandum to The Adjutant General include a suggestion to amend the Manual for Courts-Martial, 1917, as set out in paragraph 8 of this memorandum.

AUBREY E. STRODE.
Major, Judge Advocate.

EXHIBIT 160.

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, August 16, 1918.

Memorandum for Gen. Ansell.

Subject: Questions relating to the administration of military discipline; office policy.

1. Recent changes in the assignment of officers in this and The Adjutant General's Office has developed the fact that our own office has suffered from

a lack of a formulated and expressed policy which should govern in the disposition of cases wherein actions of courts and of reviewing authorities seem to vary in some particulars from the strict requirements of the Manual for Courts-Martial. Doubtless, in the eyes of the service, our office has shown a lack of continuity in its policy and instructions from time to time. This has given rise to confusion and uncertainty, both here and in the field. It is the belief of your committee that this should now be eliminated in so far as possible by an approved statement of the views and policies of this office which may hereafter be intelligently followed by anyone who may hereafter handle the work of the disciplinary division of this office.

2. In order to present this situation clearly to your mind it is necessary briefly to review events leading up to the promulgation of certain confidential instructions to reviewing authorities that were sent out by the direction of the Secretary of War under date of December 22, 1917. In October, 1917, this office began an agitation of the question of the form of punishments which are proper during time of war. On October 18, 1917, you wrote a memorandum for the Chief of Staff in which you invited attention to the fact that under the existing system of punishment a great many men would be withdrawn from actual service and you stated it as your opinion that "the department should now take some means of preventing, or at least controlling, discharges from the service as a result of court-martial punishment."

You stated further that it was your view that "disciplinary or penal battalions ought to be organized under the control of the division commander, and to these penal battalions military offenders should, except, perhaps, in rare instances, be sentenced to serve, and while therein they should be made to serve not only as soldiers but under such conditions as would involve punishment."

You also stated: "Doubtless there are rare instances where men must be taken out of the Army entirely and subjected to long term of imprisonment, but I think they must be rare. As I see it, the department has the responsibility of deciding how it can utilize the services of these soldiers and at the same time keep them within a penal condition."

Under date of November 14, 1917, you signed a memorandum on the same subject which was prepared by your direction in which it was pointed out that the action suggested in your memorandum of October 18, 1918, had been "confused with the plan heretofore suggested, by Maj. King of the Medical Corps, of establishing disciplinary battalions at the various cantonments."

Your memorandum of October 18, 1917, was referred, in connection with other papers bearing upon this subject, including the papers having to do with the establishment of disciplinary battalions in the various divisions, to the War College for study, and a conclusion was reached which served as a basis for a memorandum from the Acting Chief of Staff to The Adjutant General in which it was stated that "the Secretary of War directs that the papers herewith regarding the above matter (disciplinary battalions for divisional camps and cantonments) be filed without further action."

The memorandum from the Acting Chief of Staff then recited that the Secretary of War had directed that certain confidential instructions be given for the information and guidance of all department, division, and organization commanders, general courts-martial, and judge advocates. These instructions are quoted in paragraph 2 of the memorandum of this office under date of November 14, 1917. The purpose of the memorandum of this office under date of November 14 was to secure a reconsideration of the form in which it was proposed to convey these confidential instructions to the service, and it was pointed out that they did not meet the requirements of the case. Among other things this department said:

"Wholly regardless of the advisability of authorizing at this time such construction as may be necessary to take care of prisoners held at division camps and wholly regardless of whether disciplinary battalions, as that term is generally understood, should be organized at this time, the necessity of discontinuing the practice of dishonorably discharging men for light offenses is clearly manifest and calls for quick action. In a great majority of the cases now arising a dishonorable discharge is not only unnecessary but futile and inappropriate. Men sentenced to be dishonorably discharged, who have within them the elements of service, should still be made to serve, and to accomplish this end the dishonorable discharge should be remitted or suspended in their cases and they should be held for training and service with their divisions. Such sentences as it is necessary to impose upon them can ordinarily be worked

out in their commands, and the cases will be few in which it is necessary to remove them from their commands and confine them in a penitentiary or disciplinary barracks."

In the memorandum of November 14, 1917, this office concluded with the recommendation that the confidential instructions to be issued to the service should be in pertinent part as follows:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

These instructions as formulated by this office were promulgated by the Secretary of War under date of December 22, 1917, in the form of confidential instructions to the service. These instructions are in conflict with paragraphs 396, 397, and 398 of the Manual for Courts-Martial. They were interpreted by reviewing authorities to mean that the provisions of the Manual requiring confinement in the disciplinary barracks in all cases where confinement in excess of six months had been approved were suspended for the period of the war. Immediately thereafter reviewing authorities began designating the station of the soldier's command as the place of confinement in all cases where it was believed that the soldier had within him the elements of service and in which it was not believed advisable to impose confinement in a penal institute. The question which gave the service most concern was that which naturally arose as to the meaning to be given to the phrase "a long term of confinement" as used in these instructions. In several cases this office was asked to place an authoritative construction upon these words. It declined to do so on the ground that this was a matter which had been committed to the discretion of department and division commanders.

In a letter to the judge advocate of the Eastern Department, under date of February 11, 1918, this office wrote as follows:

"What shall constitute a 'long period of confinement' within the meaning of that term as used in the instructions referred to? This office has received several requests for an unofficial expression of its views as to the meaning to be attributed to this expression. You state in paragraph 8 of your letter that you have fixed one year as the period. In declining to express an opinion as to the proper duration of this term, this office has remarked that the purpose of these instructions was to place responsibility for discipline as completely as possible in the hands of department and division commanders, subject to the general instructions that dishonorable discharges should be reduced in number and that offenders should be held for service with their organizations and for the continuance of their training in all cases where this was considered possible. Subject to this general plan each department and division commander was intended to be allowed a free exercise of his own ingenuity and discretion in maintaining discipline without an interruption of training. If you have erred in either direction, the term as fixed by you is too short, in the opinion of this office, rather than too long."

3. Under these instructions, as was naturally to be expected, the administration of military discipline was far from uniform. It varied, as was inevitable, according to the widely differing standards and views of reviewing authorities in the matter of securing discipline through the agencies of military courts. Through it all, however, could be observed certain well-defined results. The idea of conserving man power was adopted and the number of cases sent to the disciplinary barracks was very greatly reduced. Buildings which had been erected at Fort Leavenworth to accommodate the expected increase in the popu-

lation of the disciplinary barracks remained unoccupied and the commandant of the branch at Alcatraz reported in May of this year that his barrack population was less than it had been in time of peace. Men having within them the elements of service were held for punishment of offenses committed with the organization to which they belonged and were given to understand that the commission of crime would not result in enabling them to escape the burdens and dangers of war. The resulting lack of uniformity in punishment was no greater than was natural to be expected; and it must be remembered that Congress assumed the responsibility for this lack of uniformity when it failed to confer upon the President the right to prescribe limits of punishment which would be applicable in time of war but allowed, instead, courts-martial to impose punishment in their discretion except in the few cases where the punishment is fixed by statute.

Under the system thus established, as administered in this office, a record of trial by court-martial was reviewed with the sole purpose of determining its legality and not with the idea of attempting to enforce any degree of uniformity on the courts in the sentences which they might impose or upon the action of reviewing authorities in passing upon the same. It was recognized that each convening authority would have his own ideas as to the proper methods of securing discipline and that many novel and perhaps seemingly unjust sentences would result. If, however, the sentences were legal and within the spirit of the confidential instructions set out above, the cases were passed to file. In a case where the status of the soldier's command had been designated for a considerable term of confinement and the man held there for training with his organization while undergoing punishment, it was assumed that in the opinion of the reviewing authority the man had within him the elements of service and that it was unnecessary to send him to a penal institution, and, to that extent, to deplete the man power of the country.

While this policy was in effect Col. Davis, of this committee, was in charge of the disciplinary division of this office and Maj. J. S. Jones was in charge of the corresponding work in the office of The Adjutant General. It happened that Col. Davis and Maj. Jones were relieved from duty at their respective desks at about the same time. Col. Read, who succeeded Col. Davis in this office did not know of these confidential instructions which had governed the policy of this office and apparently Maj. Riley, who succeeded Maj. Jones in The Adjutant General's office did not know of them. Not knowing of these instructions, it was but natural for Col. Read, upon assuming charge of the disciplinary division, to revert to the Manual as his guide, which although in part suspended by these confidential instructions, had not, in fact, been formally amended. Col. Mayes seems also not to have been conversant with the spirit of these confidential instructions for the reason that he directed Col. Read to adhere to the provisions of the Manual, suggesting that if the War Department wanted to amend the same, it should regularly do so. As a result of this changed policy this office began to recommend, in cases where the station of the soldiers' command had been designated as the place of confinement for punishment exceeding six months, that the place of confinement be changed to the Disciplinary Barracks in accordance with the literal requirements of the Manual. This was, in effect, an abandonment by this office of its policy of conservation of man power through the holding of men to service for which it had contended and which it had succeeded in getting established in the matter hereinbefore indicated. In several cases the changed recommendations were approved by The Adjutant General's Office and it was not until this office attempted to apply this changed policy to cases arising in the expeditionary forces in France that The Adjutant General's Office declined to follow the recommendations of this office. This may have resulted from the fact that Maj. Riley, who succeeded Maj. Jones in The Adjutant General's office, knew that special authority had been given Gen. Pershing to retain in France prisoners from the expeditionary forces, but may not have known or may have overlooked the confidential instructions communicated to the service under date of December 22, 1917.

4. The foregoing accounts for the conflicting views and attitudes of this office and for the seeming lack of understanding in the office of The Adjutant General as to the proper disposition of the question at issue.

Your committee firmly believes that the policy advocated by this office and established as a result of its insistence was the correct policy. It believes that in time of war division commanders should be charged, as completely as possible, with responsibility for the discipline of their divisions, and that the

administration of military punishment should be governed in time of war by the boldly outstanding facts that it is necessary to conserve man power, and that enlisted men should be made to understand that the commission of crime will not necessarily result in interruption of training for military service or escape from the dangers and hardships of war. It believes, moreover, that in carrying out this policy, inequalities and lack of uniformity are bound to result, but that this office can not too much concern itself with these matters if it is not to impose upon the service an unnecessary burden of paper work, and force division commanders to give time and attention to matters of administration which should be given to matters of training and instruction for combat with the enemy. In other words, the administration of this office should conform with war conditions, and sympathetic consideration should always be extended to the efforts of reviewing authorities to carry into practical effect the conservation and training policies which the War Department adopted upon the advice of this office. To accomplish these ends, we must not adhere too rigidly to peace-time standards or require military justice in time of war to be administered according to formulas prescribed by those who are not in touch with actual conditions in the field and who can not be held responsible for the results there attained.

5. In order to readjust this situation and to enable our judge advocates in the field properly to perform their functions, as well as to protect this office against the danger of further inadvertent change of policy and attitude, your committee recommends that the following statement be published in circular form for the information of representatives of this office both here and in the field:

The frequent but necessary shifting of personnel in this office has of late caused temporary misunderstanding and some confusion in enforcing the War Department policy promulgated to the service in the confidential instructions from The Adjutant General's Office under date of December 22, 1917. These instructions are in pertinent part as follows:

"Division and other commanders are expected to make themselves strictly responsible for the discipline of their commands, and these officers, together with general courts-martial and judge advocates, should give close scrutiny to all cases coming before them with a view of being able to pass intelligently upon them, and so to measure the punishment to the offense that the following conditions will obtain:

"(*a*) No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and when any other appropriate form of punishment is sufficient to meet the requirements of the case.

"(*b*) Whenever a sentence of dishonorable discharge is given, it should be accompanied with a long term of confinement in the penitentiary or in the disciplinary barracks. Where the offense is not sufficiently grave to warrant a long term of confinement, it should be assumed that the offender has within him the elements of military service, and he should be made to serve.

"(*c*) When a sentence of dishonorable discharge is given, unaccompanied with a long period of confinement, reviewing authorities should, in general, suspend or remit the dishonorable discharge and hold the offender to service and punishment with the organization to which he belongs."

As this office interprets these instructions, they amount to a practical suspension during the period of the war of that part of section 397 of the Manual for Courts-Martial which requires the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches to be "designated as the place of confinement of all prisoners other than residents of Porto Rico, Canal Zone, Hawaiian Islands, or the Philippine Islands who are to be confined for six months or more and who are not to be confined in the penitentiary pursuant to the preceding paragraph."

While heretofore refraining from placing a construction upon the phrase "long period of confinement" as used in the above instructions, this office has indicated that one year should be regarded as the minimum term which should be classed as a long period of confinement. In practical application it is believed that most reviewing authorities have fixed this period at two years, and this office believes that in general that period might well be adopted as the approved limit beyond which confinement must be served in a penal institution rather than at the station of the soldier's command.

This office is further of the opinion that within the limits of an approved sentence of two years' confinement, unless the record shows a high degree of moral turpitude, reviewing authorities should hold offenders to service as well

ıt, by suspending dishonorable discharge and designating the sta-
ɔldier's command as the place of confinement. In so far as possi-
tary duty should be required in connection with any sentence
ıis will serve to retain in service those having within them the
service, and to emphasize the principle that commission of crime
ɛlied upon to confer immunity from the hardships and dangers of
s without saying that any punishment, over which a reviewing
ains jurisdiction, may properly be mitigated in his discretion.
ts, such as hard labor without confinement, confinement without
forfeiture of pay without confinement, and variations of these
should, in the opinion of this office, be judiciously imposed, having
ys the results to be accomplished. In any case a reviewing author-
and ready to exercise the powers of remission conferred by the
ırticle of war, as amended by the act of July 9, 1918 (Public,
ıg.), whenever the ends of punishment have been attained. In this
is proper to remark that this amendment of the fifty-second
r, suggested by this office, had its inception in the desire to more
eviewing authorities to carry into practical effect the policies of
ent with reference to conservation of man power and continuity
or actual service.
s and lack of uniformity in punishments imposed are to be
t in reviewing cases in this office, only the legality of sentences
ral, be considered. No attempt will be made to secure uniformity
nt throughout the service in any particular class or classes of
by corrective action by the War Department or through attempt-
ıce the action of courts-martial or reviewing authorities. Congress
ed courts-martial, in time of war, to impose punishment in their
cept where the punishment has been prescribed by statute, and
sts at such time to prescribe limits which must be followed. A
ntelligent application of these views will, it is believed, attain the
punishment and service while at the same time reducing to the
correspondence between this office and reviewing authorities, or
office and that of The Adjutant General, in the final disposition

E. G. DAVIS,
Colonel, Judge Advocate.

———— ————,
Lieutenant Colonel, Judge Advocate.

———— ————.
Major, Judge Advocate.

EXHIBIT 161.

AUGUST 21, 1918.

n for Gen. Ansell.
nishments by courts-martial of enlisted men in time of war.
read with great interest the two memoranda of Col. Davis and the
Strode, and while I agree with both those officers in certain par-
egret to find myself unable to give my assent to the conclusions
them and to the proposals they have submitted as solutions, from
tive points of view, of this most important problem. I have given
and consideration to the question of punishments in the Army im-
ırts-martial, so that the views I entertain were not hastily formed
e result of considerable experience, observation, and reflection.
have no sympathy with many of the severe punishments imposed,
time of peace or war. In my judgment, in the vast majority of
ey defeat the very purpose had in view by those who imposed them.
ill be generally conceded by those who are qualified to express an
the subject that it is well recognized to-day in every enlightened
penology that it is the promptness and certainty of punishment,
its severity, which produces the desired disciplinary and reformative
day of punishments savoring of cruelty and vindictiveness has
ll civilized countries never to return again. Surely, nothing even
ggestive of that sort of thing has any place in the great Army of the
es we are now engaged in raising for the sole and avowed purpose of
the supremacy of right throughout the world simply because it is

the right. Harsh and unduly severe punishments are not in harmony with that great ideal. And yet I have on my desk the cases of two young soldiers who were sentenced to 10 years' confinement at hard labor for absence without leave for from four to five days, and the cases of three other young soldiers who were sentenced to 25 years' confinement at hard labor and forfeiture of five-sixths of their pay per month for that period for disobedience of orders. Admittedly, as a general rule, offenses in time of war are more serious than in time of peace and should be more severely punished, but this is not unqualifiedly true. Many offenses, particularly in this country, are no more serious now than before we entered the war, and they should not be more severely dealt with. No one ever contended before the war that there should not be uniformity in punishment wherever and whenever practicable. As a matter of fact, we tried to bring about that very situation, because it was realized, as a matter of common sense and common fairness, that for the same or similar offenses men should receive the same or similar punishment. If that be true—and there does not seem to be any serious fault with the logic—why in time of war, with literally thousands of untrained and inexperienced officers of almost every grade, should we say that because the Executive order is not in force, practically any punishment in the way of forfeiture or confinement will be permitted without question, provided there is no statutory inhibition against it? Good judgment and sound discretion on the part of courts and reviewing authorities, it seems to me, are more necessary in time of war than in time of peace, for obvious reasons. Yet, no one can sit at my desk and note the cases that daily pass across it and fail to observe that these necessary qualities are often conspicuously absent. Sentences are imposed and approved, the severity of which, from my point of view, is so out of proportion to the gravity of the offenses as to render them positively grotesque. The courts are, of course, actuated by the highest motives in imposing such sentences. They think that is the way to enforce discipline; I think they are mistaken. In addition to being the wrong method to accomplish the purpose in view, such sentences create a most unfortunate impression upon the civil community. I am constrained to believe that it would be manifestly inadvisable from every point of view to have the impression get abroad that courts and reviewing authorities in their actions are governed only by an unrestricted discretion. This is truly the people's war, to be fought by the people's Army, and it is but just and right that they should be made to feel that the system of punishments in force in that Army is not based on the judgment, informed or uninformed, of courts, but has its foundation in wise and humane principles that have been thoroughly tested in time of peace.

2. In view of the fact that the Secretary of War has authorized the commander in chief of the American Expeditionary Forces to retain in Europe all prisoners who would otherwise be confined in the disciplinary barracks, my remarks are, of course, addressed to those conditions which obtain within the continental limits of the United States and to the punishments there imposed. I believe that no one will take issue with this action of the Secretary of War. It was the necessary and obvious course to pursue. Indeed, I recommended action of that character when I was in France as judge advocate of the First Division. I realized that it was unwise and impracticable to return to this country for confinement prisoners who ordinarily would be sent to disciplinary barracks. Furthermore, it was well that it be definitely understood that no man would be able to avoid or escape his obligation to serve in France by committing an offense which might secure his return to the United States for confinement in a disciplinary barracks. There are, of course, few such men in our Army. Clearly, in the cases of other men who offended from no such motive, an opportunity should be afforded them there to win restoration to the honorable status of duty.

3. I can not subscribe to the proposition that men under a suspended sentence of dishonorable discharge with or without a short term of confinement should be left with their organizations. It is an anomalous situation with practically nothing to be said in its favor and much to be said in opposition to it. It must be borne in mind that men under a suspended sentence of dishonorable discharge receive neither pay nor allowances. In addition, they would be without means to provide themselves with those necessities which the Government does not provide even to those soldiers who are on a full pay status. I refer, for instance, to such things as laundry, barber expenses, tobacco, etc. It is needless to suggest that to keep men in that condition with troops would result in their becoming chronic borrowers and general nuisances, and, in some instances, petty thieves. The proper place for those men, as well

ose dishonorable discharge has not been suspended but who are restoration to duty, is the disciplinary barracks, or one of its hose institutions were established for the specific purpose of of soldiers under sentence of dishonorable discharge and confine- view to their honorable restoration to duty or their reenlistment. results of the work accomplished in those institutions have more l their establishment. I do not share the fears that have been to the loss of man-power due to sending prisoners to the dis- racks. That loss will be inconsiderable and may be justly re- gligible when compared with the good results obtained in promptly ined and disciplined men to the colors.

then, my opinion is that an announcement should be made to the e effect that while the Executive order is limited to a time of believed that the general limitations upon punishments fixed by that order furnish a safe, sane, and conservative guide in time they should not be exceeded or departed from save in exceptional econdly, that dishonorable discharges should not be imposed except s where no less punishment would be adequate and should usually ied by a long term of confinement, whether the confinement is to in a disciplinary barracks or in a penitentiary. Thirdly, in all dishonorable discharge has been imposed and the disciplinary bar- ated as the place of confinement, and there is reason for the belief oner may be reclaimed to the service, the dishonorable discharge spended. Fourthly, all men sentenced to dishonorable discharge of confinement will, if a penitentiary has not been designated as confinement, be sent to the disciplinary barracks, or one of its ether or not the dishonorable discharge has been suspended.

B. A. READ,
Lieutenant Colonel, Judge Advocate.

EXHIBIT 162.

OF SENATOR CHAMBERLAIN IN THE SENATE, JANUARY 3, 1919.

at, I come to another thing, Mr. President, not so much in the way as by way of suggestion, in the hope that some remedy may be nditions that exist. It is with reference to inequalities in the ad- of the law as it affects the soldiers. The administration of military g this war has developed many cases of life or long term sentences rtial which either would not have been imposed at all or would have ore lenient if the rights of the enlisted man had been properly pro- course of his trial before the court-martial. Mere boys, some of them ponsible mentally for their acts, have been adjudged guilty of or criminal offenses and sentenced for life or long terms in the Court-martial sentences found by the reviewing authority to be l for want of jurisdiction have been allowed to stand, thereby sub- egal punishment a man sentenced without justification of law.

doing military police duty who entered a shop during the night ording to his own story, he heard a noise which he thought was burglar, was found in the shop and himself accused of burglary. artial which tried him found him not guilty. The commanding of- d appointed the court disapproved the verdict and "recommended" rt reconsider the case. The court did "reconsider" and found the and imposed a long term of imprisonment. The evidence was nstantial. On final review of the record in this case it was recom- t the verdict of guilty be set aside and the man discharged. The ; officer, disapproving of this recommendation, has allowed the tand, and the man is now serving his sentence. This case, while illustrates the control which the military commander exercises ministration of military justice.

hose cases come to me. I have looked up many of them to verify ow of a case where a young lieutenant was on a court of in- certain cantonment--I will not mention where. His commanding "A. B. is charged with crime. He ought to be severely punished. be sent up for six months." The young officer, a lawyer, detailed

for court-martial duty, looked into the case, and he and his colleagues sentenced this young fellow to five days in the guardhouse. His commanding officer called him up and said: "you know, that is the man whom I told you ought to be severely punished. I see you have only sentenced him for five days in the guardhouse." The lieutenant replied, "That is all that the evidence warranted. It was a very minor offense." "That is the way military law is administered here, is it?" And in a very short time the young officer was removed from that detail, simply because he had not carried out the orders of the commanding officer. What use of a court if a commanding officer is to practically control its actions?

Senators, I am not blaming the Secretary of War for this. I blame him only to this extent: That a word from him would stop such practices.

These individual cases give the human touch to conditions, and in order to impress it upon the attention of the War Department I am just going to call attention to two or three more as illustrative of what is in my mind. I am not going to give the names of the soldiers, either.

A green country boy, a private in the machine-gun company of the One hundred and fifty-sixth Infantry, was tried and convicted of the charge of absence without leave from Camp Beauregard from May 9 to May 15, 1918. That is six days. It was shown in evidence by the prosecution that he had been notified of his selection for overseas duty. The accused testified that he went home to see his mother, probably for the last time, as she was ill in a hospital. He was sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years in a disciplinary barracks.

Now, Senators, I realize the necessity of maintaining discipline. There is not any question about that; but, in God's name, could not a boy like that have been punished a little less severely under the circumstances than 25 years in a prison, where his life in the very nature of things must be ruined?

A similar case is that of a private of Company D, One hundred and fifty-fifth Infantry, who was charged and convicted of absence without leave from May 9 to May 15, 1918—the same period of time—from Camp Beauregard—the same place—after notification of his selection for overseas duty. It was shown that the boy had gone home to his folks in Mississippi to tell them good-by. He was sentenced to dishonorable discharge, total forfeitures, and 15 years' confinement of hard labor in a disciplinary barracks.

You see, there is 10 years' difference between the punishment meted out to these young men in the same place and for the same crime. There may be aggravated circumstances connected with them that I do not know anything about, but I can not conceive how it should have been found necessary to have inflicted such terribly severe punishment. I can understand that if it was on the battle front and a boy had left his post without leave his punishment should be severe, even to sentencing him to be shot.

Mr. LA FOLLETTE. He returned voluntarily, did he?

Mr. CHAMBERLAIN. So I understand.

Now, take another case: A private of Company M, Forty-ninth Infantry, was convicted of sleeping on his post at Camp Merritt, N. J., and was sentenced to a dishonorable discharge, total forfeitures, and 10 years' confinement at hard labor in a disciplinary barracks. You see, there is the same kind of a case, and yet there are 15 years' discrepancy between the punishment meted out to the first soldier, where both crimes committed were practically the same.

Mr. WATSON. Did these men come back of their own accord?

Mr. CHAMBERLAIN. I am so informed. If the Senator from Indiana wants, I will give him the names and record, and I will give them to the Secretary of War if he wants them, but I dislike to publish these cases in the Record so that the young men may probably be discredited, because I hope that something will be done to relieve many of these sentences.

Take another case: A private of Company F, Forty-ninth Infantry, was convicted of sleeping on his post at the United States Engineers' Depot, New York City, and was sentenced to dishonorable discharge, total forfeitures and 10 years' confinement in a disciplinary barracks. He was assigned to what was virtually a watchman's job, and he gets 10 years. I can not conceive why such severe punishment should be meted out to young soldiers for such small crimes. I believe in the strictest military discipline, but it can be accomplished without any such severity as that.

A case somewhat different from these in which the President showed mercy was that of a private of the Third Training Company, casual detachment, who

disobedience of orders to drill and of having seditious literature
dion for distribution. He was sentenced to be shot. It appeared
a sincere conscientious objector and that he had not been offered
: service, as provided in General Order No. 28, War Department,
'18. He had in his possession some literature in which certain
been condemned by the Department of Justice, but that depart-
led that such books might be retained by members of religious
ate study, and there was no evidence that the accused attempted
:o distribute these books. His death sentence was disapproved
lent and the prisoner was discharged; and very properly so. I
sident will exercise the same clemency and show the same mercy
r cases, and I believe he will. But I call attention to these cases
nequality of sentences by court-martial in the country; and there
for it.

nding officer's control over the court-martial is such that he may
e action which the court should take.

y repugnant to our ideas of the administration of criminal law
should have the power to set aside a verdict of acquittal. Never-
s the power of the commanding officer over a court-martial trial.
cise this power not only in the case of military offenses but also
f ordinary civil offenses, as, for example, larceny committed by

which may be sent to court-martial are not definitely defined or
commanding officer may determine what offenses shall be tried by
. He may, for example, subject to the disgrace of court-martial
who, no matter what the justifying circumstances, has been absent
for five days. He may, without any investigation of the circum-
r such a man tried by court-martial. In the French Army such
sent to trial until an investigation has determined that the man
tried. With us the commanding officer exercises at all stages a
iplinary control of the administration of military justice. We do
er military justice according to law; it is constantly under the
military commander, who is not obliged either to ask for legal
follow it when he has asked for it and it has been given to him by
le law officers of the Army.

irprising under the circumstances that there are too many trivial
trial by court-martial, too many unduly severe sentences, and
ig punishments imposed for like offenses. Terms for the same or
ses imposed by courts-martial during the present war range all the
e imprisonment in the penitentiary to six months confinement in a
barracks. Frequently the life term is imposed for an offense for
er cases a few months imprisonment is imposed.

the less serious offenses the punishments range from days or months
y confinement to a few years' imprisonment. There is no standard
it, and the changing personnel of courts-martial, and their lack of
vith criminal law makes anything like uniformity of punishment
If we are to have a democratic army, military justice ought to be
as it is in other countries, by courts which are constituted, whose
determined and whose action is controlled by law. Courts-martial
quired to accept the interpretation of the law by a responsible law
same manner that a jury in a civil criminal court accepts the inter-
the law by the judge of the court. This is not to suggest that mili-
ne should be undermined, but that it should be supported by a fair
system of determining guilt and imposing punishments. There is
bstacle to discipline than the resentment which the soldier feels for
arbitrary punishment.

ls of the courts-martial in this war show that we have no military
m of administering military justice which is worthy of the name of
ce. We have simply a method of giving effect to the more or less
scretion of the commanding officer.

t responsibility does not rest on the Secretary of War; much of it
Congress. We ought to enact a code that would fix the boundaries
rts, and which would define their jurisdiction and duties; but, as it
se inequalities of administration, it seems to me that a word from
y of War to the commanding officers would bring them very quickly
uniform administration of the law. There is nothing in the world
ake the members of the military establishment do their duty in a

proper way more surely than to discharge or reprimand an officer once in a while. There is a sort of free masonry amongst them, and whenever one of them is put on the tenterhooks for anything that he has done irregularly, every one in the Army who is of the same rank and grade has his ear to the ground and knows it, and governs himself accordingly.

Mr. SHAFROTH. Mr. President, will the Senator from Oregon yield to me for a moment?

The PRESIDING OFFICER. (Mr. Johnson of California in the chair). Does the Senator from Oregon yield to the Senator from Colorado?

Mr. CHAMBERLAIN. Yes.

Mr. SHAFROTH. Has not the Senator from Oregon noticed the various determinations by courts of justice in the States, and noted how vastly different are the sentences which are imposed by such courts as the result of judicial proceedings?

Mr. CHAMBERLAIN. Oh, yes.

Mr. SHAFROTH. That is true in like cases of like offenses which are prosecuted. I have noticed such variations to have been from 1 year to 14 years. Such sentences often depend upon the judge and upon the character of his impression as to what would be the proper sentence. Some judges believe in severe sentences; others believe in light sentences; while still others believe in almost no sentences. The severity of the sentence oftentimes results from the make-up of the individual. So I do not see how in such cases anyone can be properly charged with any neglect or any wrong in permitting these judge advocates to remain in office. People both in times of war and in civil life invariably hold different views as to crime. Some will say this man should be set up as an example: "I will show the people in this community that there has got to be respect for a certain law"; and such judges will impose severe sentences, while at the same time almost across the border in another judicial district there will be another judge who will impose a very light sentence. That is human nature; men are differently constituted; so it seems to me when these inequalities of sentences have occurred no one is to blame except the individual who imposes the sentence.

Mr. CHAMBERLAIN. I realize the force of the Senator's suggestion. I have had some of the same experiences the Senator has had, and, besides that, I was prosecuting officer in my State in a large district for four years, and I know the difficulty of meting out exact justice. The conditions in different communities or different counties in the same State will be entirely different; but there is the great equalizing power in the Chief Executive, and ninety-nine times out of one hundred he exercises it so as to equalize inequalities by the use of the pardoning power or in some other way. But here is a great central government with a Secretary of War entirely in charge of the military branch of it, and under whose jurisdiction all of these crimes come. He can very much relieve the situation if he will only attempt by proper order to do so. When he sees that two young men in the same cantonment, as at Camp Beauregard, are sentenced, one for 15 years and one for 25 years, for exactly the same offense, a simple word from him to the President of the United States would result in equalizing the sentences, if necessary, by the use of the pardoning power.

Mr. WILLIAMS. Does the Senator mean the same offense or the same charge?

Mr. CHAMBERLAIN. The same charge.

Mr. WILLIAMS. When two men are charged with the same offense and brought up for trial, the Senator must recognize, as I do, that the facts may appear entirely different in the two cases. The character of the two culprits, or the alleged culprits, may appear entirely different. There is not an inequality of punishment for an offense, but an inequality of punishment on a charge. One man is found guilty of killing another, another man is found guilty of killing still another, and a third of killing still a third; one man is hung, one man is sent to the penitentiary for life, and one man is convicted of manslaughter. All the Senator knows about these cases is that the charges were identical.

Mr. CHAMBERLAIN. The suggestion of the Senator is more or less true. In the very great haste——

Mr. THOMAS. Mr. President, may I inquire of the Senator whether these individual cases to which he has referred have been appealed to the Judge Advocate General?

Mr. CHAMBERLAIN. I think all of them have been.

So much for that, Mr. President. Where there is a noticeable inequality on the face of the record, and there are those under the Military Establishment

who know the facts, it seems to me they ought to be looked into, with the power of recommendation somewhere to relieve the situation; but the sure cure for it all is to have some sort of a tribunal, appellate or supervisory, that shall have the power to formulate rules and equalize these unjust sentences, under the direction, of course, of the Commander in Chief of the Army and Navy.

Mr. WILLIAMS. Mr. President, I should like to ask the Senator a question there, if he will yield.

Mr. CHAMBERLAIN. I yield.

Mr. WILLIAMS. Taken for granted that the Senator's suggestion is perfectly apropos and perfectly right, whose fault is it that there is no such tribunal? It can not be the fault of the Secretary of War.

Now, I should like to ask the Senator another question in that connection, and let him answer them both at once. Suppose he was Secretary of War, or suppose that I was Secretary of War. Does the Senator imagine that either he or I could take personal cognizance of all the thousands of cases, examine them like a justice of the peace, and go into the testimony to see just how far each individual ought to be punished? In other words, if there is not a tribunal—and there would have to be about a thousand tribunals, by the way, for one could not attend to all the business—how do you expect a man of flesh and blood, like Baker or Chamberlain or Williams, to go into all these cases?

Mr. CHAMBERLAIN. Mr. President, I realize the force of what the Senator says, and I stated before the Senator came in and did me the honor of his presence that I am delivering this one message and placing it in the Congressional Record to call the attention of the Secretary of War to conditions. I can not take up the innumerable cases that have come to me, and do not expect the Secretary of War to do so; but the secretary has never been denied anything in the way of assistance that he has asked for in this war.

Mr. WILLIAMS. Now, if the Senator will pardon me just once more, and then I hope to let him alone——

Mr. CHAMBERLAIN. I hope so, because I wish to finish.

Mr. WILLIAMS. Not only the present Secretary of War, but various Secretaries of War, have communicated to us in times of peace and in times of war, during the Revolution, the Mexican War, the war between the States, the Spanish-American War, and this war, and so far the committee over which the Senator from Oregon presides—the Military Affairs Committee—has had charge of the question of courts-martial. The whole country has agreed to substitute in time of war for the ordinary courts operative in times of peace, for justices of the peace, circuit courts, appellate courts, and various courts, so-called courts-martial. They have tried to organize them so that approximate and quick justice could be dispensed in war times. It must be quick; we can not fool with it; we have got to keep up discipline in the Army; and being determined to do that we have organized the present courts-martial. The Senator will remember that while serving upon the committee of which he is chairman and of which I was once a member, I found at one time that one officer had been the accuser, the judge, and the chief witness against a man whose rank had been taken away from him. We remedied that, and why can not the committee remedy such other injustices as suggest themselves?

Mr. CHAMBERLAIN. I think the committee will attempt to do so where legislation is necessary, Mr. President, but the committee occupies this position: The committee is limited as to its clerical force. To attend to all these things is a physical impossibility for the committee with the clerical force that the committee has, while the Secretary of War is supplied not only with a great body of legal advisers, to whom he can refer any of these matters either for advice or to draft legislation, but with as much money as he needs for any legitimate military purpose. We have amended the Articles of War during this Congress two or three times at the request of the Secretary of War. He is having these difficulties pointed out to him, and I have not any doubt that if he asks for another amendment to the Articles of War we will amend them again.

Mr. McCUMBER. May I ask the Senator a question?

Mr. CHAMBERLAIN. Yes.

Mr. McCUMBER. I wish to ask the Senator if, from his observation, he has not long since arrived at the conclusion that all of the punishments imposed by courts-martial, taking them as a body, are immensely more severe than punishments which would be imposed by the ordinary courts and in most cases we might say unconscionably severe?

Mr. CHAMBERLAIN. I think that is true, but I will say to the Senator that in times of war I have no objection to the severity of sentences, as a rule, because discipline is absolutely necessary to be maintained. If a soldier is guilty of an offense and is only sentenced to five days there might be 5,000 men associated with him who would commit the same offense if they knew they would only get five days' punishment.

Mr. McCUMBER. But even in times of peace I find the punishments imposed by courts-martial immensely more severe than the punishments imposed by civil courts.

Mr. WILLIAMS. Mr. President, the Senator would not punish the Senator from North Dakota for going to sleep at all, would he?

Mr. CHAMBERLAIN. Not if he were in good company and with some one like the Senator from Mississippi.

Mr. WILLIAMS. But the Senator would punish a soldier for going to sleep when he was a sentinel, and he might have to shoot him for doing it, because it is a very serious offense.

Mr. CHAMBERLAIN. Yes, of course; there is no doubt about that in time of war.

Now, Mr. President, these remarks are just by way of suggestion with reference to the dispensing of military justice, and I do hope that the War Department will take some notice of them.

EXHIBIT 163.

LETTER OF GENERAL CROWDER.

FEBRUARY 13, 1919.

DEAR MR. SECRETARY: Upon resuming active supervision of the work of the Judge Advocate General's office early in January of this year, after a year of almost exclusive preoccupation with my duties as Provost Marshal General, I found your reference calling my attention to the remarks of Senator Chamberlain, printed in the Congressional Record of January 3, 1919, which voiced certain criticisms upon the administration of military justice during the war. I have been reflecting upon the most appropriate manner of putting you in possession of the facts on the subject dealt with in these remarks.

The subject, in general—I mean that of military justice during the war—is, of course, within my special province as Judge Advocate General of the Army; and it has been peculiarly a matter of the most conscientious solicitude on the part of myself and of the Acting Judge Advocate General, who had the direct supervision of the office during my special preoccupation with the other duties. Of the nearly 100 judge advocates attached to the office in Washington during the past year, some 50 have been assigned exclusively to the Division of Military Justice, scrutinizing the record of every one of the thousands of general court-martial cases arriving in Washington for revision. These skilled lawyers (all but two of them brought recently into the Army from civil practice, and including some eminent incumbents from the judicial bench) have been keenly alive to the demands of the situation. Months before any of these after-the-war criticisms appeared, and from the very outset of the year 1918, when the disciplinary records of the new Army were already enlarging many fold the work of this office, the Division of Military Justice had begun to apply measures adapted to safeguard the cause of justice to the individual. And, as the year went on, the progress of court-martial practice was closely and continuously followed, with a view to correcting the legal errors, equalizing the sentences in the various divisions, and exercising the appropriate clemency. How notable were the results achieved by this conscientious scrutiny before the close of the year 1918 I will later point out, noting here merely that these results were already accessible to any inquirer at this office before the close of the year 1918.

It goes without saying, therefore, that all the authentic data that would throw light on the correctness of Senator Chamberlain's complaints are to be found in the accumulated records of my office. And I could wish that he had afforded me an opportunity, however scanty, to lay before him the general tenor of these records, or any part of them, before advancing publicly the assertions contained in his remarks on military justice.

However, since receiving your reference, my own question has been whether to wait until a full and exhaustive account could be prepared for you, showing the whole range of facts in that field during the war period, or whether, with-

for that, it would be worth while to offer you, as a provisional
ts upon the topics concretely touched on in the Senator's remarks.
led to take the latter course, reserving for a later and formal re-
.re body of facts concerning military justice during the war period.
or's remarks run along two lines. In the first place, he cites certain
ıses having special features open to criticism. In the second place,
rtain generalizations involving general conditions and practices.
it necessary to deal with his remarks under two separate heads,
ur permission, I will do so. Whether or not these individual cases
the criticism as made is simply a question of the facts in each of
hey differ widely in their nature, and each must receive its own
lanation, based solely on its own facts and no other. But whether
s assertions as to general conditions and practices are correct is a
listinct question, ranging over the entire field of military justice,
sertions must therefore be examined in the light of the entire mass
ases.

erefore, by taking up the individual cases cited by the Senator for
ıres; and at the same time it will be convenient to include com-
few other individual cases cited on the floor of Congress by Mr.
ı newspaper article. (Congressional Record, Jan. 23, 1919, p. 1988).

1. INDIVIDUAL CASES CITED FOR CRITICISM.

ıt case cited by Senator Chamberlain is that of a soldier at Camp
ord No. 110595, tried January 24, 1918), who, while patrolling the
tary police was found at midnight in a shop just after a burglary.
ed with burglary, he asserted that he had entered the shop in
e burglar. His story was disbelieved, and he was found guilty;
ling was not guilty, but at the commanding officer's request, there
sideration, and the second finding was guilty. On revision of the
gal error could be found; but this office reached the opinion that
was sufficient evidence to sustain the finding the evidence did not
to show his guilt beyond a reasonable doubt. In such a situation
Court in the United States (with three, or four exceptions only)
ere and set aside a jury's verdict. Nevertheless, this office recom-
sconsideration of the verdict by the reviewing authority. It was
ısidered; but the court adhered to its finding. But the feature for
tice is that reconsideration was given not by exercising the "arbi-
tion of a military commander," but by referring the case to the
ıte of the command, as legal adviser. The judge advocate wrote an
view of the evidence, disagreeing with the view of this office, and
ng confirmation; and the commanding general followed this opinion
officer.

therefore, instead of being, as Senator Chamberlain has been led
an illustration of "the control which the military commander
er the administration of civil justice," illustrates exactly the oppo-
n the first place, the confirmation of the sentence was made, not by
y military discretion of the commanding officer, but upon the legal
is judge advocate, an ex-civilian lawyer. And, in the second place,
leration which was actually given by the judge advocate on the
of beyond a reasonable doubt, was a measure of protection which
s not provide in any civil court in the United States for the control
verdict. The case is a good illustration of a feature in which the
ıilitary justice sometimes does even more for the accused than the
vil justice.

cond case cited by Senator Chamberlain is that of an absence without
amp Beauregard (record No. 116490, tried June 6, 1918), in which a
25 years was imposed on a soldier who had gone home (as he
see a sick mother after the company had been notified of their
departure for the battlefield in France; he returned to camp just
ıit had left. This offense of leaving for home when the regiment is
point of departure overseas is obviously one of the most disorganiz-
ary plans. In this case it was committed at a time when the allied
in daily need of American help, and our units were being rushed
ed to the ports of embarkation. By leaving camp in this particular
soldier successfully evaded going into the fight with his comrades.
riousness of the offense must be emphasized in the sight of the Army
ılty imposed, needs no argument.

But the Senator errs in implying that the man was dishonorably discharged, for he was not. The sentence of dishonorable discharge was suspended, which means, under the law, that his confinement has practically no minimum, and that if his conduct is good he may be released from confinement and restored to duty at any time.

3. The third case cited by Senator Chamberlain is a similar case of absence without leave at the same camp (record No. 116800) under almost identical circumstances; but in this case a sentence of 15 years, instead of 25 years, was imposed. This matter of the variability of sentence is later explained by me, in its general aspects. But the difference of periods, however, has in this case not the significance which it appears to have, because the sentence of dishonorable discharge was in this case also suspended, and the offender went to the dicplinary barracks for a period of confinement having no minimum, and upon a record of good conduct he may be restored to duty at any time, and his confinement be terminated.

4. The next case cited by Senator Chamberlain is a case of sleeping on post at Camp Merritt, the sentence being for 10 years. The Senator's brief description of the case applies to two offenders, tried nearly at the same time. (Record No. 114717, tried Apr. 25, 1918, and record No. 115506, tried May 17, 1918).

In the one case the sentence was reduced by the commanding officer to six months, probably because the soldier was a youth of 17. This reduction was apparently not known to Senator Chamberlain, for he does not mention it. There is certainly nothing harsh in military justice in this case.

In the other case the sentence was approved by the commanding general; and on November 22, 1918, the Judge Advocate General's office, on application, after a careful scrutiny of the record, declined to recommend clemency; so that it may be assumed that the circumstances of the case did not merit it. But here, too, the sentence of dishonorable discharge was suspended by the commanding general; the period of confinement has no minimum; and the offender may be restored at any time, after a record of good conduct.

5. The next case cited by Senator Chamberlain is another instance of sleeping on post, the sentence being for 10 years. (Record No. 113076, tried on Mar. 21, 1918, at Camp Merritt.) As the sentinel had been drinking whisky shortly before going on guard, had actually left his post, and was found asleep in a toilet, the case was plainly one for making an example, and the sentence is therefore hardly to be termed severe. The Judge Advocate General's office, however, after at first declining, on application, to recommend clemency, later considered the case a second time, on December 12, 1918, and notified The Adjutant General that there was no objection to his restoration to duty.

But at this point I must take notice of Senator Chamberlain's expression, applied in his remarks to the duty assigned to this soldier, of guarding a sentinel's post, as "virtually a watchman's job." I feel sure that even the civilian mind will readily appreciate the high responsibility of a sentinel's post in time of war, and that this expression will be recognized as inappropriate. The war was not only in France; it was in our own country also; and at the post where this sentinel was on guard there were millions of dollars worth of supplies, waiting for early shipment to equip the forces on the battle front, and lying open to destruction by the incendiary agents of the enemy, who lurked at every such spot in our own country. That under such circumstances the offense of sleeping on post belongs among the most serious and dangerous misdeeds of a soldier needs no further argument.

6. The next case cited by Senator Chamberlain is one of disobedience to orders to drill, and of having seditious literature in possession for distribution. The offender was a conscientious objector who had not been given an opportunity for noncombatant service, and who was not attempting nor intending to distribute literature. The sentence was death; but the Senator adds that it was "disapproved by the President and the prisoner discharged," and he expresses the hope that "the President will exercise the same clemency and show the same mercy in many other cases." Now, the facts of the record demonstrate the precise opposite of what the Senator was led to believe, because in this case (record No. 116790), tried June 17, 1918, it was not the President's clemency that discharged the prisoner; it was the effective operation of that very system of military law which the Senator supposes not to exist. What happened was that the Judge Advocate General's office recommended disapproval of the sentence on the strictly legal grounds that the order to drill was (under G. O. No. 28, 1918) not a lawful command, and his disobedience was therefore not an offense; and that there was no evidence of the accused's in-

tention to distribute the literature. The sentence was therefore disapproved, and the prisoner discharged on the legal grounds stated by my office. This case, therefore, far from illustrating the Senator's thesis, rather affords an illustration of the operation of military law and justice in entire analogy to that of civil law and justice.

This completes the list of particular cases cited by Senator Chamberlain. I turn now to the particular cases cited in the newspaper article read into the Congressional Record by Mr. Siegel. (Congressional Record, vol. 57, No. 44, Jan. 23, 1918, p. 1988.)

7. Taking these cases, for convenience sake, in the reverse order of their mention in the article, we are told of three cases of supposedly excessive sentences for the offense of desertion or absence without leave; all three of them being of the type of a return to visit the home family in distress. I should be glad to make any explanations or admissions which these cases might merit, but they are so indefinitely described in their citation that it has been impossible to identify them even after a careful search of many records.

As they are criticized, however, on no other ground than that of the severity of the sentences, I think that what has been already here said on the other cases of that sort will serve as a sufficient comment.

8. The next instance cited by the writer in question concerns two death sentences imposed in France for sleeping on post in a front-line trench. There are really three distinct questions involved in these cases; first, whether a sentence of death in all cases of this offense should be the inexorable policy; secondly, whether, if not, these particular cases showed sufficient extenuating circumstances; and, thirdly, whether the cases were fairly and fully tried to get at the facts.

Upon the first question, it is enough here to say that Gen. Pershing especially urged the importance of adopting this policy for the protection of his Army's welfare; and his chief law officer concurred in this message; and that under such circumstances no one could have been criticized for acceding to this urgent request and adhering to the principle handed down by all the fixed traditions of military law. I myself, as you know, was at first disposed to defer to the urgent recommendations of Gen. Pershing; but continued reflection caused me to withdraw from that extreme view; and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency.

Upon the second question it can be stated that, except for the youth of the offenders (they were about 20 years of age), there were no special extenuating circumstances. The task laid upon these soldiers was no greater in its exactions than was laid upon hundreds of others, at the very same moment in the allied forces doing duty in the trenches. The chief of staff's memorandum states the situation with great force:

"The American Expeditionary Force is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company, but of the entire command, is absolutely dependent on the vigilant performance of his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of those offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night—that is, the night of November 3–4, 1917, Pvt. Sebastian was found sleeping on his post, and on the night of the 5th, Pvt. Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of 2d–3d. This condition of affairs presented an absolute menace not only to that portion of the line held by the American troops, but to the French troops in the adjacent sectors."

That the decision to exercise clemency was a sound one, I do not doubt. But no candid reader of the record could look upon these cases as anything but a distressing instance of the inevitable mental conflict that arises between the stern necessities of war discipline and the natural human sympathy for men who have incurred the death penalty, a conflict which equally agitates

every civil judge and every civil executive when such a case is presented for his action. It is unconscionable that this situation should be cited as a peculiarity of the military system.

The third question—whether the case was fairly and fully tried so as to present all the facts—would require too extended a survey for giving all the details here. I content myself with assuring you (what you, indeed, know already) that the record was scrutinized by several of the most experienced judge advocates of my staff as well as by myself personally, and that, although the cases were not tried as thoroughly as they could and should have been tried, where the death penalty was involved, nevertheless no reversible error was found and there was no doubt of the facts in either case. The only issue in this case was the severity of the sentence, as above mentioned.

9. The writer also cites, in the same connection, two other cases coming at the same time from France; in these the death sentence was imposed for refusal to drill. The circumstance indicated an obstinacy amounting to aggravation. But it was decided by you that clemency should be exercised to the extent of commuting the sentences to three years' penal servitude. And as the writer of the article in question makes no tangible criticisms, but merely couples these cases with the foregoing two, I pass them over.

It should be noted, however, as a sample of the writer's unfair presentation, that he is incorrect, in point of fact, in asserting that "upon their plea (of guilty) alone these two men were sentenced to death." Both men were tried upon testimony adduced by the prosecution after their plea of guilty was entered; both men declined to call any witnesses in denial or in extenuation. The scantiness of the record, however, was of itself sufficient ground for exercising clemency.

10. The remaining case cited in the newspaper article read into the record by Mr. Siegel is that known as the "Texas mutineers" case (Record No. 106663, tried at Fort Bliss, Tex., Sept., 1917). The criticism made upon this case is that certain sergeants, having been ordered under arrest by a young officer for a very minor offense, were afterwards, while still under arrest, directed to drill; but as the Army Regulations, properly construed, do not authorize noncommissioned officers to be required to attend drill formations while under arrest, the sergeants declined to drill as ordered. For this disobedience they were found guilty of mutiny and sentenced to dishonorable discharge and imprisonment for terms of between 10 and 25 years.

Now, it may be at once and unreservedly admitted that this was a genuine case of injustice, and that the injustice was due to an overstrict attitude of military officers toward discipline, for it is conceded by all that the young officer who gave the order to drill was both tactless and unjustified in his conduct, and it is conceded that the commanding officer who reviewed and approved the sentence was a Regular Army officer of long experience who failed to appreciate the justice of the situation. That this case illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice is plain enough. But that it indicates any general condition can not for a moment be asserted.

Moreover, this very case serves also to illustrate the essentially law-enforcing spirit which dominates in the office of the Judge Advocate General. The impropriety and illegality of the sentence in this case was immediately recognized when the record arrived in the office for review. One opinion was prepared pointing out the irregularity and injustice, and directing that the findings be set aside. But the legality of such a direction was questioned, in the face of a ruling by the Attorney General of the United States many years ago that a sentence of court-martial, once executed, can not be set aside even by the President himself. This raised the general question of the authority of the Judge Advocate General not merely to recommend for clemency (which would not have been an adequate redress for the convicted men in this case), but to direct the setting aside of the findings in a judgment of a court-martial for legal error where the sentence had been already executed (namely, in this case, the sentence of dishonorable discharge). The Secretary of War having sustained the doubt as to the authority of the Judge Advocate General to take such radical action, clemency was extended by the President releasing the men from confinement and restoring them to duty within about two months from the date of their conviction. At the same time a new measure was adopted by the Secretary of War in the shape of General Order No. 7, War Department, 1918, taking effect February 1, 1918, which prevented the recurrence of such instances by directing that the commanding general, upon confirming a sentence of death or officer's

· dishonorable discharge should suspend the execution of the sen-
ıg a review of the case in the office of the Judge Advocate General.
liate measures were taken to go as far as could be gone under the
ceded on all hands, to prevent the recurrence of the situation pre-
ıe Texas mutiny case.
e, in order to make more ample and unquestionable the authority of
Advocate General over court-martial trials in matters of legal error,
ling the Federal statutes was drafted and was sent on January 19,
: Secretary of War, to the chairmen of the Senate and House Mili-
ı Committees. Subsequently the Judge Advocate General testified
ıgth before the House Military Committee in support of this bill.
year that has elapsed since the dispatch of that proposed amend-
r the Senate nor the House committee has seen fit to take action
oposed legislation. It is therefore apparent that, to the extent that
xist to-day any doubt as to the amplitude of the authority to reach
ıtrol these legal errors occurring in court-martial proceedings and
t that it may be desirable to amplify that authority beyond present
: law, the responsibility for failure to take such action is to be laid
loor of the Judge Advocate General's Office, but at the door of the
'airs committees of Congress.

GENERAL PRINCIPLES AND METHODS IN MILITARY JUSTICE.

ıg the various criticisms of a general nature contained in Senator
ı's remarks, they seem to be reducible to the following six heads:
soldier may be put on trial by a commanding officer's arbitrary
:ithout any preliminary inquiry into the probability of the charge.
ommanding officers do thus put on trial a needlessly large number
ıarges.
he courts-martial themselves, as a rule, impose sentences which are
severe and inequitably variant.
he Judge Advocate General's Office either partakes in the same at-
akes no attempt to check it by revisory action.
such attempts as the Judge Advocate General's Office does make
s, because its rulings are recommendatory only and are either ig-
e division commanders or vetoed by the Chief of Staff.
he general treatment of accused soldiers is not according to the
tions of law as embodied in the criminal code, but is according to
ry discretion of the commanding officer in each case.
belief that the candid study of the facts will show that all six of
tions are incorrect as representing the general conditions and apart
onal individual cases. But before setting forth the recorded facts
on the correctness of the above six assertions, some general features
:ept in mind as positive features of protection for the accused, pos-
ıilitary justice, and wholly or substantially lacking in civil justice.
ıilitary justice there is automatically a double examination of every
e in the nature of appellate or revisory action by superior and
ıthority. This is in sharp contrast to civil justice where there is no
r revisory action unless the accused insists on it. Every soldier is
this double safeguard against illegal or unfair condemnation. The
, except in cases of inferior courts, are taken down verbatim, and
of the testimony, every ruling of the court, and every claim of the
submitted first to the reviewing authority in the field and next to the
ıthority at Washington. The reviewing authority has for his legal
commissioned judge advocate of the rank of major or lieutenant
d since September, 1917, almost all of these have been lawyers of
ing, fresh from civil life, and imbued with the standards and tra-
civil practice rather than those of the Regular Army; hence likely
ly as careful scrutiny as any civilian judge would give. On arriv-
shington for the second scrutiny, the records go to a staff composed
t of officers fresh from civilian life, ranking from major to colonel.
l goes first for scrutiny to a single officer of the military justice
:ho prepares a full summary and recommendation; then to a board
of three officers, who approve or modify the recommendation; then to
of division, who again scrutinizes and approves or modifies; and
the Judge Advocate General or Acting Judge Advocate General, who
is signature if satisfied. Every general court-martial case thus ob-

tains this thorough scrutiny in two separate stages, or virtually four distinct stages. No such guaranties exist in any civilian court of the United States or probably of the world.

(*b*) Every military sentence as to period of confinement is virtually indeterminate, i. e., it has no minimum, and it can later be reduced to a few months or nothing. After a prisoner's sentence is affirmed, he is entitled to ask for clemency every six months. Such application is forwarded automatically by the prison superintendent to Washington. The whole record is then again reviewed. How extensively this method resulted in commuting sentences will be shown later. The clemency section of the Judge Advocate General's Office automatically acts on all such applications. Thus there is a further opportunity for correcting possible errors.

(*c*) The foregoing safeguards are applied without any expense to the accused. Here again is a feature wholly unknown to civilian justice. Reformers have for generations urged that civilian justice give to accused persons the fullest benefit of appellate revision without cost. They have never succeeded. But military justice already possesses this beneficent feature.

In examining the system of military justice, therefore, to see whether it permits results and methods contrasting unfavorably with our notions of civilian justice, let it be kept in mind from the outset that the American system of military justice starts with three great safeguards which are lacking in civilian justice, viz, an automatic double appellate review of every case before sentence is executed, a virtually automatic third review after sentence, and the application of these safeguards without reference to the accused's ability to raise money to pay for them.

I now take up the supposed general shortcomings alleged in Senator Chamberlain's remarks:

1. PUTTING ON TRIAL WITHOUT PRELIMINARY INQUIRY.

Every system of penal justice has some method of insuring the exercise of caution by a responsible officer in scrutinizing an accusation before an accused is put to the necessity of defending himself by a formal trial. The traditional method inherited by us in civilian justice, for serious offenses, is the presentment of a grand jury. This method has now proved cumbrous and ineffective; it has been abandoned in a majority of our States. The modern method of those States is a so-called information by the official State prosecutor, filed after such inquiry as he sees fit to make. This modern method is the one to which France and other continental nations arrived some centuries ago, about the time when England developed the grand jury instead. This modern American method is also the one used in our courts-martial; it arrived in the Anglo-American military system some centuries ago by adoption in Scotland, which itself had adopted the French system; for the French were the great military nation of three centuries ago.

By this Anglo-American military system some officer must file charges before any soldier can be tried. This protection is invariable. Often the judge advocate, as legal adviser, additionally scrutinizes a serious charge before it is filed. This is exactly the protection given by the State official prosecutor in the modern American method. How essential and thorough is this protection can only be appreciated by perusing the strict terms of the law and regulations. Paragraph 62 of the Manual for Courts-Martial reads:

"By the usage of the service all military charges should be formally preferred by—that is, authenticated by the signature of—a commissioned officer."

Paragraph 75 reads:

"Submission of charges: All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets or ordinary paper as are required. They will be accompanied—

"(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

"(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

"They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander, into whose hands they may come, either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require."

Paragraph 76 proceeds:

"Investigation of charges. If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority, the commanding officer will include: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken."

It will therefore be seen that the regulations required the strictest scrutiny by a responsible officer before any accused can be put on trial by a court-martial.

In Senator Chamberlain's remarks occurs the following sentence: "The commanding office may, without any investigation of the circumstances, order a man tried by court-martial; in the French Army such cases are not sent to trial until investigation can determine whether the man ought to be tried." How is it possible for such an assertion to be made in the face of the law and regulations represented in the quotation above from paragraph 76 of the manual? The safeguard contained in our manual of military justice stands on exactly the same footing with the safeguard contained in the modern method of the State prosecutor and of the French system as cited by Senator Chamberlain.

But whatever may be the law and the regulations, doubtless it may be asserted that the regulation is not obeyed in spirit. This is, in fact, the precise assertion of Senator Chamberlain in a further paragraph of his remarks; and to that assertion I now come.

2. EXCESSIVELY LARGE NUMBER OF TRIVIAL CHARGES.

It is asserted by Senator Chamberlain that commanding officers direct the filing of trivial charges in excessively large numbers. His precise language is: "It is not surprising, under the circumstances, that there are too many trivial cases sent to trial by court-martial."

Let us examine this assertion in the light of the facts of military justice during the past year, as shown by the records.

The United States military forces raised up to November 11, 1918, numbered some 4,185,000; of these about 290,000 were already in service at the opening of the war, of whom 127,000 were in the Regular Army. Thus over 90 per cent were new men, fresh from civilian life. It must be taken for certain that their unfamiliarity with military discipline and the novelty of its rigid restraints would produce an unusual proportion of minor breaches of discipline. In other words, if commanding officers had been merely as strict and rigorous as with the Regular Army before the war in pursuing minor breaches of discipline with court-martial charges, the ratio of trials would be at least as great and presumably far greater than before the war and the accession of the new army.

But the facts show, on the contrary, that commanding officers must have been far less strict and rigorous than before.

Let us take first the serious charges brought before general courts-martial. The printed report of the judge advocate general for the fiscal year, 1918, shows that the total number of general court-martial trials in the Regular

Army of 127,000 in the year ending June, 1917, was 6,200, or about 1 for every 20 men; while the total in the entire army for the year ending June, 1918, was less than 12,000, or only 1 for every 200 men (the military forces on May 31, numbering 2,415,000); and during the last six months of 1918 the total was 7,624, or at the rate per annum of only 1 for every 275 men (the military forces on Nov. 11, 1918, numbering 4,185,000). As to special courts-martial for the lesser offenses the number in the Regular Army for the year ending June, 1917, was 2,970, or 1 for every 42 men, while for the year ending June, 1918, it was 14,700, or only 1 for every 165 men. Moreover, as between the Regular Army and National Guard and the National Army or new drafted men, the number of general courts-martial for the year ending June, 1918, was 10,363 for the former and only 1,660 for the latter, or 1 for every 107 men in the Regular Army and National Guard (numbering on May 31, 1918, some 1,112,000, and composed in part of seasoned men, but only 1 in every 800 men for the National Army (numbering on May 31, 1918, some 1,333,000, and composed entirely of new drafted men); showing conclusively that commanding officers were more lenient and liberal with the men fresh from civilian life.

Turning now to the "trivial offenses" referred to by Senator Chamberlain, they are covered by the summary courts-martial, representing the extremely petty disciplinary penalties not requiring a review by the division commander. The number of trials for the Regular Army, viz, 48,000 in 1917 (rising from an average of 38,000 for 10 years past, due to a proportionate increase in the size of the Regular Army), rose in the year ending June, 1918, to only 212,000, or slightly more than four times the number, although the entire military forces in the year ending June, 1918, rose to 2,415,000, or nineteen times the former size. In short, the petty disciplinary penalties dropped from a ratio of 1 to each 2.7 men to a ratio of 1 to each 11.4 men, or a decrease for 1918 to less than one-quarter of that of 1917.

There could be no more conclusive demonstration that commanding officers, though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did, in fact, use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial. The facts show therefore precisely the opposite of the condition asserted by Senator Chamberlain.

3. SEVERITY AND VARIABILITY OF SENTENCES BY COURTS-MARTIAL.

The severity and variability of the sentences are two distinct features, and I shall therefore take them up separately, and under each of the two heads I shall further set forth the facts according to the respective offenses, because there can hardly be a common standard of either severity or variability for all offenses. In order to abridge my presentation I have taken the nine most common military offenses. In the tables of figures appended to this letter will be found the detailed data, to which I shall refer in the text of my letter.

(1) *Severity of sentences.*—In considering the severity of sentences it is, of course, necessary to examine separately the different offenses, since obviously the appropriate punishment varies widely for offenses of different moral culpability and different danger to military discipline.

(*a*) *Desertion.*—No one can approach the subject of sentences for desertion in time of war without keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes, acting assistant provost marshal general for Illinois, as set forth in his report printed in the Report of the Provost Marshal General for the Civil War (pt. 2, p. 29). In impressive language he lays the following injunction upon us:

"Incalculable evil has resulted from the clemency of the Government toward deserters. By a merciful severity at the commencement of the war the mischief might have been nipped in the bud, and the crime of desertion could never have reached the gigantic proportions which it attained before the close of the conflict. The people were then ardent and enthusiastic in their loyalty and would have cheerfully and cordially assented to any measures deemed necessary to the strength and integrity of the Army. They had heard of the 'rules and articles of war,' and were fully prepared to see * * * that the deserters from the Army would be remorselessly arrested, tried by courts-martial, and, if guilty, be forthwith shot to death with musketry.

"This was unquestionably the almost universal attitude of the public mind when hostilities began, and the just expectations of the people should not have been disappointed. Arrest, trial, and execution should have been the short,

sharp, and decisive fate of the first deserters. * * * The Government was far behind the people in this matter, and so continued until long and certain immunity had thrown such swarms of deserters and desperadoes into every State that it was then too late to avert the calamity. * * * I state these things so that if we have another war the Government may start right—put deserters to death, enforce military law, strike hard blows at the outset, tone up the national mind at once to a realization that war is war, and be sure that such a policy will be indorsed and sustained by the people.

"There are other suggestions to be made in respect to deserters, but the one I have already advanced—the nonenforcement of the penalties provided by the military code for the crime of desertion, especially at the beginning—is, beyond all question, the grand fundamental cause of the unparalleled increase of that crime and of the inability of district provost marshals, with their whole force of special agents and detectives to rid the country of deserters."

This solemn warning was naturally in our minds at the opening of the present war. But, in spite of its urgency, it was decided to exhibit our faith in the American people and to place our trust in that loyalty and devotion to duty which we felt sure would characterize the vast majority of to-day's young American manhood. We believed that the "short, sharp, and decisive fate of the first deserters" should not be the extreme penalty as urged by Gen. Oakes. And the view was generally accepted in the Army that terms of imprisonment should be ordinarily deemed the adequate repressive measure for the few who might need it. And it is a fact that of the 2,025 convictions covered by the figures shown in Table C there is not a single sentence of death for desertion.

It must, therefore, be kept in mind at the outset that the refusal to adopt the policy of death sentences for desertion was in itself a repudiation of the policy of extreme severity, and that the practice of limiting desertion sentences to terms of imprisonment is in itself the adoption of a policy of leniency. There may be a reproach for variability; but reproach for severity must deal with the fact that the policy adopted disregarded the extreme penalty authorized by Congress.

Turning, then, to the recorded facts, we find (Table A) that the total number of convictions for desertions for the year October, 1917—September, 1918, was 2025: that the average sentence was 7.58 years; that nearly 24 per cent of these sentences were for less than 2 years: that 64 per cent were for less than 10 years; and that only 35.90 per cent were for a greater period than 10 years. The article of war reads: "Any person who deserts shall, if the offense be committed in time of war, suffer death, or such other punishment as the court-martial may direct." It would seem, therefore, that in point of severity the result of court-martial sentences for desertion can not be charged with erring on the side of severity.

You will notice that I do not here attempt to account for the justice of individual cases. Certain of the sentences for 25 years or even for lesser periods are open to criticism as excessively severe under the circumstances of the individual case. But it must be kept in mind that these trials and sentences were found legally valid by the Judge Advocate General's Office; that the only issue of doubt that could arise concerns the quantum of the sentence; and that the scrutiny of the clemency section in the Military Justice Division of the office may be relied upon to detect cases of excessive severity before any substantial portion of such a sentence has been served. Indeed, by the plan already this month sanctioned by yourself and announced to the public, there is now proceeding a general revision of sentences which will include in its scope the majority of all sentences, and not merely the excessively severe ones. But the excessive severity of an individual sentence is not the question here; that question would call for the scrutiny of the particular case. The question here is of general conditions. What the above figures show in respect to general conditions, or the trend of conditions, is that the practice has been one of relatively moderate penalties instead of the severest one permissible under the law.

(*b*) *Absence without leave (Table A, No. 2)*.—Absence without leave is an offense which represents, in many instances, cases of actual desertion; but, owing to the movements of the military unit and thus the difficulty of obtaining the necessary technical proof, the actual deserter is frequently convicted of no more than an absence without leave. It is, therefore, plain that the offense of absence without leave may, upon its circumstances, merit an extremely severe penalty, equal to that of desertion. In time of war, this

offense may lawfully be punished by any penalty short of death; in time of peace a presidential order limits the maximum penalty to six months' confinement.

For the year ending September, 1918, the total convictions for this offense numbered 3,362; the average sentence was 1.59 years (or only three times the small maximum allowed in peace times); 11 per cent of the offenses received no penalty or imprisonment; 67 per cent received a sentence of less than 2 years imprisonment; and only 22 per cent received a penalty of more than 2 years in prison. When it is remembered, as above pointed out, that this offense is in many cases virtually the offense of an actual deserter, it will be seen that the number of the sentences over two years may not be disproportionate to the probable ratio of cases individually calling for the higher penalties. An average of 1.58 years for this offense, committed in time of war, can not be deemed an exhibition of severity, where, in fact, the act of Congress establishing the Articles of War leaves the court-martial absolutely untrammeled (short of the death sentence) in the penalty to be fixed to this offense.

(*c*) *Sleeping on post* (*Table A, No. 3*).—The offense of sleeping on post is punishable by death in time of war, and in time of peace "any punishment except death that a court-martial may direct." There were two sentences of death imposed by courts-martial in France for sleeping on post in the zone of operations and in the front-line trenches; those two individual cases I have already commented on in the first part of this letter. Of the whole 609 convictions, some 575 of the offenses took place in the United States, where it may be supposed that the highest penalty suitable for forces engaged with the enemy would hardly be applicable. And it is a fact that of the entire 575 there was only one sentence over 15 years, and only four sentences over 10 years. For 10 per cent of the sentences no imprisonment at all was prescribed; for 62.40 per cent of the sentences, the period imposed was less than 2 years; and all told, only 27.42 per cent of the sentences were for more than 2 years. Having in view the maximum provisions of the Articles of War, it seems plain that the treatment of this offense by courts-martial can scarcely be called a harsh one.

(*d*) *Assaulting a superior officer* (*Table A, No. 4*).—The offense of assaulting an officer is punishable, under the Articles of War, by "Death or such other punishment as the court-martial might direct"; and this irrespective of a state of war or of peace. The total convictions for this offense were only 31, giving an average sentence of 4.10 years; nearly 50 per cent of them being for a period of less than 2 years. Again, one may say that in the face of the capital punishment expressly authorized as a maximum by the Articles of War, courts-martial have not followed a practice which may be characterized as harsh or severe.

(*e*) *Assaulting a noncommissioned officer* (*Table A, No. 5*).—The offense of assaulting a noncommissioned officer is liable to "any punishment that the court-martial may direct"; and this irrespective of a state of peace or war. The total number of such convictions was 132; the average sentence was 2.36 years; more than 6 per cent were punished without imprisonment, and more than 57 per cent were punished by imprisonment of less than 2 years. There are half a dozen sentences for upwards of 10 years; the justification for these must rest upon their individual circumstances. But the average sentence of 2.36 years, compared with the maximum allowable under the Articles of War, can not be admitted to exhibit a general disposition to severity, but quite the contrary.

(*f*) *Disobeying a noncommissioned officer* (*Table A, No. 6*).—The disobedience of the lawful order of a noncommissioned officer by the Articles of War placed under the same penalty as the assaulting of a noncommissioned officer; that is, the court-martial has complete discretion in choosing the penalties, except that of death. The total number of convictions was 411, and the average sentence was 3.04 years; 8.27 per cent of sentences gave no period of imprisonment; 50 per cent gave a period of less than 2 years.

In itself, this average sentence, comparing it with the maximum allowed by the Articles of War, can not be referred to as a severe one. It is notable, however, that this offense of disobeying a noncommissioned officer, received a higher average of sentence, viz. 3.04 years, than the apparently more heinous one of assaulting a noncommisioned officer, viz, 2.36 years. It may be admitted that some explanation remains to be sought for this apparently anomalous result, but it can

be pointed out here that the disobedience of a noncommissioned officer is often of a deliberate character making the offense a highly serious one, whereas the offense of assaulting an officer is often the result merely of a quick temper without any deliberate intention of resistance to authority, and that it thus deserves considerate attention by the tribunal.

(*g*) *Mutiny* (*Table A, No. 7*).—There were 51 convictions for mutiny; the average sentence was 7.93 years; 27 per cent fell between 2 and 3 years, and 43 per cent fell between 10 to 15 years; the other sentences scattering over the various percentages. The Articles of War provide that a person guilty of mutiny "shall suffer death or such other punishment as the court-martial may direct," irrespective of a state of peace or war. When committed in its most significant form, it is, of course, the most heinous offense of a soldier. But it may also be committed under much less culpable circumstances. In short, it gives an opportunity for the widest range of discretion in the imposition of sentences. This inherent quality is reflected in the wide range of sentences actually imposed. In view of the fact that, in any army numbering more than 3,000,000 men at the time covered by these records, there were only 51 offenses in the nature of mutiny or related thereto, out of a total number of offenses of 12,472, it is plain that the number of such convictions is extremely small; and it must be inferred that the commanding officers were not seeking relentlessly for offenses that could be characterized as mutiny, and that the offenses actually characterized as such were offenses which well deserved the name. From June, 1917, to June, 1918, when the Regular Army and National Guard together consisted of less than 300,000 men, the total number of convictions for mutiny was 43; and yet with an army of ten times the size, the number of convictions for mutiny increased only one-fifth. It seems obvious that the practice of courts-martial during the year of the war could hardly justify a reproach of severity for the offense of mutiny.

(*h*) *Disobeying standing orders* (*Table A, No. 8*).—This offense is punishable under the Articles of War by such sentence of imprisonment as the court-martial may direct. The total number of convictions for this offense was 208; the average sentence is 1.96 years; for 12 per cent of the sentences no period of confinement was imposed; for 60.58 per cent a confinement of less than 2 years was imposed; 10.58 per cent of sentences were between 5 and 10 years; the rest scattering in other periods. In view of the maximum limit permitted to the discretion of the court under the Articles of War, and in view of the variety of circumstances affecting the nature of this offense, it can not be said that the tendency of the courts has been to severity.

(*i*) *Disobeying an officer* (*Table A, No. 9*).—The offense of disobeying a superior officer is punishable, under the Articles of War, by "death or such other punishment as the court-martial may direct"; It is covered by the same article of war that deals with assault on a superior officer, but obviously it should usually rank as an offense of lower grade. The total number of convictions for this offense was 785; the average sentence was for 4.34 years; 6 per cent of sentences were punished by imprisonment; 43.69 were punished by confinement of less than 2 years; and a trifle over 50 per cent were punished by some period greater than 2 years, there being 1 death sentence and 18 sentences for 25 years or more. It will be noticed that the average sentence for this offense was almost identical with the average sentence for the offense (No. 4 above) of assaulting a superior officer, and that in both cases a little less than 50 per cent of sentences were for periods of confinement less than 2 years. But these two offenses were treated differently with respect to the sentences for higher periods; the bulk of the long-termed sentences for assaulting an officer lying between 5 and 10 years, while for the offense of disobeying an officer, they were spread out over the periods between 3 years and 25 years or more. Comparing the absolutely unlimited nature of the punishment permitted by the Articles of War to be imposed by the court-martial, and observing that 50 per cent of these sentences were for periods of under 2 years, it can not be that the tribunals appear to be seeking to exercise the maximum of severity allowable, but rather the contrary.

This completes my survey of the sentences for the nine principal military offenses.

In the foregoing comments it will be noticed that, since a charge of excessive severity implies the habitual resort to a maximum standard allowable under the law, the standard here to be taken must of necessity be the standard set by the Articles of War as adopted by the act of Congress. Judging by this standard, the practices of the court-martial, to any candid observer, must be vindicated

from the charge of the habitual employment of severity; rather have they proceeded in a direction of a lenient use of their discretion.

But the mind naturally seeks to test this issue of severity by any other accepted standard that may be available, apart from the intangible standards of individual notions. There appear to be two and only two such other standards available. One is the standard to be gathered from former practice in the Army; the other is the standard to be gathered from civil courts. Neither of these is entirely appropriate; but it is my duty to see what light can be thrown by them upon the present subject.

(*a*) *Former practices of courts-martial.*—Unfortunately the records available in the printed reports of former years are but scanty in their application to the present purpose. No data as to the length of sentences have been published in the former reports of my office, except in the report for the fiscal year 1917-18, and then only for the offense of desertion. Taking these data for such light as they may give us (Table XIV, page 81, Report of the Judge Advocate General, 1918), we find that the length of sentence did increase gradually during that year. The figures are as follows:

DESERTION.

Month.	Convictions.	Total months' confinement given as part of the sentence.	Average month's confinement (total months' confinement divided by sentences imposed).
1917.			
May	3	48	15
June	8	276	34.5
July	17	560	32.94
August	27	450	22.5
September	44	1,604.75	36.47
October	56	2,521.75	45.03
November	52	1,863	35.83
December	93	5,153	55.4
1918.			
January	203	9,057	44.6
February	202	8,925	30.14
March	202	13,088.75	64.8
April	228	16,906	74.15
May	194	19,109	98.5
June	224	24,399	112.96
Total	1,553	104,051.25	71.42

It will thus be seen that the average sentence for the year ending June, 1918, was almost exactly six years, as compared with an average of 7.58 years for the period October 1, 1917, to September 31, 1918, and that the average of six years for the period May, 1917–June, 1918, started at between two and three years for the first seven months of the war, and then rose steadily until it was reaching nine years in the fifteenth month of the war.

I do not pretend to be able to interpret the significance of this gradual rise in the average length of sentence for the offense of desertion. So many conditions are involved that any one of several hypotheses may account for the circumstance. I content myself with pointing out, as a possible explanation, the principles already quoted from Brig. Gen. Oakes in his report on desertion in the Civil War, viz. it is quite possible that the military tribunals began with an extremely low penalty, but that as the training of the new forces proceeded in camps a general impression obtained that the protection of the army against the spread of desertion required a somewhat more stringent penalty.

As to any other offenses than desertion, and as to any periods prior to June, 1917, it is not now feasible to ascertain what were the standards of courts-martial sentences in peace-time practices. But inasmuch as a condition of war transforms the whole situation for military discipline and puts into effect the *strictest* standards of military behavior, it is not possible to presume that the

sentence length imposed in former peace-time practice would afford a suitable standard for comparison with war-time practice.

(*b*) ***Standard gathered from civil courts:*** Here it will be necessary to depart from the list of principal military offenses, which have no counterpart in the civil courts, and to resort to the principal civil offenses represented in the military records. The criminal statistics of the United States are but imperfectly organized for study, and the only available record for the present purpose that could be found, after extensive search, is in the report of the Director of the Census for 1910, entitled "Prisoners and juvenile delinquents in the United States." Table 42, at page 64, sets forth the variance in periods of sentences imposed for the various civil offenses. Setting these side by side with the sentences imposed for the corresponding offenses by military courts during the year ending September, 1918, the result is shown in the following Table I.

TABLE I.—*Sentences for civil offenses in military and civil courts compared.*

Offense and court.		Total.	Life or death.	10 years and over.	5 to 9 years.	2 to 4 years.	1 to 2 years.	Under 1 year.
Forgery:								
Military	number	223	.....	35	63	69	20	36
	per cent	100	.....	15.7	28.3	30.9	9	16.1
Civil	number	1,290	.....	43	146	569	323	209
	per cent	100	.....	3.3	11.3	44.1	25	16.3
Perjury:								
Military	number	14	.....	.....	.....	2	3	9
	per cent	100	.....	.....	.....	14.3	21.4	64.3
Civil	number	128	.....	1	3	38	49	37
	per cent	100	.....	0.8	2.3	29.7	38.3	28.9
Embezzlement:								
Military	number	162	.....	22	31	36	23	50
	per cent	100	.....	13.6	19.1	22.2	14.2	30.9
Civil	number	487	.....	7	22	76	117	265
	per cent	100	.....	1.4	4.5	15.6	24	54.3
Robbery:								
Military	number	117	.....	42	34	28	3	10
	per cent	100	.....	35.9	29.1	23.9	2.6	8.5
Civil	number	904	2	192	205	229	133	143
	per cent	100	0.2	21.2	22.7	25.3	14.7	15.9
Larceny:								
Military	number	1,025	.....	89	131	237	188	380
	per cent	100	.....	8.7	12.8	23.2	18.3	37
Civil	number	19,136	3	120	393	1,970	2,636	14,014
	per cent	100	.....	0.6	2.1	10.3	13.8	73.2
Rape:								
Military	number	15	[1] 7	4	2	1	.....	1
	per cent	100	46.6	26.7	13.3	6.7	.....	6.7
Civil	number	762	[2] 38	181	174	149	117	94
	per cent	100	5	24	23.1	19.8	15.5	12.6
Gambling:								
Military	number	15	.....	1	3	1	.....	10
	per cent	100	.....	6.7	20	6.7	.....	66
Civil	number	671	.....	.....	1	7	20	643
	per cent	100	.....	.....	0.1	1	3	95.9
Burglary:								
Military	number	29	.....	4	8	7	3	7
	per cent	100	.....	13.8	27.6	24.1	10.4	24.1
Civil	number	4,925	7	227	750	2,015	1,062	864
	per cent	100	0.1	4.6	15.2	40.9	21.6	17.6
Threats to do bodily harm:								
Military	number	30	.....	5	4	5	3	13
	per cent	100	.....	16.7	13.3	16.7	10	43.3
Civil	number	235	.....	.....	1	2	14	218
	per cent	100	.....	.....	0.4	0.9	6	92.7
Murder:								
Military	number	24	[3] 10	4	2	2	3	3
	per cent	100	41.7	16.7	8.3	8.3	12.5	12.5
Civil	number	937	[4] 814	109	3	7	4	.....
	per cent	100	86.9	11.7	0.3	0.7	0.4	.....
Manslaughter:								
Military	number	33	.....	[5] 7	5	[6] 9	6	6
	per cent	100	.....	21.2	15.2	27.2	18.2	18.2
Civil	number	1,437	[7] 24	520	419	341	97	36
	per cent	100	1.6	36.2	29.2	23.7	6.8	2.5

[1] Hanged.
[2] 3, death.
[3] 2 hanged, 2 commuted.
[4] 118, death.
[5] 3 mitigated.
[6] 1 mitigated.
[7] 5, death.

In the above table the percentages are the significant items. On the whole, it appears that the percentage of long sentences is greater in the military

courts than in the civil courts. For example, in the offense of forgery the sentences of 10 years and over were 15.7 per cent of all sentences, while in the civil courts they were only 3.3 per cent; the sentences for 5 to 9 years were 28.3 per cent, while in the civil courts they were only 11.3 per cent.

But this general trend is marked by so many exceptions that it is hardly open to any general conclusions. For example, in perjury the military court gave a sentence of under one year for 64.3 per cent of the cases, while the civil court gave its lowest sentence in only 28.9 per cent of the cases. Similarly for burglary the military court gave its lowest sentence in a larger percentage of cases than did the civil court. So, too, turning to the highest sentence it appears that murder and manslaughter received less severity of sentence in the military courts than in the civil courts; for murder only 41.7 per cent were sentenced in military courts to the death penalty or life imprisonment, while in the civil courts 86.9 per cent received such penalty; and similarly for manslaughter the percentages of sentence of life imprisonment or imprisonment of 10 years or over or imprisonment from 5 to 9 years were only about half as large as the percentages of the same sentences in the civil courts.

Moreover, it must also be remembered that the moral heinousness and danger of even these civil offenses, common to both codes, varies more or less in military life and civil life. Larceny, for example, which to the civilian mind never receives the deepest measure of reprobation among property offenses, has long been deemed throughout the rank and file of the Army as an intolerable offense, for the safety and mutual confidence of military intimacy as fellow soldiers becomes impossible unless every soldier can be assured that his few and precious belongings can be safely left unguarded in his restricted quarters. In these sections of our country where the horse has always been indispensable to every man's daily occupation, the offense of horse stealing is visited with penalties which seem grossly severe to the residents of other communities; indeed, so far has this principle been carried that in one Southwestern State noted for its splendid horses the law (unless it has been recently changed) permits the owner of a horse to shoot the horse thief while in the act of running away with the property, a privilege not accorded by the law of any other State. It is undoubtedly due to this sentiment that in the table above the offense of larceny is found to be visited with sentences of more than two years in percentages considerably in excess of the percentages found in the sentences of civil courts.

I mention the foregoing instances only as a preface to the general suggestion that the use of longer terms of sentences in military courts than in civil courts for some of the above civil offenses may well be explained by the exigencies of internal military life and by the habitual standards of military conduct known to all soldiers, rather than by any disposition on the part of military tribunals to impose heavier sentences for offenses of an identical nature.

I close this part of my letter, therefore, by noting that the general practices of courts-martial, judged by the maximum sentences allowable by the military code, must be deemed not to merit the charge of excessive severity and that, in my opinion, they rather merit the opposite characterization.

This general condition of things, however, I repeat, must of course be sharply discriminated from the question of the excessive severity of a particular sentence measured in the light of the circumstances of the individual case. That is a question totally irrelevant to the judgment to be passed upon the propriety of the practices of courts-martial in general, as judged by their average treatment of the offenses coming before them.

(2) *Variability of sentence.*—When we come to the question of variability of sentences we reach a subject which has been the fertile field for complaint and criticism in civil courts for a century past. It is notorious that the independent judgment of different courts and of different juries seems to be characterized by the most erratic and whimsical variety. Such has been the constant burden of complaint in civil justice, and it can hardly be hoped that military justice could escape a similar complaint in some degree. On the other hand, it must always be remembered that here the individual circumstances vary so widely that a variation of sentences is perfectly natural, and that the mere variation of figures in itself signifies very little, where the individual circumstances remain totally unknown to the critic. Nevertheless, a variability of sentences for the same offense is something which naturally excites attention and caution, and it should be the object of appellate authorities to equalize the penalties for the same offense where no obvious reason for

substantial difference is found. How far the revisory authority of the Judge Advocate General and the clemency powers of the Secretary of War have been effectual to secure such equalization will be noted later in this letter. At the present the inquiry of fact is whether there has been such variability and at what points it has taken place.

Table A, above referred to and annexed to this letter, summarizes for the nine principal military offenses the variance of the sentences: First, by months of the year covered; and, secondly, by jurisdiction areas from which the court-martial records come up for revision. In summary of these variances, it is here to be noted that such variances obviously exist: that these variances are not in themselves any more striking than those that are found in the sentences of civil courts, as already shown in table B; and that in seeking the possible source of these variances it appears very strikingly that there has been a slight but appreciable increase in the number of higher-period sentences as we come down to the later months of the war; and that, so far as jurisdictional areas are concerned, there have been notable variances which seem, in some cases, to localize the higher-period sentences, for certain offenses, in certain specific areas.

As illustrating the foregoing inferences, it will be sufficient here to take the single offense of desertion. Examining it by months, it will be noticed that the long-term sentences of 10 to 15 years and of 15 to 25 years and over 25 years increase slightly in their ratio to the whole of the sentences for the month as we approach the later months of the year under examination. For example, for the months of October, 1917, to February, 1918, there were no sentences over 25 years, although the number of convictions increased from 55 to 196 (the increase, of course, being due to the much greater ratio in the increase of armed forces). But during the months of April to July, with approximately the same number of convictions, averaging 225, the number of sentences for over 25 years increased from 4 to 9, to 15, and finally to 33. Apparently, therefore, some conditions in the Army changed as the months advanced so as to induce this variance in the direction of higher-period sentences. Just what those conditions were are not even the subject of speculation without a very careful inquiry; merely the fact is here pointed out.

Again, turning to the jurisdictional areas, we find that the Central Department shows about 9 per cent of sentences for over 10 years, while the Eastern Department shows only 3 per cent; that the Twenty-eighth Division, having 21 convictions, imposed no sentences in excess of 10 years, while the Eightieth Division, with exactly the same number of convictions, imposed 14 sentences greater than 10 years.

As further indicating this variance by jurisdiction areas, a glance at the same Table A, under the offense of "absence without leave," shows that in the Twenty-eighth Division, which exhibited the above leniency for desertion, so the offense of absence without leave was given a sentence of under 2 years for 127 out of 140 convictions, while the Eightieth Division, which had shown a large majority of long-term sentences for desertion, was on the other hand, lenient for the offense of absence without leave, imposing 16 sentences of under 2 years out of 20 convictions. Comparing again the Thirty-sixth and Thirty-ninth Divisions, with substantially the same number of convictions, viz, about 175, one finds that the former imposed about 20 sentences of above 10 years, while the other imposed 101 sentences above 10 years. This same Thirty-ninth Division had also used a majority of higher-period sentences for desertion, whereas the Thirty-sixth Division showed for desertion a record that averaged with the other divisions.

It will be seen, therefore, that in many, if not in most cases the extreme variance may be traced to difference of practice in the different jurisdictional areas. Just what conditions existed which would justify in the individual cases, or in the general trend of cases, this variance between divisions can hardly be the subject even of hypothesis. But it must be obvious to any candid observer that there do exist wide differences of conditions, not only in the racial and educational makeup of the different camps, but also in the morale and necessities of discipline prevailing in different camps. It is well known that the sentences of civil courts for civil offenses vary widely in the different States. For example, in 1910 (census report above cited, p. 50), the percentage of sentences of 10 years or over was 9.7 in the East South Central States, but was only 0.1 in the New England States; in Mississippi it was 22.51, but in California it was only 2.3. This illustration is mentioned merely to suggest that whenever one discovers that variances in sentences have a cer-

tain relation to variances in camps or divisions, the subject becomes at once too complex for hasty judgment.

Whatever may have been done or may now be contemplated as to the equalization of sentences by commutation in the way of clemency, I am only concerned here to point out the facts as they are found in the records relative to the action of the courts-martial themselves, as are revealed in any noticeable amount, seem to be due most largely to differences of conditions in the different camps, divisions, and other jurisdictional areas, and the greatest caution must be exercised before passing judgment upon such variances and inequalities, without being fully familiar with the conditions operating in those places.

I can not leave this subject without inviting attention to the enlightened tenor of the principles inculcated thoroughly upon the members of courts-martial by the manual which serves as their guide. This manual is required to be studied by all candidates for appointment as officers in the training camp, and a familiarity with its contents is required. Paragraph 342, on the adaptation of punishments, reads as follows:

"In cases where the punishment is discretionary, the best interests of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; that the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which, from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required."

It is confidently believed that the principles thus inculcated upon members of the courts-martial will be found not to have been substantially departed from when tested by the results shown in the above figures for 1917–18.

4. ATTITUDE OF THE JUDGE ADVOCATE GENERAL'S OFFICE AS TO SEVERE OR VARIABLE SENTENCES.

The distinct implication running throughout the remarks of Senator Chamberlain is that there is no central authority which can check, equalize, and correct such severity or variability as may be found to be excessive; in other words, that the Judge Advocate General's Office, charged with the duty of revising these court-martial records either acquiesces in the results of the court-martial sentences as approved by the reviewing authority of the division or department or makes no attempt to check any excesses by revisory action.

It is necessary therefore to emphasize what has been already pointed out above, that the Judge Advocate General's Office scrutinizes the court-martial records for the very purpose of discovering not only errors of law or procedure, but also excesses of sentence. The law section of the military justice division besides scrutinizing the records for errors of law or procedure has from time to time made recommendations, when sending back the record to the reviewing authority, that the sentence be revised. But, furthermore, the clemency section of the military justice division occupies itself exclusively with the scrutiny of records after the man's confinement has begun and an application for clemency has been filed.

But it is not enough to point out the existence of these powers and practices of the Judge Advocate General's Office. Inquiring into the results to see what the facts show I ask: To what extent has the Judge Advocate General's Office called for a reduction of sentence by recommendation of clemency to the Secretary of War?

(1) The extent of such recommendations as to number of sentences will be found by taking the total number of sentences for all offenses classified by length of term, noting the number of these sentences recommended for reduc-

tion by clemency by the Judge Advocate General's Office, and then reckoning the percentage of offenses of each length thus reduced. This gives the following results:

TABLE B.—*Distribution of sentence reductions by Judge Advocate General's Office according to length of original sentence.*

	Total sentences, by length of terms, for 9 principal military offenses, Oct. 1, 1917, to Sept. 30, 1918.	Sentences recommended by Judge Advocate General's Office for reduction, 9 principal military offenses, Jan. 1 to Dec. 31, 1918.	
		Number.	Per cent.
Total	7,624	947	12.42
Below 2 years	3,886	330	8.49
2 to 3 years	483	174	36.02
3 to 5 years	482	135	28.00
5 to 10 years	1,064	197	18.51
10 to 15 years	626	68	10.86
15 to 25 years	373	33	8.84
25 years or more	159	10	6.28

The important thing to notice about the table is that it shows 12 per cent of the total sentences to have been reduced by clemency exercised on recommendation of the Judge Advocate General. I see no reason to doubt that this 12 per cent is ample enough to cover all the individual cases in which an excessive severity would have been apparent on the face of the record.

The above table shows the reduction in its relation to the sentences of different lengths. The table shows that the largest percentage of reduction occurred in the sentences of medium length, and that the smallest percentages of reduction occurred in the sentences of shortest and of longest periods.

This result is perfectly natural and appropriate. The shortest sentences are those in which there would be the least call for reduction by clemency on the ground of excessive severity. The longest sentences are those in which the reduction on the ground of excessive severity would presumably not bring them to an extremely low period and therefore in which the time for recommending such reduction had presumably not arrived.

(2) How much total reduction did this action effect in the total length of all the sentences acted upon? This will afford some gauge of the thoroughness of the action in the nature of clemency. Table C below shows the number of sentences recommended for reduction, the total years of the original sentences, the total years reduced on recommendation of the Judge Advocate General's Office, and the net years of sentence as actually served. The figures are given for the nine principal military sentences, as well as for the total thereof.

Referring to the table for details as to the specific offenses, I will point out here merely that the total reduction effected was a reduction of 3,876 years out of an original period of 4,331 years, or a reduction of 89½ per cent. In other words, action of this office, in effecting reductions in the 1,147 sentences selected on their merits for reduction, cut them down to 10.50 per cent of their original amount. Presenting the same result in another form, the same table shows that the average original sentence of these 1,147 sentences was for a period of 3.78 years (or nearly four years), and that the average sentence as reduced was only 0.40 of one year, or less than five months.

These figures as to reduction effected in the length of the sentences, demonstrate that the action of this office was a radical one, and must have served to eliminate the excessive severity in those sentences. That the sentences selected for such recommendations of clemency included all of the sentences meriting the term "severe" neither I nor anyone else would be in a position either to affirm or deny without a consultation of every record. But I think that it is fair to assume that the scrutiny of the officers of the Judge Advocate General's staff presumably included all of those cases in which an excessive severity was obvious on the face of the record.

TABLE C.—*Reductions of sentences recommended by Clemency Division, J. A. G. O., according to amount of reduction. Jan. 1, 1918, to Dec. 31, 1918.*

Offenses.	Number of court-martial sentences. Oct. 1, 1917, to Sept. 30, 1918.	Number of sentences recommended by Judge Advocate General's Office for reduction.		Years of original sentence in cases selected for recommendation.		Total years reduced on recommendation of Judge Advocate General's Office.		Net years of sentence as served.		Per cent of averages.
		Number.	Per cent.	Number.	Average.	Number.	Per cent on third column.	Total years.	Average in years.	
Total offenses	12,472	1,147	9.20	4,331.28	3.78	3,876.69	89.50	454.59	0.40	10.50
Desertion	2,025	577	23.49	2,193.49	3.80	2,056.56	93.76	136.93	.24	6.24
Absence without leave	3,362	112	3.33	361.67	3.23	313.72	86.74	47.95	.43	13.26
Sleeping on post	609	63	10.34	187.08	2.97	150.14	80.25	36.94	.59	19.75
Assault and attempt to assault	173	34	19.65	135.00	3.97	108.09	80.07	26.91	.79	19.93
Mutiny	51	10	19.61	49.00	4.90	46.81	95.53	2.19	.22	4.47
Disobedience, disrespect, disloyalty	1,404	151	10.75	567.17	3.75	454.57	80.15	112.60	.75	19.85
Disobedience of regulations	208	46	22.16	192.75	4.19	116.07	60.22	76.68	1.67	39.78
Disobedience of orders	1,196	105	8.78	374.42	3.57	338.50	90.41	35.92	.34	9.50
Miscellaneous, forgery, larceny, etc	4,848	200	4.13	837.87	4.19	746.80	89.13	91.07	.46	10.87

5. EFFECTIVENESS OF RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

But the foregoing demonstration of the extent of mitigation of severity effected by the Judge Advocate General's Office, through its recommendations, is vain and meaningless, according to Senator Chamberlain. In his remarks I find it repeatedly asserted and implied that the commanding officer of the division or department—in technical expression, the reviewing authority—is not obliged to follow and does not follow these recommendations. "Court-martial sentences found by the reviewing authorities to be null and void for want of jurisdiction," he states, "have been allowed to stand." "The military commander is not obliged either to ask for legal advice or to follow it when he has asked for it and it has been given to him by responsible law officers of the Army." "Courts-martial should be required to accept the interpretation of the law by a responsible law officer."

Here again we have arrived at a simple question of fact. There is, to be sure, a question of legal theory involved. The records of courts-martial come to the Judge Advocate General to "revise"; and what legal effect this "revision ought to have in theory is a mooted question of law and policy on which it is needless to enter here. Suffice it to say that a difference of view exists and that the judgment expressed by the Judge Advocate General in his appellate capacity is customarily phrased in terms of a recommendation to the commander in the field. But this question, after all, like many questions of fundamental principle, may become practically irrelevant in the light of the facts. The assertion made in Senator Chamberlain's remarks is an assertion of fact, viz, that the commanding officer *does not* follow the legal advice which is given him and does not accept the rulings of the responsible law officer.

On the question of fact, let the facts themselves answer:

The cases fall necessarily into two groups. One class of cases coming to the Judge Advocate General for revision under United States Revised Statutes, section 1199, the thirty-eighth article of war, and General Order No. 7, January, 1918, require and receive no other revision or approval than that given by the Judge Advocate General. The other class of cases includes all sentences of death and of dismissal of officers, which, under the forty-eighth article of war, require confirmation by the President as well as certain other cases in which error of law has been found, but the execution of the sentence has not been suspended

by the reviewing authority. The former class of records go directly back from the Julge Advocate General to the reviewing authority in the field; the latter class of cases go from the Judge Advocate General through The Adjutant General and the Chief of Staff to the Secretary of War, and sometimes to the President. The question of fact is, therefore, in what proportion of cases does purely military authority fail to give effect to these revisory rulings of the Judge Advocate General?

The results in both classes of cases are shown in the following Table D:

TABLE D.—*Effect of action of Judge Advocate General's Office October, 1917, to September, 1918.*

Cases recommended for modification or disapproval on legal grounds.[1]	Number of cases.	Recommendations given effect.		Recommendation not given effect.	
		Number.	Per cent.	Number.	Per cent.
To reviewing authority	125	121	96.8	4	3.2
To War Department	141	135	95.7	6	3.8
Total	263	256	96.2	10	3.8

[1] Does not include a few cases in which the recommendation referred only to the place of confinement.

It thus appears that out of a total for the period covered of 266 cases recommended by the Judge Advocate General for disapproval on legal grounds, there were only 10 cases in which the Judge Advocate General's ruling was not followed; of these cases, 4 were not followed by the reviewing authority in the field, and 6 were not followed in the Secretary of War's Office.

In the light of these facts, I think I am justified in asserting that the records disclose no foundation for the assertion which Senator Chamberlain has been led to make. It is not a fact that the military commander or that any military authority proceeds to follow out the dictates of his own discretion regardless "of the interpretation of the law by a responsible law officer," nor that he fails to follow the legal advice "when he has asked for it and it has been given to him by the responsible law officers of the Army." Whatever may be the legal theory of the function now placed by statute in the Judge Advocate General as the law officer or appellate tribunal for military justice in the Army, that theory becomes virtually immaterial in the light of the facts during the period of the war. The state of things supposed by the Senator to exist, simply does not exist. Virtually the recommendations of the Judge Advocate General are given practical effect in the same manner as the trial courts in civil justice give effect to the mandate of the supreme court of the State.

6. MILITARY LAW AS DEPENDENT ON THE MILITARY COMMANDER'S DISCRETION.

But this brings me naturally to the last and most general assertion contained in the Senator's remarks, viz, that the general treatment of accused soldiers is not according to the strict limitations of law as embodied in the military penal code, but is made to depend upon the arbitrary discretion of the commanding officer in each case; or, to use the Senator's own language, "the records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice; we have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer."

As a concrete demonstration of the incorrectness of this assertion, the foregoing facts, taken directly from the records of the courts-martial, appealed to by the Senator, must suffice as a principal refutation. And yet the Senator's remarks call for more than the citation of concrete facts to the contrary. I will, therefore, take the opportunity to point out briefly what general difference does exist between military justice and civil justice.

The substance of my counter assertion is that although the theory of military justice does differ slightly from the theory of civil justice, yet in substance and in practice both of them, in our inherited Anglo-American system, are

fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law.

The only kernel of correctness in the abstract statement of Senator Chamberlain is that the theory of military justice is in its general purpose somewhat different from the theory of civilian criminal justice. The contrast of theory between the two is well set forth in a statement of Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War:

"The object of the civil law," he says, "is to secure to every human being in a community the maximum of liberty, security, and happiness consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation."

This definition of Gen. Sherman shows that the objects to be attained are different, in that military justice aims to make the man a better soldier or to eliminate him from the military organization if he can not be improved, while civilian justice looks to the ultimate protection of the community at large.

But, once this difference of theory and purpose is conceded, the two systems proceed in identical method, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand and the inflexible rigor of automatic penalties on the other hand.

The former end is attained by a system of courts, procedure, and definitions of offenses, which contains the counterpart of civilian justice in virtually every respect; and which, as already noted, is superior to the civilian system in its ample provision for automatic appellate review in every case These rules and regulations are fully set forth in the Manual for Courts-Martial: every officer is required to be familiar with this; and a new edition of 50,000 copies, revised to date, was just printed in October.

The other aim, to protect the offender from the harsh consequences of a rigid system of penalties, is secured by the method of indeterminate sentences, i. e., virtually a probationary sentence for every man whose offense is not so heinous as to rquire immediate separation from the Army. For seven years past, military justice has possessed an indeterminate sentence and probation system which is in advance of that of any State of the Union; for it possesses virtually no minimum limit. How effective it is in mitigating and commuting the sentences originally imposed has been seen in the figures already set forth.

The system of military justice thus established is one of law and orderly procedure, not one of arbitrary discretion of the commanding officer. The proceedings are so conducted as to preserve for scrutiny of the superior authority every point of law which can possibly be raised for the protection of the accused. The accused is furnished a copy of the proceedings on request. This record goes up to the reviewing authority, and then to the Judge Advocate General. The Judge Advocate General's rulings on revision represent the application of all those legal principles which are required by law and regulations to be observed—definition of offenses, organization of the court, due procedure, sufficiency of proof, limitations of penalty, and so on. And the judgment of the Judge Advocate General, embodying those principles, is practically enforced and put into effect by the commanding officers with virtually the same effect as the decision of an appellate civilian court. The picture drawn of an arbitrary commanding officer contemptuously ignoring the limitations of law as embodied in the opinion of the Judge Advocate General is incorrect. In justice to officers of the Army who have in the stress of war acted as convening authorities it should be dismissed from the minds of the American people.

The foregoing figures and facts amply show this. But another and convincing way to understand it would be to read a few records from the Judge Advocate General's Office. They bear all the familiar marks of a record in any civilian court of criminal appeal. Except for the subject being a military offense, the spirit permeating them is essentially not different from that of the records of a civilian court—the same raising of legal questions as to the allegations of the offense, the jurisdiction, the procedure, the evidence, and the judgment. The whole record is redolent of legalism. No one can read these records and not admit that the system of military justice is as full of legal limitations as any civilian system. Some might even infer that the technicalities of civilian criminal law are too prominent. But none could assert the contrary.

That military justice can not be improved in many details could certainly not be maintained. Much might be said on this subject. But neither does any one maintain that civilian justice is perfect. The experience of the past year and a half, when carefully studied, will doubtless reveal numerous details in which improvement of the military code can be secured. It will first be necessary to compare divergent opinions, based on differences of local experience and of important policies. But the same is true of each one of our institutions, civil as well as military, that has passed through the crucible of war time. What we possess is a system of military justice founded on the Constitution, the statutes of Congress, and the President's regulations, administered in the trial courts by officers required to be familiar with it, and scrutinized in the appellate stages by professional lawyers whose sole object is to insure conformity in every substantial detail to those requirements of law.

E. H. CROWDER,
Judge Advocate General.

LETTER TO SENATOR CHAMBERLAIN.

FEBRUARY 13, 1919.

Hon. GEORGE E. CHAMBERLAIN,
United States Senate.

MY DEAR SENATOR CHAMBERLAIN: On the appearance of your remarks in the Congressional Record on January 3, 1919, with reference to the administration of military justice during the war, I at once directed that the Judge Advocate General's Office prepare such data as are available for your information and that of the Senate dealing with the subject. It is not unnatural that so grave a matter as this should attract widespread public attention and that the humane sentiments of Senators and the public should be stirred by such representations as were made to you and formed the basis of your remarks.

In the meantime, as I have happened to be a lawyer and to have had considerable experience as an executive in dealing with the administration of criminal law and of prison discipline, my own attention was not unnaturally attracted to the administration of military justice upon my assumption of the office of Secretary of War. Until the entry of the United States into the European war I found it possible personally to examine the records in most of the cases involving serious penalties. This became impracticable with the increasing demands upon my time, and I therefore came to rely for my action in these matters more and more upon the elaborate reviewing machinery erected in the Office of the Judge Advocate General to deal with these cases, although when any doubt was brought to my attention, either by division of opinion or from outside suggestion, I either personally examined the records or caused them to be independently examined by lawyers whose relation to the subject was purely judicial. It seemed, therefore, quite incredible that any general and widespread perversion of the principles of justice could have crept into a system with the workings of which I was thus familiar and the organization of which seemed to me so well calculated to secure thorough consideration and the application of most humane policies.

The Judge Advocate General has just handed me a letter covering such preliminary examination as he has been able to make of the situation, which is to be followed by a report much more comprehensive in character; but the inquiry so far made has developed a situation which I think ought to be brought to your attention at once and which I have no doubt you will be glad to bring to the attention of the country in order that the interest which has been aroused on this subject will have before it all the facts which ought to be considered before any judgment is formed or any apprehension created on the part of parents or friends of those in the military establishment that soldiers are subject to a harsh and unequal discipline.

In addition to the data presented in Gen. Crowder's letter, I beg leave to express my willingness to produce all other data and information within the control of the department which would be useful or interesting to the members of the committee.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

LETTER TO MR. LUNN.

WAR DEPARTMENT,
Washington, March 1, 1919.

Hon. GEORGE R. LUNN,
House of Representatives.

MY DEAR MR. LUNN: I think I can answer your question about the course of military justice during the war more adequately by sending you the inclosed copy of a letter written by Gen. Crowder to me than in any other way. Immediately after the original discussion of the subject in the Senate, I asked Gen. Crowder to give me a comprehensive memorandum covering the whole matter. This letter resulted. Its statements are, I think, most reassuring.

In the meantime, I may say that during the war we investigated and acted upon the cases involving the death penalty and dishonorable discharge from the service. The great number of cases involving long terms of imprisonment could not be circumstantially reviewed under the pressure then existing. The fact of the legality and sufficiency of the trials was inquired into and the cases otherwise put aside for mature consideration. A board of officers organized in the Office of the Judge Advocate General, known as the clemency board, has been at work for some weeks reviewing these postponed matters, and I have already in a good many cases acted upon the suggestion of that board by reducing some of the longer sentences to such terms of imprisonment as would have been imposed for like offenses under the peace-time procedure in force in the department.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 164.

[From Congressional Record, Feb. 19, 1919.]

Mr. BURNETT. Mr. Chairman, a few days ago I felt called upon to criticize some of the methods of the War Department in regard to the infamous system of courts-martial that were being held in our armies. In the course of those remarks I criticized somewhat severely Gen. Ansell, who had been acting as Judge Advocate General. Facts that have come to my attention since that time have led me to believe that I was perhaps too harsh in that criticism. I have received a letter from Gen. Ansell, and the gentleman who handed that letter to me stated that I was at liberty to place it in the Record. This letter shows much of the activity of Gen. Ansell in trying to reform the infamous system.

It always gives me pleasure when I have done even a partial injustice to anyone, to admit that fact, or make reparation. I do not believe, however, that even from the letter of Gen. Ansell itself that he has been entirely blameless. He shows in the letter that he did make his appeal to Gen. Crowder, to the Chief of Staff, and to the Secretary of War, urging the correction of the system that had grown up, and which he thought, and which I think, beyond question, they had the right to revise and change. He shows that he tried to secure reconsideration in a number of cases, and was overruled. But, Mr. Chairman, my reason for now criticizing him—not so harshly as before—is that, as he knew, that those iniquities were being perpetrated, that those outrages were being committed, he ought to have notified those who were his superior officers and responsible for them that he intended to resign unless such abuses were corrected. Not having done so, I feel that he has not placed himself entirely outside the pale of just and legitimate criticism.

I know what the answer will be. The answer will be that during that time we were at war, and that is true, and that may be a partial mitigation; but we were at war when Senator Chamberlain bravely dared to criticize conditions in the military camps of this country. Attempts were made to call him down. It was even said by high authority that he had forced the Secretary of War to lose his valuable time in going before the committee of the Senate for the purpose of making explanations. But, Mr. Chairman, though that brave Senator may go down to defeat, I believe he will carry with him the blessings of many mothers of soldiers in this country whose lives he saved by that very criticism, because he brought about at least a partial reform in the infamous conditions that existed in the camps. If that action on the part of that brave

Senator shall forever retire him to the shades of private life, he will carry with him the consciousness of having saved human lives from the work of heartless tyrants. And I believe that if Gen. Ansell had then said to the War Department, "Unless these things are changed, unless these savageries are discontinued, unless these barbarous and inhuman cruelties are stopped, I will resign my position and expose to the world just what has been going on," I believe it would have had its effect in getting a correction of those conditions.

He would no doubt have been threatened with court-martial; but if the War Department had permitted that outrage, the country would have arisen in such just protest that the threat would never have been executed.

A brave man may be suppressed for a time, but the conscience of honest people, shocked by atrocity and barbarism, will rise to his vindication, and the cowards who seek his destruction will in the end be driven from the seat of power. The wicked and heartless may flourish for a season, but that justice which has its seat in the bosom of God will finally overtake them. It seems from the letter of Gen. Ansell that whenever he tried to treat soldiers like human beings he was called down and overruled. Then, how could he remain in the councils of such Huns? How could he herd with such Attilas?

Mr. Chairman, as he suggests, I was no doubt too harsh in the criticism, and I feel that it is due to me and to this House and to the country that I should read the statement of Gen. Ansell, and thus pillory the Neros responsible for these cruelties before the country.

Only yesterday I received a letter from the War Department in regard to a court-martial sentence that had been brought to my attention. I had placed before them a case where it was stated to me that a young man had, as I thought, been most cruelly sentenced to 20 years at Fort Leavenworth. The reply was that they could not reopen the case now, because more than six months had expired since he made application for clemency, and clemency had been denied. The letter stated that a reexamination at the present time is precluded under War Department orders of August 28, 1907, which prohibit the reexamination of application for clemency within six months of the last consideration, unless new and material reasons therefor are presented. Is that the system under which people in a Christian land, in a civilized country, have to live? Is it possible that the War Department has so tied itself down by inflexible rules that although a most outrageous sentence has been fixed upon a soldier, because it has been six months since clemency had been asked and denied, they could not reopen the case? The letter pointed out that the 18th of May 1919, was as early as he could make another application. Hindenburg and Kaiser Bill could hardly be more cruel. The letter is as follows:

* * * * * * *

(Separate file.)

* * * * * * *

Mr. GOOD. Mr. Chairman, I yield seven minutes to the gentleman from Ohio (Mr. Kearns).

Mr. KEARNS. Mr. Chairman, Gen. Ansell has recognized the injustice that has been done thousands and tens of thousands of private soldiers during this war. These wrongs have been committed in the name of justice through the medium of a military trial. He has come to this Congress and asked us to revise the military laws under which it is made possible for these wrongs to be inflicted on the enlisted man. If any Member of Congress will take the time and has the inclination to go to the War Department and investigate these alleged courts-martial he will come back to his seat in this House denouncing in most unmeasured terms the military law under which the enlisted men have been tried during this war and are still being tried.

We ought not to forget that we still have under arms more than two millions of men. Each one is subject to trial by court-martial upon the charge of violating some frivolous and absurd military rule. I will venture to guess that none of you can read the hearings in the average court-martial but will say that justice is an absolute stranger at these so-called trials.

If we adjourn this congress and leave Gen. Ansell and other officers who want to help him with their hands tied, I do not know what may be the result. If the worst should follow, the responsibility will be at the door of Congress because we have refused to heed his cry of danger.

In this connection I am going to read to you an excerpt from a letter received from the mother of one of these boys who is somewhere in Europe. The mother says:

"I am inclosing you herewith a letter that I have received from my son. Can't these boys be brought home?"

I am thinking that this thought is in the heart of many mothers to-day. I will read now a paragraph from the son's letter which was inclosed:

"This is the worst hole that I ever got into. I sleep on a board floor, as does each private. The officers are well fed while we starve. They have good beds in good quarters. If we complain, we get a court-martial. I have not been up before them yet. Don't know how soon I will be."

Here follows a warning in this letter that every Member of Congress ought to heed. Listen to the voice of this boy as it comes from over the sea. Here is his closing sentence in this paragraph:

"One thing, a time will come when the boys are home, and these officers may never know who got them."

Mr. FERRIS. Does the gentleman think that is a good spirit for the boy to write?

Mr. KEARNS. I am not discussing the spirit of this letter. I am stating a cold fact. I have sympathy for a boy put in this position, where he is made to sleep on a bare floor and the officer is furnished with comfortable quarters and well fed while the boy is being starved. I say most emphatically my sympathy is with the boy.

Mr. FERRIS. Does the gentleman's sympathy extend to the threat to assassinate the officer?

Mr. KEARNS. Of course I have no sympathy with anarchy or lawlessness in any form, but I have read to this House the language of a boy who says he has been made to suffer untold and useless hardships. He says if he complains because he is starving he is brought before a court-martial. Under our present system of courts-martial the chances are he would receive many years at hard labor in prison. To my mind, the entire system is wrong and the hardship of these boys would appeal to a heart of adamant. The only argument that I am trying to advance is the argument that we, this Congress, should act; that we should do something before we adjourn to relieve these boys. No; I am not upholding anarchy, neither do I subscribe to any veiled threat that might be expressed between the lines of the paragraph taken from this letter, whatever that threat may be. I believe in law and order; but I am telling you that these antiquated laws should be repealed. They have come down the centuries from the dark ages. We have tried to rewrite these laws here on two or three occasions within the week by way of amendment to the military appropriation bill, but each time some one made a point of order to the amendment. We wanted to rewrite these laws so that boys would not be compelled to make threats against officers, if indeed they make threats. We wanted to make the enlisted man's liberty just as sacred and as safe as your liberty and mine.

I want to say to you that there is not one private out of one hundred who is tried by a court-martial who stands a ghost of a chance of acquittal if an officer is the prosecuting witness. In support of this statement let me read to you from an argument made by a young officer in defense of his client. Before I do that, and by way of explanation, permit me to say that three officers had testified against the defendant, who was a private. When these officers had finished their testimony the prosecution rested its case. The young lieutenant who was defending the boy did not put his client on the stand, nor did he put any witness on the stand. Here I call your attention to the reason, as he said, why he did not. Let me say in praise of the young lieutenant who defended this private that he had nerve sufficient to talk straight out from the shoulder to the court. He had the nerve to tell them the situation, the environment in which he found himself in the defense of his client. Listen to the language that he defiantly slings into the very teeth of the court, composed, I think, of about seven officers. And note, too, the silence of the court when, if this statement that follows is not true, the officer making the accusation should have been himself brought to trial. Yet there are high Army officers here in Washington who will tell you this situation does not exist. Listen to the first paragraph of this argument, and then tell me what you think. The language hurled at the court was as follows. Listen to it:

"If the court please, I will take up a few minutes this morning of your time in order to sum up the evidence. I will deal mostly with the evidence of Capt. Williams, the man who prepared the charges and on whose account we are

ere this morning. I did not allow the defendant to take the stand behalf"—Let me pause here and ask, Why do you suppose he did it you to listen to the reason why he says he did not allow his ke the stand in his own behalf to rebut the testimony of three ls is what he says:

t allow the defendant to take the stand in his own behalf because it the words of an officer are above reproach (with this court) and idence that the defendant might be able to give would simply be a ie."

first paragraph in the speech made by the counsel for the defendant, cers here in Washington will tell you that what I am saying is et I have quoted from the record of a military trial wherein the as found guilty and sentenced to imprisonment for eight years at and all because an officer's word in a military court "is above All because it would be "a waste of time" to offer testimony of ldier in a military court. I say this is disgraceful; this is shame- s Congress ought to deal military autocracy a death blow while s chance. Gen. Ansell has defied this military aristocracy and is o act. Here is a young lieutenant, M. P. O'Keefe, defending a pri- s the nerve to say to the court that he did not put his client on the d because he realized that the word of a private was worthless in ourt as against the word of an officer, and the court sat there and he charge in silence, and by that silence, as we all know, admitted ord that Lieut. O'Keefe said was true. [Applause.]

NT OF COL. JOHN A. HULL, JUDGE ADVOCATE, GENERAL STAFF COLLEGE, WASHINGTON, D. C.

WARREN. Now, Col. Hull, will you state your name and ie stenographer?

ll, the members of this committee—that is, of the whole affairs Committee of the Senate—have before them Senate , which was introduced by Senator Chamberlain, providing ral and entire reorganization of the Articles of War, and nmittee is charged with the authority of recommending to mmittee approval or disapproval of changes in that bill, ing changes; and, with the understanding that you had o with the dispensing of justice under the old Articles of hould like to hear from you any suggestions you may have as to that particular bill or as to the Articles of War gen- erhaps you have seen the Kernan report or the report of can Bar Association's committee. If you wish to refer to rts in any way, we would be glad to have your views.

LL. I might state in introduction, Mr. Chairman, that for years I have been a judge advocate in the United States that since last November I have been on special duty as icer of the American Expeditionary Forces, and since my he United States I have been a special student of the Gen- College, so that I have not had an opportunity, such as I ire, before testifying specifically, either to read the bill or he reports mentioned by you.

WARREN. You were on the other side for a year and a half

LL. Yes, sir. During part of that time I was judge advo- S. O. S. I also organized and was for some time a director uisition and claims service, and after the armistice I be- ice officer, as I have stated.

Senator WARREN. You will find in this print, in parallel columns, the present Articles of War and Senator Chamberlain's suggested substitute as contained in the bill.

Col. HULL. I am sorry to say that this is the first time I have seen that. I tried to get a copy of it in France, but it was not available; and since then, as I have said, I have not had the time.

The only report which I have read is the Kernan report, and any dissent that I might have from anything that is mentioned there would be of a very minor character. I believe that it is an excellent report, and have great confidence in the experience and ability of the members of that board.

Senator WARREN. You heard Senator Chamberlain's very able drawing out from the Inspector General of his opinion as to a style of appellate court, if I may term it such. We should like to hear your views about that; whether there should be greater power of revision in the hands of the Judge Advocate General, or whether there should be another man or body of men who could take up these cases for final adjustment. As stated here a few minutes ago, there seems to be no real controversy in the minds of those in question that there should be an appellate tribunal with powers to correct any injustice that might appear.

Col. HULL. Personally, I am firmly of the opinion that if that work is to be well done, for the benefit of the country, it should be subject to the control of the constituted authorities. In 20 years' experience as a judge advocate I have been fortunate in serving, as a rule, with the older and more experienced general officers of the Army. With only one have I discussed to any great degree legal questions, and that was Gen. Otis, commanding general of the Philippines, who was a distinguished lawyer in civil life before he became an officer in the Army, and whose judgment on both law and facts was of the highest order.

With the other officers in whose staff I have served, as a rule their comments have been only in applying the law to the facts, based on their long experience in the Army and their sound judgment of men and affairs. There are many court-martial cases where a knowledge of military conditions surrounding the camp and garrison is necessary for a correct understanding of the testimony, and I am sure that a body of civilian lawyers, no matter how sound they might be both in law and their experience in civil affairs, would in many cases fail to give proper estimation, either for or against the accused, to the soldier language used by the witnesses.

Senator WARREN. Senator Lenroot is very much interested in the discussion that has come up on the floor of the Senate, and he asked me to say that he wishes us to go on without him, as he will read all the testimony taken. He will be in later if possible.

Col. HULL. If you will permit me to say so, I have seen in the public press a number of statements that would indicate that some of the witnesses before the committee have almost the impression that the average officer of the Regular Army, as well as the average officer during this world's war, almost took a pleasure in treating the enlisted men under his command in a harsh and cruel way, and with special reference to courts-martial. I doubt if such statements have made any impression upon the committee, as the officers of the Army have sworn to perform their duties in just the contrary way:

and, leaving aside the sense of duty, a man's self interest as a commanding officer would require him to treat his men justly and fairly; as otherwise he can not have a well-disciplined command.

Senator CHAMBERLAIN. What were your functions, Colonel, in the Judge Advocate General's office here? Did you review cases that came up from commanding officers?

Col. HULL. I have had little or no service in the Judge Advocate General's office at Washington in my 20 years' service.

Senator CHAMBERLAIN. It has always been with the line?

Col. HULL. It has always been at department headquarters, as a rule. I was here in Washington one year in which I was mainly connected with Philippine affairs, and with the Manassas maneuvers and the claims for rental and damages growing therefrom.

Senator CHAMBERLAIN. You have not had much experience, then, in connection with cases which come up for review?

Col. HULL. No, sir; except this, that probably, in the 20 years, I have sent to Washington over 20,000 cases.

Senator CHAMBERLAIN. That is, cases where the approval of the commanding officer had been had?

Col. HULL. Yes, sir.

Senator CHAMBERLAIN. Either of convictions or acquittals?

Col. HULL. Yes, sir.

Senator CHAMBERLAIN. And practically all of those cases were approved here?

Col. HULL. So far as I know. I have never had a case returned to me from Washington, pointing out a fatal error.

Senator CHAMBERLAIN. You do know this, Colonel, that under the construction of the law as it has been interpreted by Gen. Crowder, the only power that the Judge Advocate General has, where the court had jurisdiction and where the trial was regular, is to advise the commanding officer only as to the merits of the case?

Col. HULL. Either that, or submit the case to the Secretary of War for his action.

Senator CHAMBERLAIN. Yes; but he really had no appellate tribunal for errors of law occurring at the trial?

Col. HULL. In question of language, no. Practically, yes.

Senator CHAMBERLAIN. What I am trying to get at is the fact. If the trial was wrong in the court below, if the court-martial proceedings were wrong—if the trial was wrong, but if the court had jurisdiction—then the Judge Advocate General, under his theory of the law, had no power to undertake to correct the trial or to criticise the sentence?

Col. HULL. No; nor would the appellate court have that power, under the facts as given by you.

Senator CHAMBERLAIN. A civil court?

Col. HULL. Not if the case was regular, and there was nothing the matter with it.

Senator CHAMBERLAIN. Well, prejudicial error—I will put it that way. That is what the Judge Advocate General holds, that if the trial was regular and the court had jurisdiction he has no power other than to advise. I was using the language of that office.

Col. HULL. No.

Senator CHAMBERLAIN. Even if there was prejudicial error committed against the defendant, and the commanding officer had ap-

proved the judgment, under the theory of the Judge Advocate General, he still had no power to set aside or revise or modify that sentence?

Col. HULL. Personally, no.

Senator CHAMBERLAIN. You say "personally." Has he officially?

Col. HULL. He has the official duty to report the error to the Secretary.

Senator CHAMBERLAIN. To whom?

Col. HULL. To the Secretary of War.

Senator CHAMBERLAIN. Yes; but the Secretary of War does not claim that he has any right to reverse.

Col. HULL. There have been, during my experience, a great many thousands of men whose sentences have been modified by the Secretary of War.

Senator CHAMBERLAIN. Clemency has been shown them?

Col. HULL. Yes.

Senator CHAMBERLAIN. But there have been no reversals in judgment?

Col. HULL. Except where the sentence has been held to be illegal for error of form, as a rule.

Senator CHAMBERLAIN. Do you think there ought to be any appellate jurisdiction anywhere?

Col. HULL. As I said, I believe in it; yes.

Senator CHAMBERLAIN. Where ought it to be?

Col. HULL. I should say in the Judge Advocate General's office, with power to report to the Secretary of War.

Senator CHAMBERLAIN. Do you agree with Gen. Crowder's construction of section 1199 of the Revised Statutes, or do you agree with Gen. Ansell's view of it?

Col. HULL. That question arose first to my mind definitely when I was on my way to France. Gen. Ansell spoke to me about it and told me the general views. My impression at that time was that if the case had been *de novo*, Gen. Asell had a very strong position, but that in view of the construction that had been made and the years of practice that had taken place, I thought his position was greatly weakened.

Senator CHAMBERLAIN. In what respect; what practice?

Col. HULL. Namely, from the time of the statute and the original construction, a practice that had grown from that time on, that the power to revise did not mean what Gen. Ansell claimed it did.

Senator CHAMBERLAIN. I believe that is all that I want to ask, Mr. Chairman.

Senator WARREN. Unless you have something you wish to say, Colonel, that is all.

Col. HULL. Yes; I have.

Senator WARREN. In that case we should be very glad to have you proceed, and we wish you to feel free to comment upon anything that is before us. Our duties are not in connection with anybody's differences, but they are to get before the Congress—and first before the main Committee on Military Affairs—the best form of bill to correct errors in the present law and practice, or the law which creates the practice.

Col. HULL. I have also seen in the newspapers an impression given out regarding the trial of the mutineers at Houston, Tex. I was

ı the central department and sent to San Antonio, Tex., dvocate to prepare the case of the United States and to nen. The impression has been given that there was no heir case and that those 13 men were improperly hung. entire trial a copy of the daily evidence was given to the cate of the Southern Department, and a copy was also Judge Advocate General.

WARREN. At Washington?

L. At Washington, D. C. Col. Dunn, the judge advocate thern Department, detailed an assistant of his, a lawyer life, to review this case, and this officer had no other cept to carry on a current review of the case as the case

from memory only, the court was closed for considera- the 24th of November. They spent several days in con- of the findings and sentence. I gave to Col. Dunn, in- copy of the findings and sentence at the same time I ıg them up in the record, so his review could be brought ıte. This was about the end of November. I think the s were in front of Gen. Ruckman about one week before I think it was five days thereafter that the 13 were ex-

WARREN. You are speaking now of the colored troops?

L. Yes; of the Twenty-fourth Infantry. I am sorry that with me here an extract of the opinion of the Acting Judge eneral, dated January, 1918, reviewing that case, which I was signed by Col. Mayes for Gen. Ansell——

CHAMBERLAIN. That was after they were executed, was

L. Yes.

CHAMBERLAIN. It was very gratifying to the men who hot!

L (continuing). Stating that the record disclosed a per- and fair trial, and that the record and the proceedings t as to law and fact in every degree.

t also interest the committee to know that the 13 men executed, before their execution, voluntarily stated that inion they had had a fair and impartial trial, that each one of them convicted had taken part in that mutiny, eir punishment was just.

inion of Col. Mayes, referred to by Col. Hull, is here full as follows:)

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, January 29, 1918.

tes v. William C. Nesbit, sergeant, Company I, Twenty-fourth et al.

ecord of trial by a general court-martial convened at headquarters, Department, Fort Sam Houston, Tex., on November 1, 1917.

review, and for convenience in reference, the prosecution will be as the Government and Sergt. William C. Nesbit and those jointly h him as the defendants.

* * * * * *

ourt was lawfully constituted. The case was well and vigorously nd prosecuted, and was defended with equal skill and vigor. The

rules of procedure governing trials by courts-martial were carefully observed, and the record is singularly free from evidence that is irrevelant or of doubtful competency. The record is lengthy, comprising 2,172 pages of typewritten matter, besides 67 exhibits and 63 charge sheets. It has been read and studied with much care and deliberation because of the very great importance of the case, and the conclusion has been reached that the defendants had a fair and impartial trial, and that the convictions and sentences imposed were authorized by law and fully sustained and justified by the evidence.

JAMES J. MAYES.
Acting Judge Advocate General.

Senator CHAMBERLAIN, You speak of the newspapers having said that these executions were unjust or improper—something of that kind. I have not hesitated to say in public, and possibly the newspapers have referred to that, that such a condition as that ought not to be permitted to exist in the Military Establishment or any establishment in a democratic form of government; and I repeat that. I am glad the court has an apologist in you for the proceedings that were had, Colonel. But, as a matter of fact, you speak of the abstract of the evidence being furnished the judge advocate of the department each day and copies of it being furnished to the Judge Advocate General each day here in Washington. I assume that that was not an official forwarding of the case for review to the Judge Advocate General, was it?

Col. HULL. Oh, no; it was not an abstract of the testimony. It was a verbatim copy.

Senator CHAMBERLAIN. But even if that was done, the Judge Advocate General had no power to act or recommend on that testimony, did he?

Col. HULL. No; but I did that not because it was required by law, but in addition to what was required by law.

Senator CHAMBERLAIN. Well, what was required by law?

Col. HULL. Only that the record should be forwarded at the completion of the trial.

Senator CHAMBERLAIN. Yes; but the complete record was not forwarded until after the men had been executed, was it?

Col. HULL. It was forwarded to the convening authority, as required by law, as soon as I could prepare it.

Senator CHAMBERLAIN. But that was not forwarded to the Judge Advocate General until after they were executed?

Col. HULL. No; and it was not required by law.

Senator CHAMBERLAIN. Possibly not; but suppose that the record had been forwarded to the Judge Advocate General, as the law contemplated it would be eventually, and he had found that the court was without jurisdiction, or that it was improperly constituted; it would have been too late for him to have said so, because the men were executed, would it not?

Col. HULL. Yes; certainly.

Senator CHAMBERLAIN. That is the injustice that I am speaking of. I do not mean to charge the individual officers with unfairness, but I say that was a condition that ought not to be permitted to exist. Now, the very fact that those men were executed before the record reached Washington led to the adoption of a rule to prevent it, did it not?

Col. HULL. General Order No. 7.

Senator CHAMBERLAIN. Yes; so that thereafter, because of that case, because of the apparent chance for injustice to be perpetrated.

Department and the commander in chief issued General . 7, which required that all of these proceedings should be ere for review prior to the execution of the sentence?

ILL. Yes.

CHAMBERLAIN. Which was very proper. Do you think ndition ought to be allowed to exist where a man could be before the reviewing authority had a chance to examine the

ILL. That condition exists, I think, in pretty nearly every l it has existed in every army up to this time.

CHAMBERLAIN. I beg your pardon; it does not exist in the rmy or in the French Army, and it does not exist now in , because of General Order No. 7; and it ought not to exist ny, if you will permit me to say so.

ILL. I can imagine conditions at the front where, even in ar, there were executions without review.

CHAMBERLAIN. Oh, yes; there was a case cited here where s convicted in the British retreat from Mons and was exe- hin 24 hours after he was caught. I can conceive of such it here was a case where the country was at peace.

ILL. It was hardly a condition of peace existing in this case.

CHAMBERLAIN. I think there was. And then, of course, e case of an honest disagreement of minds.

ILL. But what I was trying to get at and show was that vas complied with as it then existed, and that the officers charged with the unpleasant duty down there discharged y according to the law and according to their oaths, and heir conscience and their God.

CHAMBERLAIN. That may be true; but here was section he Revised Statutes that provides in terms that the Judge General should have power to do certain things. Now, t have a chance to do those things. There was no rule that that he should have the chance, but the law was there and l that it should be complied with. In other words, the law ated that before a man was executed the Judge Advocate should have an opportunity to look at the record.

ILL. There were a great number, as I believe the records , during the Civil War of cases where men were executed reference of their cases to Washington.

r CHAMBERLAIN. I can conceive of cases where it might n proper during war times. But there was no excuse for

ILL. Now, you had a witness in front of you, Mr. Thomas, le certain comments on the operation of the Judge Advocate s Department in the S. O. S. He speaks, on pages 301 of the record, of an officer who was alleged to have been Tours. Although he states that his papers have been lost, pts to quote *in extenso* the words of a Maj. Elmore, who was ant judge advocate at Tours for a time. I do not know how l have this exact language and not be able to give the exact I have tried to remember a case somewhat similar, and one ssistants, who has been in town, also tried to remember the f the case, but without our papers we have been unable to . There was the case of an officer who picked up an enlisted

man as a barroom acquaintance, and at closing time left the café with two Frenchwomen and went to a questionable rooming house, and remained absent without leave for two or three days, and kept the enlisted man with him, absent from duty. He was tried and dismissed, according to my recollection of the case, and I believe should have been. I have no recollection of the language as quoted by Mr. Thomas. I do know, however, that Maj. Elmore was without authority to represent the Judge Advocate General's Department by the use of any such language as is alleged.

He also speaks of the general conditions that existed at Gièvres in the prison camp there. I drafted the instruction for the establishment, and the rules governing, the prison camp at Gièvres, under general instructions from Gen. Kernan. The officer in charge was an exceedingly able, conscientious, and hard-working officer.

Senator CHAMBERLAIN. Was that "Hard-Boiled" Smith?

Col. HULL. No, sir; that was Col. C. J. Symmonds, of the Regular Army. Gen. Kernan's ideas were set forth in full in these instructions, and I am sorry that I have not a copy of them with me. They provided for segregation of the prisoners, both as to the character of the offenses, and also as to white and black, to prevent any trouble; and also gave the commanding officer power to further subdivide them in order to work out the general scheme of the prison camp, which was to restore the men to duty at as early a date as practicable, as one of the main problems then confronting the senior officers of the Army in France was man power.

Senator CHAMBERLAIN. Have you seen the report of the commission that was over there?

Col. HULL. No.

Senator CHAMBERLAIN. On the conduct of the Gièvres prison?

Col. HULL. On Gièvres?

Senator CHAMBERLAIN. Yes.

Col. HULL. No; they were talking about Schelle, were they not?

Senator CHAMBERLAIN. They were talking about all of them. Do you know whether the regulations that you prepared were lived up to or carried out at the prison?

Col. HULL. I was going to say that I was down there twice subsequently and went through the prison camp, and talked to some of the prisoners, and talked to the commanding officer, whom I have known for a great many years, and also talked to several of the officers who were directly concerned in the management of the prison.

Senator CHAMBERLAIN. Of course, that is not in this hearing.

Col. HULL. I do know that the effort was to restore as many of these men to duty as it was possible to restore; that there was segregation of the prisoners according to character of offenses; and to make it still simpler, the restoration to duty, the authority to restore, was given into the hands of the commanding general of the intermediate section.

Senator CHAMBERLAIN. But that was only the exercise of mercy, of clemency, was it not?

Col. HULL. No; not any more than the exercise of mercy and clemency is coming through the disciplinary barracks.

Senator CHAMBERLAIN. But if any of those men had been convicted, there was no power here to correct the judgment, was there?

Col. HULL. I was talking about this testimony of Mr. Thomas, primarily; the testimony here that those things were not done over

there to try to restore the men to duty. On the other question, of course, they followed the actual line according to the law as written in the statutes. But I do know that they did restore to duty a great number of men from Gièvres.

Senator CHAMBERLAIN. Oh, yes; Gen. Crowder promised in February last, when he was before this committee, that there would be a general jail delivery within 60 days. I say that is an argument confirming the injustice of the system. Why deliver the jails if all these convictions had been just?

Col. HULL. I was not talking about the jail delivery at Gièvres, Mr. Senator; I was talking about the fact that in regard to those convicted and sent there we at once established a policy so that we could get as many of those men out of confinement and back on the line as the best officers that we had there could possibly do; that instead of trying to see how many men we could get into jail, we were anxious—those in authority—to see how many we could restore to duty.

Senator CHAMBERLAIN. Yes; one of those young men that was ordered to be shot over there was restored to duty and was afterwards killed in battle. Better to die as a hero than to die as a felon for sleeping at his post!

Senator WARREN. You speak of the "jail." As I understand it, as the word "jail" is used, it means the disciplinary barracks, and it would convey a little different meaning from the ordinary.

Col. HULL. Oh, yes.

Senator WARREN. What was this you speak of? It was a disciplinary barracks, you say?

Col. HULL. It was on the order of a disciplinary barracks.

Senator WARREN. Yes.

Col. HULL. The regulations of the department then required that all men convicted and sentenced to dishonorable discharge be returned to the United States. That was a loss of man power, as in spite of the high character of the enlisted force in the American Expeditionary Forces, there were some unworthy members that were desirous of getting, as they called it, a "sentence overseas."

Senator WARREN. To get home through that?

Col. HULL. To get home and avoid service in France.

Senator WARREN. Did not that occur more from the draft, which took in material of all sorts, the bad with the good? Did not that occur there more than in the Regular Army?

Col. HULL. Oh, Senator, no one can appreciate the very fine character of the enlisted force as a whole in France unless he has been over there and served with them and seen them.

Senator WARREN. I think that got to us.

Col. HULL. But notwithstanding that this was the first pressing of the grape of our young manhood, there were some members, of course, that had to be segregated from the others.

Senator CHAMBERLAIN. The commanding officer over there was given power to do that very thing.

Col. HULL. Now, also, in Mr. Thomas's testimony, if the committee will permit me, he says there was a regular policy in the S. O. S. of trying men by special court, and he charges that—let me get his exact language. On page 303 he states as follows:

They would pile up the charges in the special court.

It is doubtless unnecessary to call your attention to the fact that that practice is forbidden in the manual of courts-martial, and I am certain that no such practice obtained in the S. O. S., especially so at a camp so near the headquarters of the intermediate section. The orders were that a man convicted and sentenced to more than three months was at once to be sent to the camp; and to have held him there for repeated trials and to have given him six months on each trial would have at once been detected by the authorities. The judge advocate at Gièvres, Capt. Adams, was a civilian alwyer from Massachusetts, and as industrious and careful an assistant as I had under me.

Senator CHAMBERLAIN. Were you the judge advocate general of that department?

Col. HULL. Yes, sir. There were six or seven jurisdictions under me that had judge advocates that had authority to convene general courts-martial.

Senator CHAMBERLAIN. Was Gièvres in your jurisdiction?

Col. HULL. Gièvres; yes, sir. It was in the intermediate section of the S. O. S.

Senator CHAMBERLAIN. What was your departmental jurisdiction called?

Col. HULL. The S. O. S.

Senator CHAMBERLAIN. You were not connected with the line of the Army?

Col. HULL. I served on Gen. Kernan's staff, and afterwards on Gen. Harbord's staff as judge advocate of the S. O. S.

Senator CHAMBERLAIN. Were you the superior officer in the Judge Advocate General's Department on it?

Col. HULL. Yes, sir; from February until November.

Senator CHAMBERLAIN. You did not have much to do with the court-martial cases, did you?

Col. HULL. Every officer's case, and every case of an enlisted man sentenced to five years or more, I personally read, in spite of the fact that they had already been formally reviewed in my office—that is, of the cases that came through our headquarters, under the law and orders.

There was another case here where Mr. Thomas comments. On page 313 and on the bottom of page 314 he speaks of Gen. Patrick's review of a case. According to my recollection, Gen. Patrick at no time in France exercised general court-martial jurisdiction.

The greatest difficulty with the administration of military justice that I have encountered in 20 years has been the lack of trained officers as judge advocates, as counsel, and the absence of proper stenographers.

Senator CHAMBERLAIN. That is all the more reason why there ought to be an appellate jurisdiction, is it not?

Col. HULL. I am in favor of an appellate tribunal, Mr. Senator, as I said some time ago. But I mean, that has been in the administration the greatest difficulty that we have met. I have in mind only one case where I believe an innocent man was convicted and sentenced to confinement, and in that case he was convicted on the direct testimony of two witnesses. The members of the court themselves subsequently testified that they believed that an injustice had been

done. That kind of a conviction would have taken place under any system; namely, two witnesses had lied against a man.

Senator WARREN. Every man on trial has his counsel of his own selection, if possible, or perhaps I ought to say, always his own if it is at all practicable. If he does not select counsel, the court appoints counsel for him, does it?

Col. HULL. The post commander as representing the convening authority.

Senator WARREN. Now, suppose that counsel should be an enlisted man, suppose that an enlisted man should ask that his counsel might be another enlisted man or a noncommissioned officer; are they permitted to serve?

Col. HULL. They are permitted to serve. That has occurred only rarely and in the case of the emergency forces.

Senator WARREN. Is there any discrimination against enlisted men as compared with officers, in service of that kind, if the accused himself chooses to select an enlisted man?

Col. HULL. I should say not. The duty of counsel is a well recognized duty, and if properly performed, meets with no objection from anyone in authority.

Senator WARREN. Senator Chamberlain, have you anything further?

Senator CHAMBERLAIN. Nothing more, Senator.

(Thereupon, at 12.30 o'clock p. m., the subcommittee adjourned until to-morrow, Friday, October 24, 1919, at 10.30 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

FRIDAY, OCTOBER 24, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The committee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Lenroot.

Senator WARREN. We have with us this morning Gen. Crowder; and we are ready to hear you now, General.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY.

Senator WARREN. Gen. Crowder, this is a subcommittee of the Committee on Military Affairs of the Senate, having under consideration the so-called Chamberlain bill, which Senator Chamberlain says was originally the Ansell bill, and the report of the Kernan-O'Ryan-Ogden Board on that bill, and also what report has been made, so far as we have gone in considering the subject, by the American Bar Association; and, in fact, as I understand it, and I think my colleagues understand it the same way, we are to report to the full committee our suggestions or judgment, first, as to whether the present Articles of War are all that they should be and, second, how shall we change them, if at all, and if we change them, whether we shall take in whole or in part these other bills that have been proposed; and, of course, we want to hear from you along the lines of the present law and how it should be changed, if at all, and other things which you may wish to bring before the committee.

Gen. CROWDER. The problem with me is to discover just what will be responsive to the condition of the minds of the members of this subcommittee; if possible to find some way of testifying within the field of what is relevant to the inquiry which remains in your minds.

This court-martial controversy—and I believe it has been called such in your proceedings—had its beginning within the War Department with the filing of the November, 1917, briefs, which were addressed to the question of appellate power in the Judge Advocate General to reverse, modify, or affirm the sentences of courts-martial. It had its beginnings as a public controversy with the speech delivered by Senator Chamberlain on December 30, 1918, withheld by him for revision, and published in its revised form in the Congressional Record of January 3, followed closely by an interview given out by the president of the American Bar Association, Mr. Page, on January

4, 1919, announcing what he called the archaic character of the then existing military code, pronouncing it a code unworthy of the name of law or justice, and stating his intention to investigate the facts connected with its administration through a committee of the American Bar Association appointed by himself.

From that time the matter has been before the public, and there has been a torrential flow of criticism, accusation, and defamation impugning the motives of men who have helped to administer military justice during the period of this World War, until the real issues of the controversy are to-day somewhat obscured.

It will be my effort to keep without that field of accusation and defamation, and within the field of what is relevant; but these personal accusations, personal defamation, and this impugning of the motives of men who have helped administer military justice, are so interwoven and blended with the issues of that controversy that I may not be altogether successful in addressing you always on the matters that are vital to a proper revision of the code; for, of course, no one thinks we have come out of this unprecedented World War without knowing that there are many respects in which the existing code may be improved. I recognize the necessity for revision, and I hope to be able to place before the committee, as I progress in my remarks, much needed amendments to the existing code.

Now, because there are so many issues of fact in this controversy which are rapidly developing into questions of personal veracity, I would like to ask, Mr. Chairman, if it is consistent with the rules of your committee, that I be sworn.

Senator WARREN. I see no reason why the witness should not be sworn.

Senator LENROOT. If the witness desires it. It is not the custom; it is to be taken for granted, but if the witness desires it, I see no objection.

(The witness was here sworn by Senator Warren.)

Gen. CROWDER. I also want to place in the record at this point an expression of regret that I am not able to proceed now and at all times in the presence of Senator Chamberlain and subject to his cross-examination. I hope that in the discussion of these more vital issues he may be present and interrogate me, particularly on questions of fact.

Senator WARREN. We shall try to have him with us later in the hearings.

Gen. CROWDER. Now, if left to follow my own method in presenting this whole subject, I think I could classify all legitimate criticism of the Articles of War and the administration of military justice that I have heard or read under two heads—first, excessive sentences; second, illegal convictions. I propose to address myself first to the question of excessive sentences and to reserve what I have to say about illegal convictions until we come to discuss this question of appellate power, which I think is relied upon by all of you as the proper method of correcting the evil of illegal convictions.

I do not know how you can understand, or how anybody can understand, whether a sentence is excessive or not, or the degree to which it is excessive, until you know something of our military penology; that is, of the disciplinary barracks régime, at which bar-

racks are executed all of the sentences of general courts-martial for major offenses against the discipline of the Army. Therefore, I shall talk first about the disciplinary barracks.

Senator WARREN. May I ask you a question right there?

Gen. CROWDER. Yes, sir.

Senator WARREN. You speak of disciplinary barracks. In this country there has been a good deal said about the jails over in France and our men being confined in jails. Do you understand that they are jails as separated from disciplinary barracks, or are those so-called jails branches, in reality, or practically, of our system of disciplinary barracks in this country?

Gen. CROWDER. I understand they are improvised places having no connection with disciplinary barracks. There is authority given by act of Congress to designate branches of the main disciplinary barracks at Leavenworth, a discretion which has been exercised to establish branches in two places—Alcatraz and Castle William, respectively, at San Francisco and at Governors Island, New York; but I do not know that it has been exercised abroad.

Senator WARREN. Do you understand that the conduct of those jails, which has been complained of, was along the line of disciplinary barracks?

Gen. CROWDER. No, I do not; I am not prepared to speak of those places established as I suppose by the commanding general of the expeditionary forces in France.

Senator WARREN. The reason I ask is because we have had it testified that men were kept there to be returned to their duties when their conduct was such that they should be relieved.

Gen. CROWDER. It is to be supposed that they were organized along the same lines; but I can not speak of that. Gen. Bethel, who has been before you, probably could tell you about that, but I have no knowledge of the subject, and I have no means of informing myself as to what régime was adopted for the conduct of those improvised places in the theater of war.

When I finish what I have to say on the subject of disciplinary barracks and of the régime that prevails there, the treatment of military offenders confined there, this committee will know whether or not there are sentences of 40 years, 25 years, 20 years, 15 years, 10, or even 5, that are to be served as penal servitude—that is, to be satisfied only by actual imprisonment at hard labor for 40, 25, 20, 15, 10, or even 5 years; and I hope that I shall be able to place the matter upon the basis of conceded or demonstrated fact, and that no longer will the public imagination be inflamed with the view that we are exacting penal servitude for fixed periods in cases of our military offenders.

Finishing with this subject of our disciplinary barracks system and the penology in force there, I shall next take up for discussion the applicability or nonapplicability of the Bill of Rights to accused military persons. Much has been said to this committee and much has been printed in the public press on that subject. It has been represented that military accused are denied protection that civil accused get before our civil courts, and the public has been asked to deduce from this fact a kind of military tyranny characterizing the administration of military justice.

When I finish with the Bill of Rights, I shall take up the subject of courts-martial as executive agencies, and I hope, when I have finished my discussion of that subject, this committee will know whether or not there is any merit in the statement that military tribunals are dictated to by military commanders.

I shall then pass to the consideration of the question of jurisdictional and prejudicial error before courts-martial; and when I have finished with that subject I want to test out by further discussion the accuracy of certain statements that have been made to this committee on the subject of the English and French systems of military justice, and particularly the use of high prerogative writs as a means of correcting judgments of courts-martial.

I shall pass from that to a discussion of the November briefs of 1917, and then take up the pending bill. My discussion of the pending bill will assume the commission of an offense—the offense of disobedience of orders—and pass under review the successive steps of a trial under the code you are now considering, called the Chamberlain bill.

I think, when I have finished with my discussion along these lines there will be one and only one large question left upon which there will be any difference of opinion and that will be where this appellate power, which we all concede must be created, shall be located.

Now, gentlemen, as I have outlined my method of presentation of the general subject, I would like to ask whether, if I pursue that method, it will be responsive to the condition of mind of the committee?

Senator LENROOT. I think it is exactly what we would like.

Senator WARREN. I think just what you have stated, all of it, and especially the last part of it, is what we need most information on.

Senator LENROOT. I would be glad to have you, General, go through the whole course which you have just outlined.

Gen. CROWDER. It may take more than a day.

Senator LENROOT. I understand; but I think it is very important.

Senator WARREN. I think Senator Lenroot will agree with me that we shall give you all the time you want, and we may have to extend your hearing over more than one day, because we are called upon the floor of the Senate at various times.

Gen. CROWDER. Yes. First, as to excessive sentences. Frankness requires that it be conceded that there have been many—too many—excessive sentences. Five, 10, 15, 20, 25, and even 40-year sentences have been given for the principal offenses of desertion, absence without leave, sleeping on post, assaulting a superior officer, assaulting a noncommissioned officer, disobeying a noncommissioned officer, disobedience of standing orders; disobedience of an officer; but in judging the system we must take into consideration that the average sentences imposed by general courts-martial for the year October, 1917, to September, 1918, were: For desertion, a capital offense, 7.58 years; for absence without leave, 1.59 years; for assaulting a superior officer, 4.1 years; for assaulting a noncommissioned officer, 2.36 years; for disobedience of a noncommissioned officer, 3.04 years; for disobedience of an officer, 4.34 years; for disobedience of standing orders, 1.96 years. We get, therefore, a very erroneous impression from citing the relatively few cases of excessive sentences of longer duration than the average. In other

words, the question is, shall courts-martial be judged by the exceptional cases, or by the average record they have made? The answer is, of course, by both; but the explanation for the exceptional case lies in the facts of that case, which it has been very difficult to get before the committee, and which involves——

Senator LENROOT. You asked whether they should be judged by the average record, or the exceptional record, and then you said by both; because you certainly would not intimate that we should judge by the average record alone.

Gen. CROWDER. No.

Senator WARREN. You speak of that length of sentence. Does that mean the actual service? Of course they have not served their length of time; but take those that have served their time and those who are still under confinement. Does this represent the findings of the court without deducting suspensions?

Gen. CROWDER. Without deducting for any clemency at all.

Senator LENROOT. That is, the average original sentence?

Gen. CROWDER. Yes; the sentence as approved.

Senator WARREN. That is it; you have stated it better than I.

Gen. CROWDER. The public has been misled in another important regard. These excessive sentences have been commented upon as if they were absolute fixed sentences, to be served by 5, 10, 15, 20, 25, and even 40 years of actual imprisonment at hard labor. I have seen them referred to in the Congressional Record and in the public press as prison and penitentiary sentences. No adequate mention has been made of Disciplinary Barracks at which they are to be served, or of the indeterminate character of these sentences, of the system of parole in force at our disciplinary barracks, and only minor mention has been made of the system of restoration to duty with which good conduct at the disciplinary barracks while undergoing sentence is rewarded. So that these essential characteristics do not at all enter into the popular conception of our military penology. I want the committee to understand, and the country to understand, that practically all offenders against the discipline of the Army have received, in fact, indeterminate sentences to be executed not in penitentiaries or prisons but in the disciplinary barracks; and I want the committee, and through the committee the country, to understand our system of military penology in force at these barracks, including the parole system in force there. I shall first take up the subject of disciplinary barracks.

Senator Chamberlain remarks, on page 248 of the hearings, that—

> The only real reform in the articles of 1916 was that which admitted the creation of the disciplinary barracks where young men who had been convicted by courts-martial might be restored to the colors.

And, in the subsequent colloquy between him and Gen. Ansell it is made to appear that that "real reform" grew out of an opinion rendered by Gen. Ansell in the construction of the military prison statute of 1873. In truth, the whole plan of prison reform and restoration had been formulated before Gen. Ansell had reported for duty at Washington. I propose to give an accurate history of the development of that reform, because unless it is understood and Congress and the people are made aware of the military penology practiced at these barracks no judgment can be formed as to the severity of

the sentences which have been imposed by our courts-martial to be served in these barracks.

Let me say, preliminarily, that I am prompted to present this in some detail by the request of a Senator who visited my office and who was so much in ignorance of what our system of military penology was, that, upon hearing the explanation of it, he asked that this matter be placed before the public in some way so as to lift the cloud of general misunderstanding that rests over the whole subject.

I became Judge Advocate General on February 15, 1911. A controversy had been going on for years as to the treatment of military prisoners, particularly deserters. Annual reports, service journals, and the public press were filled with discussions of the general subject. One class of Army officers, perhaps the majority, believed in punishment for deterrent effect; another class favored reformatory methods. Because of the relations of this subject to the administration of military justice, I asked for orders to proceed to Fort Leavenworth, the main branch of our military prisons, and make an investigation. This investigation took place in October of 1911, and the report is dated November 17, 1911.

I first gave attention to the statute law, the act of 1873, establishing the prison and prescribing its government. I found that the organic act followed closely the legislation of the States of the Union for the establishment and maintenance of penitentiaries. Indeed, in some respects the law establishing the prison was less humane than later legislation of the United States establishing penitentiaries at Leavenworth, McNeil Island, and Atlanta; and the same illiberal rigid character must be ascribed to regulations adopted from time to time by the War Department in aid of the execution of this military prison statute. In these regulations the War Department had uniformly interpreted the law as requiring the prison to be administered as a penal institution. The prisoners were required to be clad in the usual prison-striped clothing, to wear their hair close-cropped, their faces clean-shaven, to be designated by numbers, and to be employed at the kind of daily hard labor at which convicts confined in civil prisons and penitentiaries are customarily employed.

I found 940 ex-soldiers in confinement at the Leavenworth branch. I asked to have them paraded, and, when I passed down the line, I was struck with their youthful appearance. I ascertained that the average age of these 940 men at the time of their commitment was about 23 years. Classified in accordance with the nature of the offense for which committed, I found 667, or about 71 per cent, had been committed for purely military offenses—that is, offenses against the discipline of the Army—195 for military offenses in connection with common-law and statutory offenses—most of the latter were misdemeanors—and 78 were common-law and statutory offenses.

When I finished this inspection of the military prison, I went over to the United States penitentiary, located on the same reservation, and took a look at the inmates of that institution. They were men of more advanced years—most of them veteran criminals—all felons—and yet subjected to no more severe prison régime than were our young ex-soldiers at the military prison. I reached the conclusion that our system was fundamentally wrong. On returning to Washington at the conclusion of this investigation, I submitted my report, which I am going to ask the committee to publish as an appendix to my statement. Have I permission to do that?

· WARREN. Is it very voluminous?
ROWDER. No.
· WARREN. It could go in at this place in the report, and not
endix?
ROWDER. I would like to have it go into the record at this

· WARREN. Yes.
port referred to is here printed in full in the record as

UM FROM THE JUDGE ADVOCATE GENERAL TO THE CHIEF OF STAFF, NOVEMBER 17, 1911.

ADMINISTRATION OF THE MILITARY PRISON FROM A PENAL INSTITUTION TO A MILITARY REFORMATORY.

ot admit of question, I think, that the laws applicable to the military
ire it to be administered as a penal institution. As pointed out in my
rt, they follow closely the legislation of the States and the later legislation
ed States for the establishment and maintenance of penitentiaries. This
evident when the provisions embodying the requirements for employ-
nates at daily hard labor and in the trades are considered. In some
laws applicable to the prison are less humane than later legislation of
States creating penitentiaries. For example, the provisions of the act of
90 (26 Stat., 839), that in the construction of prison buildings there shall
arrangement of cells and yard space that prisoners under 20 years of age
any way be associated with prisoners above that age, and that the manage-
class under 20 years of age shall be, as far as possible, reformatory, is not
e laws relating to the military prison.
lations adopted from time to time for the government of the military
its inmates (editions of 1877, 1883, 1888, 1890, and 1910) show that the
tment has uniformly interpreted the law as requiring the prison to be
d as a penal institution. In the five editions of said prison regulations
provided that prisoners should be clad in prison dress, wear their hair
ed, with face clean shaven, be designated by numbers, and employed at
hard labor at which convicts confined in civil prisons and penitentiaries
arily employed. While in the several editions of prison regulations in
to 1895 the inmates of the prison were uniformly designated as "prisoners,"
ent edition of the regulations the term "convict" is uniformly used.
artment has uniformly administered the prison as a penal institution.
de to appear from the present employment of prisoners confined therein,
not differ from past employment, except in so far as their labor is diverted
of new prison construction, and which the commandant states as follows:
estic labor.—This includes orderlies, messengers, clerks, barbers, cooks,
iters, hospital attendants; and tailors, shoemakers, harness makers, black-
ctricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters,
pair purposes only; laundrymen, librarians, warehouse laborers, teamsters,
printers; total, 250.
struction work on new prison and the shops and industries in connection
total, 450.
side work in connection with the construction of roads, the operation of
al railway, the care and preservation of the forest, the care of the reserva-
prison farm; total, 240. (This number is far below the daily requirements
not meet the demands.)"
he theory that the prison will continue to be administered as a penal institu-
the completion of prison construction, the commandant recommends that
nployed as follows:
nestic labor.—This includes orderlies, messengers, clerks, barbers, cooks,
aiters, hospital attendants; and tailors, shoemakers, harness makers, black-
ectricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters,
epair purposes only; laundrymen, librarians, warehouse laborers, teamsters,
printers; total, 250.
eration of shops inside the prison.—In the operation of the shops such work
recommended as would be least liable to cause interference from outside
ollows: Making shoes for the use of all prisoners in the Army; making harness
e of the Army; making brooms for the use of the Army (a large part of the
rn can be raised on the prison farm); making tinware and stove pans, etc.,

for the use of the Army; also galvanized-iron buckets; making clothing for all prisoners in the Army, especially civilian suits for discharged prisoners; repair of wheel transportation; laundry work; total, 250. This number depends, of course, upon the amount of work of this class that is given the prison to do and can be expanded indefinitely.

"3. *Outside work.*—(*a*) The operation of the prison farm: Between 700 and 800 acres of land are now available for farm purposes; this will have to be diked and the diking will have to be of the very best; the river bottoms will have to be protected; it appears to be possible to do this and have an 800-acre farm in the bottoms; 200 additional acres could be secured on the reservation on the northwest side without interference with any military operations; a 1,000-acre farm, using a large part of it as a truck garden, would give employment to a large number of convicts. (*b*) The operation of a dairy for the use of the prison. (*c*) The repair and maintenance of post roads and the construction of reservation roads; approximately 12 miles of rock road are to be built. (*d*) Grading; the number of hills to be removed and the amount of yardage is very great. (*e*) Drainage and construction of culverts and bridges; this work requires a large amount of labor. (*f*) Care of the forest and the conversion of waste portions of the forest into park land for use of troops in maneuvers. (*g*) Crematory and disposal of wastes; should the crematory be removed from its present location, which appears to be inevitable, the construction and maintenance of it should be turned over to the prison. (*h*) Operation and repair of the terminal railway system; the handling of all freight, coal, and forage in connection with the operation of the railway system. (*i*) Operation of the rock quarries, crushers, limekiln, brick plant, concrete-block machines in connection with such work at the prison and post as may be authorized by the Quartermaster General. (*j*) Installation of a water supply for the prison and post. (*k*) Operation of an electric-light and power plant for the prison and post. (*l*) Operation of an ice and refrigerating plant for the prison and the post."

Because of the proximity of the military prison to the large and important post of Fort Leavenworth, and the extensive and urgent demands for labor upon the post reservation indicated above, it is probably true that no similar institution of the United States or of any State or Territory is in such a favorable situation for the utilization for public purposes of free prison labor. The extensive employment of its inmates at daily hard labor on the much needed and urgent improvements of the military reservation proper, the conservation of the forests, and the building of roads, for which contract labor would otherwise be necessarily employed, would result in very obvious economies to the Government; while the employment of the prisoners on the large prison farm (about 900 acres) in the raising of food products, in the shops of the prison at trades in the manufacture of articles for use of prison and prisoners confined there and at posts, would be a long step in the direction of making the prison self-sustaining. The argument of economy is thus seen to be exceptionally strong, and, in connection with the opportunity the work outlined above affords for the training of prisoners in civil employment and graduating them back into civil pursuits under conditions which would put them in the way of establishing themselves in civil life upon their release from the military prison, constitutes the most persuasive argument that can be urged, I think, in favor of continuing the administration of the military prison as a penal institution.

I am prepared to concede to this argument controlling effect as to the inmates of the prison convicted of common-law and statutory felonies alone. These belong to the regular criminal class, and their punishment should conform to what is prescribed by law for this class of prisoners undergoing punishment in our United States, State, and Territorial prisons; but I do not think it should be regarded as decisive of the more important question presented, viz: Should soldiers, convicted of purely military offenses, committed in time of peace, be subject to ignominious penal servitude similar to that inflicted upon common-law and statutory felons? Preliminary to a discussion of this question, I invite attention to the following classification of prisoners serving sentence at the military prison, Fort Leavenworth, at the time of my inspection:

TABLE No. 1.—*Prisoners convicted of military crimes only.*[1]

Of desertion only	440
Of desertion and fraudulent enlistment only	104
Of desertion and other military crimes other than fraudulent enlistment	56
Of desertion, fraudulent enlistment, and other military crimes	12
Of military offenses, not including desertion and fraudulent enlistment	6
Of fraudulent enlistment only	49
Total	667

[1] Slight variances in totals appear in these tables which do not affect the argument based upon them.

TABLE NO. 2.—*Prisoners convicted of military crimes in connection with common-law and statutory crimes.*

Of desertion and common-law and statutory crimes, not military	75
Of desertion, fraudulent enlistment, and common-law and statutory crimes not military	10
Of desertion, fraudulent enlistment, other military crimes, and common-law and statutory crimes not military	12
Of desertion and other military crimes, not including fraudulent enlistment, and common-law and statutory crimes	48
Of military crimes, not including desertion and fraudulent enlistment, and common-law and statutory crimes	46
Of fraudulent enlistment, other military crimes not including fraudulent enlistment, and common-law and statutory crimes	4
Total	195

TABLE NO. 3.

Number of prisoners convicted of common-law and statutory crimes only	78

Summary.

Prisoners convicted of military crimes only	667
Prisoners convicted of military crimes in connection with common-law and statutory crimes	195
Prisoners convicted of common-law and statutory crimes only	78
Grand total	940

TABLE NO. 4.—*Desertions.*

	Number.	Average age of enlistment.
First year of enlistment	431	23 years 5 months 28 days.
Second year of enlistment	210	23 years 2 months.
Third year enlistment	34	22 years 8 months 16 days.
Second enlistment period	59	26 years 1 month 25 days.
Third enlistment period	12	29 years 10 months 4 days.
Fourth enlistment period	5	32 years 7 months 9 days.
Fifth enlistment period	2	39 years 11 months.

The data for the Pacific branch of the United States military prison at Alcatraz Island, Calif., if assembled, would probably show similar percentage strength of the several classes of prisoners confined in said branch.

The foregoing classification is not as complete as it is desirable that it should be, in that it fails to distinguish between civil felonies and misdemeanors. It is doubtless true that a large majority of the prisoners listed as common-law and statutory offenders have been convicted of misdemeanors only, and that therefore only a very small percentage of the inmates of the military prison belong to the regular criminal class.

It will be noted that the average age at enlistment of prisoners serving sentences for desertion is about 23 years. I did not ascertain the average age at enlistment of other classes of offenders, but it is presumably about the same as for deserters. The average age of prisoners at the time of my inspection may be safely estimated at between 25 and 26 years. The contrast in respect of age between them and convicts of the United States penitentiary located on the same military reservation, which I visited, is most marked, the latter being in appearance a much older class of men. In prison dress and in the methods of treatment and daily employment of inmates there is no substantial difference between the two institutions, and the inmates of the prison are undergoing penal servitude of the same character as inmates of the penitentiary, with the additional ignominy in case of deserters of loss of citizenship rights, of rights to become citizens, and the right to hold office of trust or profit under the United States.

Recurring now to Tables 1, 2, and 3, we find that of the 940 prisoners undergoing sentence at the military prison at the time of my inspection, 667—approximately

71 per cent—were convicted of purely military offenses. If we add to these those convicted of purely military offenses in connection with common-law and statutory offenses of the grade of misdemeanor, ordinarily punished by light jail sentences, we shall have a total of approximately 90 per cent of the inmates of the prison, by far the greater number deserters, who may be said not to belong to the regular criminal class, but who are undergoing the same kind of penal servitude as felons confined in the United States penitentiary located on the same reservation. The question whether penal servitude is a proper punishment for them is thus seen to turn mainly on what is a proper punishment for desertion in time of peace.

Perhaps there is no other single subject connected with the administration of the Military Establishment which has received more earnest attention by the military authorities than this subject of desertion, its causes, and its proper punishment. Annual reports, service journals, and the public press have teemed with its discussion. It may be said also that there is no other single subject connected with Army administration in respect of which such diverse views have been expressed. Systematic efforts have been made to ameliorate the condition of the soldier in respect of his living, dress, enjoyments, comfort, and contentment as a means of reducing desertion rates. The Inspector General, in his report of 1905, summarizes the efforts of the Government in this regard as follows:

"It has constructed for him barracks luxurious in their appointments compared to the housing of the armies of other civilized countries throughout the world; it has provided in these barracks air space in dimension equal to the demands dictated by the best scientific thought; it has given him spring beds, mattresses, pillows, sheets, and pillow cases; it has provided him with toilets and baths of the most modern manufacture, and much superior in general appearance and effect to similar necessities enjoyed by people in middle life; it has provided spacious reading rooms, supplied with newspapers and books calculated to cater to the soldier's taste; it has bettered the amount and quality of his clothing; it is to-day supplying him with the largest variety and best quality of food that is given to any Army, and at many of the large posts it has provided magnificent exchange buildings, not a few of which have swimming tanks and gymnasiums thoroughly equipped for athletic exercises. It has made the demands of discipline and authority over the soldier, in conformity with the spirit of the age, mild compared to what it was 20 years ago; it sends the uneducated soldier to school and gives the partially educated every advantage of an extended education; it has provided outdoor amusements for him in the way of atuletic games; and it has, in fact, accomplished everything to make him contented and to cause him to live out his enlistment, with one exception—it has failed to provide an adequate punishment for the crime of desertion.

"Nine-tenths of the soldiers who desert from the Army of the United States have no real cause for the act."

But the efforts of the Government have not been limited to what is outlined in the foregoing report of the Inspector General. We have tried the additional expedients of long-term and short term enlistments, bounty for reenlistment, retained pay and detained pay, forfeited to the Government by desertion, discharge by purchase and, finally, increased pay—all, except discharge by purchase, without appreciable deterrent effect upon the commission of the offense of desertion. If, as claimed by the Inspector General, we have failed to find adequate punishment for desertion, it is not because we have not run the gamut in this regard; for we tried the ignominious punishment of branding and tattooing the deserter, the wearing of ball and chain, and long sentences of penal servitude. We have also tried the expedient of recognizing different grades of criminality in desertion, distinguishing between the recruit led off by companions, homesickness, ignorance, and the old soldier who commits the offense with full knowledge and deliberation, giving to the former a very short term of imprisonment and frequent restoration to duty, and preserving as to the latter the long sentence of penal servitude. In 1908 we abandoned the attempt to distinguish between the recruit and the old soldier in respect of this offense and provided one punishment for desertion, only to return to the prior system in 1911. That none of these expedients has been attended with results which were satisfactory to the department tends directly to support the view expressed by The Adjutant General of the Army in his report for the fiscal year of 1908, that:

"The principal cause of the evils in question lies deeper than any of the causes commonly assigned for them, and is beyond the reach of any of the measures proposed. Our people, although aggressive enough, are not a military people. They have little real interest in the Army in time of peace, and from the earliest days of the Republic have been accustomed to look upon it as a more or less unnecessary institution that may be pared down with safety whenever a demand for retrenchment of public expenses arises. Enlistment in the Army in time of peace is not uncommonly regarded

as evidence of worthlessness on the part of the recruit, and desertion in such a time is generally looked upon as nothing more culpable than the breach of a civil contract for service. The deserter suffers little or no loss of caste by reason of his offense, and is seldom without friends and sympathizers to shield him from arrest and to intercede in his behalf in the comparatively rare event of his falling into the hands of the military authorities.

"It is safe to predict that desertion from the Army will continue to be excessive until there shall have been a radical change of public sentiment toward the Army and until the deserter shall come to be regarded as the criminal that he is, to be ostracized and hunted down as relentlessly as any other transgressor of the laws. There is no reason to look for such a change of sentiment in the near future, and there are some who believe that the change will never come until our people shall have learned through national disaster and humiliation, that the effective maintenance of an Army of professional soldiers is absolutely essential to the preservation of the national honor and life, and that the trained and disciplined troops of a modern enemy can not be withstood by hastily organized armies of untrained or half-trained civilians."

I concur in the view here forcefully expressed that the main obstacle encountered by the military authorities in their efforts to reduce desertion is found in the attitude of the people toward this offense. Public opinion, with which we have to reckon in the enforcement of any law or policy, does not associate and never has associated moral turpitude with desertion in time of peace. For this reason we do not have and never have had the cooperation and aid of public sentiment in the execution of our policy of treating desertion as a felony and punishing the deserter as a felon. I concur further in the view intimated above that this state of feeling is an outgrowth of our military policy to rely upon a volunteer army rather than upon an army of professional soldiers, and that the sentiment will continue so long as that policy continues; that is, for the indefinite future. It must, I think, be taken into account in determining our policy in dealing with the offense.

But in the past three years marked success has been achieved in reducing desertion rates in face of this adverse public sentiment by the vigorous campaign for the apprehension and punishment of deserters inaugurated by The Adjutant General's Office. The system of apprehension is fully explained in the annual reports of The Adjutant General for the fiscal years 1909 and 1910. It involves telegraphic notice to The Adjutant General's Office of every desertion, the preparation and distribution of desertion circulars, containing personal descriptions and reproductions of photographs of deserters, with an announcement of rewards payable for their apprehension and delivery. It appears that about 4,000 copies of such desertion circulars are distributed to department, post, troop, battery, company, or detachment commanders, to United States marshals, police officers of the larger cities, to established detective agencies, to agents of the Secret Service Division of the Treasury Department and of the Bureau of Investigation of the Department of Justice, and to civil peace officers in the vicinity of the homes of the deserters and in localities to which they are likely to go.

The system outlined above became fully inaugurated in October of 1908. It found the desertion rate of the Army for the fiscal year ending June 30, 1908, at 4.59 per cent. Its deterrent effect was not immediately apparent, for in the fiscal year of 1909 there was a slight increase in the desertion rate. This is explained in the report of The Adjutant General for that year by the fact that the enlisted strength of the Army was largely increased during the year, with the result that an unusually large proportion of the enlisted men were serving in the earlier part of their enlistment, when desertions are most frequent. In the fiscal year of 1910, when normal conditions in this regard were more nearly approached, the desertion rate fell to 3.66. In the fiscal year of 1911 it fell to 2.28 per cent, the lowest desertion rate that has been reached since the establishment of the military prison in 1874, except for the fiscal year of 1898, when because of the very large increase in enlistments incident to the war the percentage rate decreased to 1.57.

I think service opinion will be found to support the view that this very marked reduction in desertion rates is to be attributed almost entirely to the system of apprehension and punishment of deserters outlined above and would view with marked disfavor any modification of the system which would tend to imperil the excellent results that follow its employment. The point to which I would invite special attention is the necessity, if any, for retaining the degrading punishment of ignominious penal servitude, or, stated in other words, whether the change in the character of the punishment, retaining its severity in so far as is consistent with the change, would impair the excellent results to be obtained under the system as now enforced.

That the stigma of prison confinement operates as a deterrent to desertion must be conceded, just as we must concede deterrent effect to the old but now disused pun-

ishments of branding and tattooing of deserters, but to what extent prison confinement has operated to deter desertion is not readily deducible from desertion statistics. It sufficiently appears, however, that during the entire period we enforced penal servitude as a punishment for desertion the department was confronted with the unsatisfactory results already referred to, and that results did not become measurably satisfactory until the vigorous campaign looking to the apprehension of deserters was fully inaugurated. A comparison of desertion statistics of the period from 1875 to 1895, during which the military prison was available for confinement of soldiers convicted of purely military offenses, with the period from 1896 to 1906, during which it was not so available, shows that the percentage of desertion to total enlisted strength during the former period was approximately 6.77 per cent, and during the latter period 4.68 per cent, excluding the year 1898, during which the percentage was, for abnormal causes, unusally low. There is thus seen to have been an actual falling off in the rate of desertion during the period that penal servitude was not in force, a reduction which must be attributed, however, largely to the fact that discharge by purchase was operative during the entire period from 1896 to 1906, whereas during the former period of 21 years it was operative only for 5 years. Still, the fact that the effect of discharge by purchase in reducing desertion was not in a greater degree neutralized by the abatement in the character of the punishment would seem to furnish some suggestion that the stigma of penal servitude, standing alone, has not a relatively important deterrent influence upon desertion.

The question has, however, another aspect which I think merits consideration. I find that since the restoration of the prison to military control in 1906, 3,924 prisoners have been confined therein. The number confined in the prison from its establishment in 1874 down to its transfer to the Department of Justice in 1895 I have been unable to ascertain, but it is undoubtedly very large; nor have I available the number of men who have been confined in the branch prison at Alcatraz during the period of its existence. Taking a total of these we have a very large number of persons who have passed from these prisons into civil life. In common with other soldiers dishonorably discharged and held in confinement at posts, they remain after discharge from confinement under statutory disability for future military service, those convicted of desertion having the additional disabilities of loss of citizenship rights, of rights to become a citizen, or to hold any office of profit or trust under the Government. They constitute a large and ever-increasing element of our population properly described as military outcasts.

That the organic act establishing the military prison (act of Mar. 3, 1873) contemplated that this element should to some extent be saved to the Army is made plain by the provision of section 6 of that act, that:

"The Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

I can not ascertain that the Secretary of War has ever made any use of the authority here given him to restore prisoners to duty. It has not been possible for him to do so since the enactment of the act of August 1, 1894, prohibiting the reenlistment of men whose last preceding term of enlistment has not been honest and faithful. In order that the inmates of the prison may have restored to them the chance for honorable restoration to duty with the colors which the Congress granted them in the original enactment, it will be necessary to seek such amendment of the act of August 1, 1894, as will except from its prohibition inmates of the military prison confined therein for purely military offenses and discharged therefrom as good-conduct prisoners, with the recommendation of the prison authorities that they be allowed to reenlist. Administered upon these lines the prison would acquire the character of a reformatory, or detention barracks such as are now maintained by England for the confinement of purely military offenders, and which are described by an officer of our Army who has recently inspected them, as follows:

"Only such soldiers as have been convicted of military offenses as distinguished from statutory or common-law offenses are sent to detention barracks for punishment and correction. The controlling idea in the treatment of the soldier, where confined in the barracks, is to reform him and send him away from the institution a better instructed soldier than when he entered. He is worked 10½ hours a day. No prison garb is worn. The soldier is in uniform at all times, except possibly when in the workshops, and then he wears working clothes. They are designated by name—no numbers are used. Although the inmates are kept under close surveillance during the day, and in barred cells under lock and key at night, yet every effort consistent with this is made, and with considerable success, to eliminate the prison atmosphere and aspect of the surroundings. Hard work, wholesome food, plenty of sleep, regular hours, kindly treatment, and total abstinence from the use of all intoxicants and

tobacco soon bring the man under control of his own will. This is the condition the authorities attempt to develop as a preliminary to proper reformation of character. Much of the work is purely military and especially designed to perfect the man in marksmanship and the use of his weapons. There is daily instruction for some hours in this class of work. The barrack inclosure is fitted up with almost every known device for training in shooting, and I was told that remarkable results are secured. Instruction is also given in military bridge building and in other types of purely military work, including a very thorough course in gymnastics.

"Each man is required to do a certain amount of work daily in the workshops. All of this work has a direct bearing on the military service and includes such tasks as repairing picks, shovels, barrack chairs, mattresses, beds, etc., which are sent to the institution from the garrisons on the outside. Very few of the inmates possessed any of the ordinary characteristics of the criminal class in appearance or bearing, and as a matter of fact they do not belong to this class. Had I seen the same men doing the same work in other surroundings I would have noted no special difference between them and other soldiers. They appeared to work with spirit and willingness, and a good atmosphere pervaded the place. The treatment by those over them, while severe and unrelenting, is very kindly. * * * The director of the institution said that he seldom or never had the same man committed a second time.

"It is worthy of note that all cases of desertion are handled here.

"The controlling idea is to send the man out sound in mind and body, reformed, and as well instructed in his duties as a soldier as he would have been had he remained in his organization."

The attitude of the English people toward desertion is the same as that of our own people. There, as here, public opinion does not associate moral turpitude with this offense. The reason is not far to seek. The contract of enlistment is voluntarily entered into and the abandonment of the service is considered by the people simply a breach of the voluntary contract. In the British service the fact has been recognized and the policy of punishing deserters as felons has been abandoned. We persist in the policy in the hope, which I think can never be realized, that by so persisting we can educate our 90,000,000 people to take the service view that the deserter should be punished as a felon.

From what has been said above it is evident that if we should adopt, in principle, the system of detention barracks as administered in the British service, there need result no abatement in severity of punishment now obtaining in our service, except in so far as relieving prisoners from the ignominy of penal servitude would be an abatement. This could be compensated for to some degree by increasing the punishment for military offenses. Daily hard labor to the extent necessary for the domestic administration of the prison would continue as heretofore, but the system would require that there should be relief from daily hard labor not connected with said domestic administration and the time thus saved given over to the most rigid military instruction; and it would seem reasonable that, under such instructions, inmates would acquire proficiency in rifle practice and other specialized military training equal if not superior to that acquired by men who remain with the colors, and that such opposition as may now exist among officers and enlisted men to receiving inmates of the prison back into their organizations would in a very large measure disappear as to those good-conduct prisoners who acquire such proficiency and are discharged with the recommendation that they be permitted to reenlist.

The details of the new system would, I think, be appropriately fixed by a board convened especially for the purpose. I think it would be an essential part of the new system that prisoners undergoing confinement at the military prison or its branch for grave common-law and statutory crimes, and those convicted of such crimes in connection with military offenses, should be segregated.

I would suggest that Alcatraz Prison and Fort Jay Prison be reserved for their confinement, and their administration as prisons continued. And I would further suggest that those convicted of purely military offenses would be properly confined in the detention barracks, to be subjected to special discipline, the general outlines of which are given above, with a view to their restoration to duty with the colors. There would remain those convicted of common-law and statutory misdemeanors of a character ordinarily punished with light jail sentences, or of such misdemeanors in connection with purely military offenses. These, under the policy above outlined, should be sent, I think, to the detention barracks, there to be kept employed at daily hard labor connected with its domestic administration, to be admitted to the classes undergoing special military instruction only as their conduct may justify it. The effect would be such a division of military prisoners under sentence by court-martial as would segregate and give over to special training all those who have offended primarily against the discipline of the Army, leaving the regular criminal classes under the prison régime to which they are at present subjected.

In view of the fact that we are legislatively committed to the maximum use of the labor of military prisoners on new prison construction, the change from prison to detention barracks must await the completion of said construction—about two years—unless it can be assumed that Congress will be found willing to complete said construction by contract labor. But when the new prison is completed the way will be open to inaugurate the change, which can be administratively accomplished, except in the following regards, where it would be advisable to have amendments of the existing law so as to provide:

1. For changing the name "United States military prison" to "United States detention barracks," and for making the designation of the inmates of the detention barracks uniform by eliminating the term "convict" wherever necessary and substituting therefor the term "prisoner," which latter term is used in the existing law as synonymous with the term convict.

2. For exempting the detention barracks from the existing provision vesting the government and control of the prison in the Board of Commissioners of the United States Soldiers' Home; this for the reason that the detention barracks would become an integral part of the military establishment, to be administered directly as any other department thereof.

3. For modifying the provision of existing law respecting the employment of prisoners in said detention barracks so as to limit the daily hard labor of prisoners confined therein to what is required for purposes of domestic administration, as outlined above by the prison commandant, and directing that prisoners not so employed shall be subjected to a rigid course of military training and instruction.

4. For exempting from the prohibitions of section 1118 of the Revised Statutes against the enlistment in the military service of any deserter therefrom and of section 2 of the act of August 1, 1894 (28 Stat., 216), against the reenlistment in the military service of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, all good-conduct prisoners discharged from the detention barracks or post guardhouse with the recommendation of the authorities of the detention barracks or post that they be permitted to reenlist.

5. For the modification of the requirements of sections 1996 and 1998, Revised Statutes, so as to provide that the forfeiture of citizenship rights or of the right to become citizens shall not attach to a conviction of desertion committed in times of peace.

Other minor changes will be required in the existing law, and of course, extensive amendments of the existing regulations governing the United States military prison at Fort Leavenworth would be necessary to conform them to the amended law.

The last recommendation (No. 5) was designed to remove the forfeiture of citizenship rights, or of the right to become citizens, which those statutes imposed in case of desertion committed in time of peace, leaving that penalty in force for desertion committed in time of war; and I will interpolate here that these statutes had their origin in the Civil War Act of March 3, 1865, and represented the then thought of Congress on the subject. This act was a sweeping, drastic provision which required that this penalty of forfeiture of citizenship rights and of the right to become citizens should attach automatically to a conviction of desertion and made no distinction between peace and war.

We lived under that statute up until a subsequent date, which I shall refer to in the further remarks that I have to make to the committee.

Projects of legislation to carry out both (4) and (5) were submitted to the War Department and transmitted to Congress and a project of an act repealing the prison statute and substituting therefor the disciplinary barracks statute, which ultimately became the act of March 4, 1915, was submitted by me to Congress on May 27, 1912. That project provided for both restoration and reenlistment of good-conduct prisoners.

Segregation.—At my inspection in 1911 I found purely military offenders held in close association with common-law and statutory felons. I recommended in my report the segregation of these military offenders, and on December 29, 1911, this recommendation was carried into effect by the issue of orders prepared by me directing that all felons held at Leavenworth, with the exception of a few with short periods of confinement remaining to be served, be transferred to Alcatraz; and all prisoners at Alcatraz convicted of purely military offenses, with like exception, be transferred to Leavenworth; giving to Leavenworth prison the character of a disciplinary barracks or reformatory, but continuing Alcatraz as a penal institution. The same order changed the designation of the inmates at Leavenworth from military convicts to general prisoners.

In other words, I was trying to proceed in advance of an act of Congress, and as far as I could go without the authorization of Congress, to establish this reform immediately.

Nothing further was accomplished in the way of prison reform in the year of 1911. My report was submitted in November, 1911, and segregation was an accomplished fact before December 31 of the same year.

What was done was preparatory to the inauguration of greater reforms when the necessary legislation could be secured from Congress.

I appeared before the Military Committee of the House in May of 1912 in support of the then pending revision of the Articles of War. Section 2 of that revision contained the reform of the prison statutes. The salient provisions of the bill were:

(1) Changing the designation from prison to barracks.

(2) Segregating military offenders from felons.

(3) Placing the control of the barracks directly under the control of the Secretary of War. You will remember, Senator Warren, that the military prison was then under the control of the board of governors of the Regular Army Soldiers' Home, located in the District of Columbia.

Senator WARREN. Yes; I remember that.

Gen. CROWDER. The next provision was:

(4) Authorizing prisoners confined in the barracks to be placed under military training with a view to honorable restoration to duty or reenlistment; and

(5) Authorizing the Secretary of War to restore to duty prisoners confined in said barracks.

This section 2, along with the revision of the Articles of War, failed of a favorable report by the House committee. However, on August 22, 1912 (37 Stat., 356), Congress enacted the law recommended in my report of 1911 exempting peace-time deserters from loss of citizenship rights and permitting the reenlistment of peace-time deserters and other classes of prisoners whose prior service had not been honest and faithful, when specially authorized by the Secretary of War. We immediately entered upon the policy of reenlistment of prisoners confined in the military prison.

Gen. Ansell did not report for duty in the Office of the Judge Advocate General until March 11, 1912, after all the legislation on the subject which was afterwards enacted into law had been formula-

ted. I do not think he has claimed or would claim that the scheme was in any sense his own, or that he had any substantial part in formulating the several projects.

Reenlistment.—As I have said, immediately following the enactment of August 22, 1912, we commenced the policy of recommending deserving general prisoners confined in the military prison for reenlistment, and in the annual report of the prison commandant for the fiscal year ending June 30, 1913, is found the statement that 63 general prisoners had been recommended for reenlistment under that act.

In August of 1913 I made a second inspection of the military prisons, and in my report of that inspection recommended that we proceed in advance of any authorization by Congress to inaugurate that part of the scheme of reform which looked to military training of deserving general prisoners. On September 17 of 1913 there was issued from the War Department, upon my recommendation, General Order No. 56, War Department, 1913, which I will insert here:

GENERAL ORDERS, No. 56. } WAR DEPARTMENT, *Washington, September 17, 1913.*

1. General prisoners confined at the United States Military Prison at Fort Leavenworth, Kans., under sentence for purely military offenses alone, whose record and conduct are such as to entitle them to the privilege, will be afforded an opportunity to receive a special course in military training during a portion of the time that would otherwise be devoted to hard labor. To that end, the formation of one or more, but until further orders not exceeding four, disciplinary companies at said prison is hereby authorized and directed.

2. Except in particular cases in which the commandant of the prison deems such enrollment unwise, all general prisoners of the first class (paragraph 30, Regulations, United States Military Prison, 1909), confined at the United States Military Prison at Fort Leavenworth, Kans., under sentences for purely military offenses alone, will be enrolled in disciplinary companies, but no such general prisoner shall in any case be excluded from enrollment in a disciplinary company, or from regular participation in the course in military instruction, because his services may be regarded as desirable or necessary elsewhere.

3. Disciplinary companies will be organized as Infantry, and four such companies will constitute a disciplinary battalion.

DETAILS OF ORGANIZATION.

Disciplinary Company—

Officers.—One captain or first lieutenant detailed as company commander, and 1 lieutenant detailed for duty with the company.

Enlisted men.—One sergeant detailed as acting first sergeant, 1 sergeant detailed as acting quartermaster sergeant, 4 sergeants, and 8 corporals.

General prisoners.—Two under instruction as musicians and 56 under instruction as privates.

The number of general prisoners placed under instruction as privates in a disciplinary company may be increased to 84, in which case the number of enlisted men assigned to duty with the company will be increased by 2 corporals and 2 lance corporals.

Disciplinary Battalion—

One major or captain detailed as battalion commander.
One first lieutenant detailed as battalion adjutant.
One sergeant detailed as acting battalion sergeant major.
Four disciplinary companies.

4. The officers required for duty with disciplinary organizations will be detailed in orders from the War Department, and the enlisted men required for duty as noncommissioned officers of such organizations will be assigned thereto by the commandant of the prison from enlisted men assigned to duty at the prison for that purpose.

5. General prisoners enrolled in disciplinary organizations will be placed under military training and instruction during one half of each working day, but will be required to work during the other half. Exceptions to this requirement may be made by the commandant in cases of individual skilled workmen and paroled prisoners

cessary in the work of reconstruction and in the operation of the railway like employment, but this discretion will not be exercised in such a way these men of a fair amount of military training and instruction.

nder instruction as members of a disciplinary organization, and during sure, general prisoners will be dressed in such uniform, without facings as may be prescribed by the Secretary of War. For this purpose obsolete rms will be utilized. When at work, general prisoners enrolled in dis- anizations will be dressed in fatigue clothing.

nary organizations will be armed and equipped as Infantry, with such to equipment as may be recommended by the commandant of the pproved by superior authority. The firing pins of rifles placed in the eral prisoners enrolled in disciplinary organizations will be removed, replaced temporarily while the prisoner is engaged in gallery practice supervision within the prison inclosure.

prisoners enrolled in disciplinary companies will be designated by name number; will not be required to work in the same party with general enrolled in disciplinary companies; will be quartered in a separate prison; will be seated at separate tables in the dining room and in a on in the chapel; will be permitted the privilege of rendering the pre- ry salute; and when under arms, at work or at meals, will be permitted with each other under the restrictions that govern enlisted men while aged.

rse of military training and instruction for general prisoners enrolled in organizations will include: physical training; personal hygiene, includ- e uniform; the school of the soldier, squad, company, and battalion; avalry and Field Artillery drill; elementary signaling; care of arms and iming and sighting drill; gallery practice, rifle and revolver; saber drill; stances; pitching and striking tents; hasty shelter—use of intrenching nd lashings; duties of enlisted men in military bridge construction; and e duties of enlisted men in the service of security and information— ance, rear and flank guards, and scouting.

the foregoing regulations one disciplinary company will be organized liam, Fort Jay, N. Y.

l prisoners confined at Castle William, Fort Jay, N. Y., under sentence or common-law crimes or misdemeanors alone or in connection with ry offenses, are not eligible for membership in the disciplinary company d at that place. They will be kept separate from purely military offend- prison facilities permit, with further segregation of felons from misde- he harder labor will be devolved upon felons.

Pacific Branch of the United States Military Prison, Alcatraz, Calif., fined only those general prisoners who have been convicted of statutory w crimes or misdemeanors alone or in connection with purely military application of these regulations will be deferred until it is determined e whether the system should be extended to misdemeanants undergoing at this branch prison felons and misdemeanants will be segregated so able, and detachments to Angel Island and other places in the harbor y posts for hard labor in construction, improvement, and other public far as practicable, be drawn from the felon class.

ethod of dealing with prisoners here outlined is an innovation. The ribed is to a certain extent tentative and experimental, and will be its operation circumscribed in the future as experience may suggest. mmandant of the United States Military Prison at Fort Leavenworth, f its Pacific branch, and the prison officer, Castle William, Fort Jay, port by letter to the Judge Advocate General of the Army, who will have l control, under the Secretary of War, of these prisons and their adminis- ect correspondence with chiefs of staff corps and departments, as now vill continue.

e policy of the War Department to separate, so far as practicable, general victed of offenses punishable by penitentiary confinement from general victed of purely military offenses or of misdemeanors in connection with ary offenses. In furtherance of this policy reviewing authorities will penitentiary as the place of confinement of general prisoners sentenced d for more than one year upon conviction of offenses punishable by con- a penitentiary under some statute of the United States or under some her law in force in the locality in which the offense was committed (see of War), except in individual cases in which the proved circumstances e holding of the prisoners so convicted in prison associations with misde-

meanants and military offenders will not be to the detriment of the latter. For general prisoners to be confined in penitentiaries under the foregoing rule, reviewing authorities in the United States or Hawaii will designate the United States Penitentiary at Leavenworth, Kans., as the place of confinement, except that such prisoners as are residents of Hawaii, Porto Rico, and the Canal Zone may be confined in local penitentiaries; and reviewing authorities in the Philippine Islands will designate the penitentiary at Bilibid, Manila, P. I., as the place of confinement.

[2079146, A. G. O.]

By order of the Secretary of War:

LEONARD WOOD,
Major General, Chief of Staff.

Official:
GEO. ANDREWS,
The Adjutant General.

You will observe that this order authorized and directed the organization of a maximum of four disciplinary companies at Leavenworth prison to be composed of general prisoners serving sentences for purely military offenses, and further authorized one disciplinary company at Castle William, Fort Jay. It directed that members of the disciplinary organization were to be taken out of prison garb and put into uniform. They were to be known by name and not by number, separated from other prisoners, permitted to render and receive the military salute, and to be armed, equipped, and trained as infantry—all for the purpose of developing their own self-respect and fitting them for restoration to duty. Disciplinary companies were organized rather promptly in the remaining months of 1913 and January, 1914.

It was not until February 6, 1914, that the pending bill to convert the United States Military Prison into a disciplinary barracks was favorably reported by Senator Chamberlain with some amendments made by the Senate Military Affairs Committee of which he was then the chairman. The bill failed to pass at that session of Congress. But we got partial relief in the act of April 27, 1914 (37 Stat. 346, 352), in the form of a rider on the annual Army appropriation bill, inserted on my insistent recommendation, authorizing a suspension of the sentence of dishonorable discharge when there was reasonable hope of reclaiming the man. As to all men thereafter convicted and sentenced, with a suspended dishonorable discharge, we could proceed to restore the men by remitting the dishonorable discharge, of which the execution had been suspended, and in this way send them back to their organizations. This was followed by instructions to commanding generals, issued on June 9, to suspend sentences of dishonorable discharge whenever there was a probability of reclaiming the soldier to honorable service (G. O. 45, June 9, 1914). In this order it was announced that "the object in seeking the legislation authorizing the suspension of dishonorable discharge was to afford a plan of giving soldiers convicted of purely military offenses an opportunity to reclaim themselves and gain restoration to the colors."

But there remained, of course, the large class already in confinement whose sentences of dishonorable discharge had already been executed and who did not come within the provisions of the foregoing act of April 27, 1914, and General Order No. 45. They could only, under the accepted construction of the statute, get back into the service under the legislation of August 22, 1912, heretofore noted—that is, by reenlistment for a full term. Not being willing to wait further for the enactment of the pending bill, which would have

ıem, I directed a study of section 1353, Revised Statutes' ɛction 6 of the original prison act, to see if there could not l therefrom this power of restoration as to inmates of the ɔse discharges had already been executed. Gen. Ansell ed to that study. With his usual ability, he analyzed the l presented a strong brief contending for the construction ːt was sufficient to reach this class of prisoners. Secre- ɪon, then in office, gave the opinion his careful consideration ıally approved it March 7, 1914, though, I think, not with- as to its legal correctness, but in the belief that Congress mately validate this procedure by giving it the necessary sanction. From that time on we had recourse to both e., to reenlistment for the full term, and to restoration to stment, in dealing with the inmates of this prison.

o remark here that I have found in Gen. Ansell's testimony ent that there was great opposition in the War Department ıstruction. All that I can say is that with my very keen it, I never heard of great opposition. I know that Secretary ıve the legal question considerable study, and that he reserved for about two weeks before he gave his approval of the ut that there was such opposition on the part of the War ıt from which you could deduce a military autocratic char- the part of the officers of the War Department at that time, invited to do, I doubt very much. Certainly, I did not

WARREN. Were there any unfavorable comments from ɪs, outside of the department?

OWDER. His statement was that within the department ɔpposition.

WARREN. Do you know of any supposed opposition from ɜ, from officers in command?

OWDER. No; though I think a great majority of officers s reform with apprehension. They believed in punishment nt effect.

gle contribution that Gen. Ansell made to the scheme of ɔrm was his opinion on section 1353, Revised Statutes. had entered upon his study, 63 inmates of the prison had nmended for reenlistment in the fiscal year ending June 30, nearly twice that number before the date of the rendition ion in 1914. The first man restored under his opinion was n March 14, 1914. The record for the fiscal year ending the Leavenworth Prison shows that 40 per cent of the men l from the prison in that year were recommended for reen- Many preferred that course to restoration. From March 14), 1914, 39 men had been restored.

the enactment of the bill repealing the prison act and sub- the disciplinary act the reforms carried out by Executive l by acts of Congress may be summarized as follows:

ssification and segregation of prisoners, December, 1911.

enlistment of inmates as authorized by act of August 22,

ganization of disciplinary battalions and companies and ion of military training for purely military offenders, Sep- , 1913.

(4) Instruction to department commanders to suspend sentences of dishonorable discharge inaugurated under act of April 27, 1914.

(5) Disciplinary battalion established on October 13, 1914, at branch military prison at Alcatraz, extending to misdemeanants confined there the privileges of military training and instruction.

So it was that the system of reform was already pretty well established in its more essential features before Congress finally came to enact the bill for the repeal of the prison statute, which it did on March 4, 1915, as a rider on the Army appropriation act. But the act of that date did abolish the penal character of the institution, change the name, and convert the institution in a very real sense into a military reform school, where every inmate could earn, by good conduct, irrespective of the length of his sentence, an honorable restoration to duty with the colors, and an honorable discharge.

Senator WARREN. At that point: Do you propose to comment upon the old law and the new law, at some place in your remarks?

Gen. CROWDER. Yes.

Senator WARREN. I wish you would do so.

Gen. CROWDER. There remained little to be done under the act of March 4, 1915. We reorganized the disciplinary battalion and companies (G. O. 21, April 13, 1915, drafted by me) and on May 18, 1915, issued parole regulations in aid of the execution of so much of the act of March 4, 1915, as authorized the Secretary of War to establish a system of parole for inmates of disciplinary barracks. This parole provision was a separate rider and not a part of the prison section proper.

I realized that this scheme was not complete unless we had some corresponding measure of relief for those who could not be recommended for either reenlistment or restoration, and I sought this parole rider as a separate rider to this bill. It gave authority to the Secretary of War to establish a system of parole for military prisoners; and the regulations were issued under it, providing for the release of men back into civil life who had served at least half of their sentences.

Senator WARREN. That was a companion piece to what had preceded?

Gen. CROWDER. A companion piece, so as to cover the entire population of the prison.

Senator WARREN. Yes.

Gen. CROWDER. Under this system as thus built up and as it exists to-day, the disciplinary barracks at Leavenworth and the two branches at Alcatraz and Governors Island are sharply to be distinguished from the ordinary prison, and confinement therein is sharply to be distinguished from penal servitude. They are the reform schools of the Army, the primary purpose of which is to fit inmates for honorable restoration to duty with the colors or for useful employments in civil life.

Senator WARREN. Is Alcatraz used also for the Navy and the Marine Corps?

Gen. CROWDER. No, sir.

Senator WARREN. Just for the Army?

Gen. CROWDER. It is exclusively an Army barracks now. The essentials of the system of military penology are:

indeterminate sentence (effected by means of a suspended
of dishonorable discharge, remission of the unexecuted
' the sentence to confinement, and restoration to duty or
ı to reenlist);
ng men for restoration by training them and stimulating
respect through—
tary training and instruction in the disciplinary battalion.
ing them out of prison garb, putting them into uniform;
; them "convicts;" giving them the privilege of the mili-
te; treating them as soldiers under intensive military

ustrial as well as military training; all tending to stimulate
r's self-respect and sense of his own value, and giving him
ty for greater usefulness in his organization, and to earn
ıey upon return to civil life, and become a better citizen.
WARREN. As I understand you, that took the place of hard

OWDER. Of all of what is described by the phrase, "penal
"

LENROOT. In that connection, will you tell us how they
l?
OWDER. I can, but at this place I would be glad if you
me finish this.
LENROOT. Yes; I do not want to disturb the order of your
.
OWDER. The next is:
parole, by which the man's fitness for restoration to civil
nay be tested; and
orable restoration to duty with the colors.
g the reenlistments, which have been considerable in
and dealing only with restorations, the following is the
the men restored to duty from the disciplinary barracks
ranches for the years 1914 to 1919, inclusive:
year 1914, 39; 1915, 139; 1916, 193; 1917, 436; 1918, 678;
17; total, 2,902.
r WARREN. May I ask you right there, what has been the
' those men afterwards restored? Have you any record
hat you could give us what, generally, is the effect; that is,
y have done to justify the leniency, after they got back
ice?
ROWDER. At the time Secretary Garrison approved the
nd issued General Order No. 56, he transferred the adminis-
f the prisons from The Adjutant General's Department to my
ent, and placed me in charge, and I followed this matter that
g up, very closely. My men were going back and completing
ms of enlistment with a lower desertion rate than was made
who reached their organizations through the recruit depots
ary processes of enlistment. Not infrequently they became
nissioned officers. But this act of March 4, 1915, by a cir-
ce which you will remember, for I think you served on the
ce committee, Mr. Chairman, wrested the control of the
ı régime from the Judge Advocate General's Department and
it to The Adjutant General's Department, and since that
ave not had the means of following these restored men, and
ing what records they had made.

Completing what I had to say, 2,448 men were restored to duty between April 6, 1917, and August 31, 1919. The average sentence in years actually served by these men so restored is less than six months, or 0.49 of a year. Two thousand four hundred and forty-eight men restored served less than six months (average) in the disciplinary barracks. Within this average the prison commandant and his officers had judged that their reformation was so complete as to justify their being restored to duty with the colors.

Senator WARREN. You will give it as your judgment, will you, that those men restored, taking them by and large, as a lot, have rendered as good a class of service as the men who have been newly enlisted in the Army?

Gen. CROWDER. That was true up to the date when I lost the actual supervision.

Senator WARREN. Do you know anything to the contrary?

Gen. CROWDER. I do not know anything to the contrary since, and I know this, further, that during the time I was in charge I followed the actual expense to the Government of this process, and in comparison with the bringing of the men to the colors by enlistment through the recruit depots, the expense of this system was less per capita than the expense under the recruiting system.

Senator WARREN. We know that the expense of recruiting is excessive. Could you furnish us, later, so that it could go into your testimony, any statistics or any proper testimony as to what has been the change in these men since they went under the control of The Adjutant General?

Gen. CROWDER. The Adjutant General would have to furnish that information. I could not give it.

Senator WARREN. Could you give us any approximate idea of the average sentence of these men you have been speaking of?

Gen. CROWDER. Yes; by calling your attention to the average length of sentences imposed by general courts-martial for the entire period, namely, three and one-half years, about. In other words, the average sentence of three and one-half years was served, by these men, by an average confinement of less than six months. That would be the only comparison you could make that would furnish you an approximation of the amount of remission they earned by going to the disciplinary barracks and entering upon this course of military instruction.

Senator LENROOT. That average would evidently not apply, though, because for the longer sentences there would be a less number that would have the advantage of it.

Gen. CROWDER. It is true, and is published in my letter of March 10, which I shall refer to later as the Wigmore letter, prepared by Col. Wigmore and Maj. (now Lieut. Col.) Rigby, but signed by me, that certain men serving even these long-time sentences earned their restoration to duty in less than six months. That is already in the record before you. That has already been submitted for the consideration of this committee.

Senator Lenroot asked me a moment ago about the character of prison construction. Unfortunately the showing is not as favorable as I wish it might be. The chairman of the committee will have no difficulty in recalling when that prison construction was commenced. They laid out the prison just as penitentiaries are ordinarily con-

structed, with cell wings and doors, and all of the indicia that mark penal servitude. If you visited Leavenworth you would find a battalion of four companies in uniform marching all over the reservation under drill and instruction preparatory to being restored to duty, but when released from drill they return to places like that. The best that we could do was to take off the cell doors and leave them unobstructed access to the galleries that are found in each tier. But the prison construction was so far advanced—so nearly completed, in fact—that it was impossible to change it.

Senator LENROOT. Are these military prisoners kept in an entirely separate portion of the prison from other prisoners?

Gen. CROWDER. The segregation was complete during the time I administered the prisons. We found some barracks in the prison inclosure, and we kept these prisoners under military training in those barracks, but I do not think it has been possible to do that during the period of this war.

Senator LENROOT. Are there any of them in the same buildings at all with other prisoners?

Gen. CROWDER. I think there are.

Senator LENROOT. You think there are?

Gen. CROWDER. I think there are.

Senator LENROOT. So, to that extent, they have the same character of——

Gen. CROWDER. Yes; that is one unfortunate thing.

Senator LENROOT. Have any recommendations been made to Congress in that matter?

Gen. CROWDER. I think not. It was so impracticable, so improbable, rather, that Congress after appropriating the large sums of money that it had, under this mistaken theory of military penology, to construct what was in fact a military penitentiary, would condemn all of that property and rebuild, in accordance with the new idea: certainly not until the new idea had been tested.

Senator LENROOT. Would you say, however, that it was extremely important to carry out this reform?

Gen. CROWDER. Very important. I would like to think that we had military barracks everywhere to answer the purpose of these military reformatories, to give this idea a chance, and to keep this class of prisoners from association with men who are irreclaimable.

Senator WARREN. What is the distance from these quarters you have described; that is, from the regular Leavenworth Penitentiary to which criminals of all kinds are sent?

Gen. CROWDER. They are at the opposite end of the reservation, and are separated by a distance of 3 or 4 miles.

Senator WARREN. Both on the same side of the river?

Gen. CROWDER. Yes; but both on the military reservation.

The net result of our disciplinary barracks administration is that out of 13,593 men passing through the United States Disciplinary Barracks between April 1, 1917, and July 31, 1919 (including 2,101 in confinement on April 1, 1917, and 11,492 sentenced to the barracks between April 1, 1917, and July 31, 1919), only 3,839 remained in confinement in the various barracks on July 31, 1919; being only 1,738 more than were in the barracks at the beginning of the war, in spite of the great increase in the Army during the war, and of the number of unfit men of various kinds who were necessarily brought into the service through the operation of the draft.

Senator WARREN. On that date, July 31, can you tell us how many men we had in France?

Gen. CROWDER. I have not the statistics of the American Expeditionary Forces.

Senator WARREN. I wonder whether we could get that?

Gen. CROWDER. I think the recalling of Gen. Bethel would put you in the way of getting that information.

Senator WARREN. Would it be convenient for you to suggest to Gen. Bethel that we would be glad to have him furnish the committee with that information?

Gen. CROWDER. Yes, sir.

Senator WARREN. You would like to have it, Senator?

Senator LENROOT. Yes; I think so.

(The information desired is contained in the following note by Gen. Bethel:)

In France general prisoners were confined in two camps—at general intermediate storage depot (Gievres) and at St. Sulpice, near Bordeaux. Both these camps were under the jurisdiction of the commanding general Services of Supply. On June 13, 1919, that officer was directed to send all general prisoners to the United States as soon as transportation was available. On June 30, there remained in the two camps 108 general prisoners; on July 31 there were but 2. An indeterminate number were en route to the United States on July 31, 1919, either at Brest, in France, or on the seas. It is known that on August 12 there were but 34 remaining at Brest.

Gen. CROWDER. Although quite a proportion of the sentences to the disciplinary barracks were, nominally, for long terms of years, yet, in fact, the actual sentence served by the 9,754 men who were released from the barracks (including the men restored to the colors about whom I was talking a moment ago) during the period of the war, as above stated, averaged only 1.06 years.

During the month of August, 1919, the number of men in the barracks was further reduced, so that on August 30, 1919, only 3,728 men remained on confinement, or only 1,627 more than at the beginning of the war.

The purpose of the disciplinary barracks is to aid in the restoration of offenders; to make them, if worthy, good soldiers and good citizens. The period that a man is detailed in the barracks lies wholly in his own hands.

Senator WARREN. You rather emphasize what you stated earlier about these sentences all being conditional. We can understand that was as to time; that is, they should not exceed a certain time?

Gen. CROWDER. I made that plain, I think, by this statement. Those are maximum sentences. There is authority, of course, to hold the man for the entire period for which he is sentenced. It is written into the law by the very terms of the statute, authorizing suspension of the dishonorable discharge, that these men are there for the purpose of earning remission of that particular sentence of imprisonment and dishonorable discharge and getting them back into the service. This gives the sentence an indeterminate character. And let me emphasize it, because I may forget it, there is no minimum sentence.

Senator LENROOT. Are these sentences always of the same nature?

Gen. CROWDER. They are all of the same nature.

Senator LENROOT. They are all fixed sentences, but under the operation of the law they may be remitted?

Gen. CROWDER. In terms, yes—5, 10, 20, 40 years—but there is where the misapprehension has come. A 40-year sentence may, with good conduct, become a 6-months' sentence. I want this record to show that.

Senator LENROOT. You do not use that word "indeterminate" in the ordinary sense in which it is used in criminal law.

Gen. CROWDER. No; I am perfectly willing to say that, provided I do not allow anybody to think for a moment that it is not just as effective in the form in which we have it.

Senator LENROOT. It is just as effective, but it is not used in the sense in which the word "indeterminate" is used in the civil law.

Gen. CROWDER. No; the word "indeterminate" does not occur in our Articles of War at all. In this connection I find that I have some statistics here that answer the inquiry by Senator Lenroot. I have a statement showing the number of men restored to the colors from disciplinary barracks between April 6, 1917, and August 31, 1919, with the length of the average original sentence and the average sentence served. At the main branch disciplinary barracks, Fort Leavenworth, Kans., 1,410 men with an average sentence in years adjudged of 8.8 years, the average sentence in years actually served was 0.43 of a year.

Senator LENROOT. That is what I wanted to know.

Gen. CROWDER. At the Atlantic Branch of the United States Disciplinary Barracks at Fort Jay, N. Y., 470 men with an average sentence in years adjudged of 2.98 years, actually served an average sentence of 0.59 of a year.

At the Pacific Branch of the United States Disciplinary Barracks at Alcatraz, Calif., 568 men with an original average sentence adjudged of 2.17 years, served actually 0.57 of a year.

The total shows: Total number of men, 2,448, with an average sentence adjudged of 5.73 years, serving an average actual sentence of 0.49 of a year.

In tabular form the statistics are in this statement:

Statement showing number of men restored to the colors at United States Disciplinary Barracks between Apr. 6, 1917, and Aug. 31, 1919.

	Fort Leavenworth, Kans.	Atlantic Branch, Fort Jay, N. Y.	Pacific Branch, Alcatraz, Calif.	Total.
Number	1,410	470	568	2,448
Average sentence in years originally adjudged against men so restored	8.8	2.98	2.17	5.73
Average sentence in years actually served by men so restored	.43	.59	.57	.49

NOTE.—This statement does not include 124 men who during the period stated were restored to the colors and at once honorably discharged, and 13 men who during the same period were restored to the colors and discharged under paragraphs 139 and 150, Army Regulations, for the reason that the necessary information concerning these men is not available.

JOHN P. DINSMORE,
Lieutenant Colonel, Judge Advocate.

Senator LENROOT. Does any reason occur to you why there should be this difference in those three prisons? I notice in one of them you have a lower average for a longer term. In others you have a high average for a shorter term.

Gen. CROWDER. During the period of the war it seems Leavenworth was designated generally for the longer-term men, and the shorter-term men were held at Alcatraz and Jay. Perhaps that explains why the average sentence adjudged was so small for the prisoners confined at the Atlantic and Pacific branches.

Senator LENROOT. No; that is not what I gathered from your reading of those statistics. You have a longer average for the shorter average term in one case.

Gen. CROWDER. Yes; it has worked out that way.

Senator LENROOT. I do not see why it should be so.

Gen. CROWDER. Forty-three hundredths of a year at Leavenworth. 0.59 of a year at Fort Jay, and 0.57 of a year at Alcatraz.

Senator LENROOT. In one case the average sentence for your lowest average is very much higher than in the other case of the highest average.

Gen. CROWDER. I should say that the only reason for that was that the policy adopted at these different places was not uniform.

Senator LENROOT. That is what I was getting at, whether it was a difference of policy and recommendation.

Senator LENROOT. I should judge that it might indicate a more liberal policy in one institution than in the other.

Gen. CROWDER. It would seem to show a lack of coordination.

Senator WARREN. There might be a little difference in the character of the men.

Senator LENROOT. Yes.

Gen. CROWDER. It shows a lack of coordination of the prison administration in the three places, I think.

Senator LENROOT. Yes.

Gen. CROWDER. Something of that kind must explain it. I had hoped to find here some statistics which I had gathered which might possibly explain some of these long-term sentences—5, 10, 15, 25, and even 40 years—for the offense of absence without leave.

I called upon the port of embarkation at Hoboken for the number of men who were absent without leave from their organizations at the time they were expected to go up a gang plank and embark for Europe, because I knew the problem was concentrated largely there. These are some of the men of whom you have heard the story that they went home to see sick wives, fathers and mothers, and sweethearts. A great picture has been drawn for the contemplation of the American people of the cruelty toward these men.

Here are the statistics, and they show that the number of men who were absent without leave at the port of embarkation at Hoboken for the calendar year of 1918, at the time their organizations were due to embark for the theater of war, was approximately 14,098. I have no figures available for the year 1917, but the number of men transported to Europe that year was comparatively small. I can only explain these excessive sentences in this way: The call had come from Europe as early as March that the English had their backs to the English Channel and the French had their backs to Paris. The call was for bullets rather than bread.

As Provost Marshal General I had to furnish three times as many men as the schedule called for for April of that year; four times as many as the schedule called for for May; about the same percentage for June. The culminating peak was reached in July, during which

month I furnished, under call, 401,000 men. The country was worked up to a higher pitch of excitement and insecurity than ever before. The officers who were expected to go abroad with their organizations and win battles found their commands disintegrating at the ports of embarkation. Unquestionably this fact affected the administration of military justice, and led to many of these heavy sentences. No one, I am sure, wishes to conceal or obscure the fact of heavy sentences. They were given. But little attention has been paid thus far to what must have been in the minds of the men who were adjudging these sentences, to do something at a critical period of the war for deterrent effect, knowing full well that this system of military penology which I have described to you would correct the evil of disproportionate punishment before any man had entered upon the execution of the excessive portion of his sentence; and I think you gentlemen may accept this as true, that during the period of the war, and ignoring for the moment any illegal convictions that may have taken place, no man has ever served one day of the excessive portion of the sentence adjudged by court-martial.

Senator LENROOT. That is, you mean if it was adjudged, it was reduced before he began his service?

Gen. CROWDER. Before he began the service of the excessive portion; and I think that point can not be too forcibly put. At least, I would like to have it controverted if it is not true. That is my best judgment, from a rather close study of the question.

Senator LENROOT. When a man was convicted and sentenced for 40 years, what became of him then, immediately?

Gen. CROWDER. He is held at the point of trial, or at some convenient place to which he may be sent, awaiting orders of transportation to the designated place of serving sentence. It may be one of these three disciplinary barracks, or it may be some place of execution provided by the commanding general of the American Expeditionary Forces in France; or in Siberia it may be some improvised place; or at Archangel an improvised place.

Senator LENROOT. When does the sentence begin?

Gen. CROWDER. It is reckoned from the date of approval of the sentence.

Senator LENROOT. If a man is sentenced to a year, and he remains 60 days in the guardhouse, do I understand that he serves a year from the date of the approval of the order additional?

Gen. CROWDER. No; he gets credit for all confinement served after the date of the approval of his sentence.

Senator LENROOT. Then, in effect, the service of the sentence begins——

Gen. CROWDER (interposing). On the date of approval.

Senator LENROOT (continuing). Not with the approval. In effect, I say, the service begins immediately upon the verdict of the court-martial?

Gen. CROWDER. In effect, that.

Senator LENROOT. Yes.

Gen. CROWDER. Unless there is some delay interposed between the action of the court and the action of the reviewing authority.

Senator LENROOT. So that, while technically you are correct, in a 40-year sentence he does enter upon the service of the sentence before there has been any reduction?

Gen. CROWDER. That is true; but I was careful to say before, he had not entered upon the execution of the excessive portion of his sentence—not the sentence, but the excessive portion. That is what I said.

Senator LENROOT. He could not enter upon the excessive portion of a 40-year sentence. He would have to serve a year——

Gen. CROWDER (interposing). I should assume that there was a period of confinement in all those cases that was justified, whereas the entire period was not justified, and that he had not entered upon the execution of the excessive portion at the time when clemency was granted.

Senator LENROOT. He could not have both. If it was reduced to 20 years, he could not enter upon the excessive portion until 20 years had elapsed. Suppose that it was reduced to two years, or three years; he could not enter upon the excessive portion until after two years.

Gen. CROWDER. No; the point that I wanted to get before the committee was that if all these sentences had been excessive, the prisoner had not suffered by it except in name, because he had not served any part of the excessive portion at the time clemency reached him.

Senator LENROOT. That would be almost inevitably true, would it not, in every case?

Gen. CROWDER. I do not believe that the people of this country understand that.

Senator LENROOT. You think that the people of the country believe——

Gen. CROWDER (interposing). I think there is a vast amount of misapprehension in the minds of the people of the country, that men have actually executed—served out—these excessive sentences.

Senator LENROOT. How could they have served out a 20-year sentence which was imposed only two or three years ago?

Gen. CROWDER. But suppose it was a 20-year sentence where only one year was justified. It would then be a question as to whether the man had been kept in prison one year. That is the point that I want to cover, that I do not believe there are any of them—and I disregard illegal convictions where no sentence would have been justified—taking the legal convictions, I do not believe there are any of them where any part of the sentence in excess of what was justified has been served.

Senator LENROOT. Beyond the time of the proper sentence?

Gen. CROWDER. No.

Senator LENROOT. I see. I think that is probably true.

Gen. CROWDER. I think that is absolutely true.

Senator WARREN. Detention in the guardhouse has been only, I suppose, until they could send them under proper guard?

Gen. CROWDER. Yes. Perhaps there may have been inexcusable delay in some cases.

Senator WARREN. I wanted to bring that up, because that has been charged, that men have been put in uncomfortable places and sent to general disciplinary barracks.

Gen. CROWDER. Perhaps this is the proper time to refer to a distinction which I find it very important to keep in mind in expressing some judgment upon these court-martial sentences. I do not see

how we can hope for a discriminating, fair, and sane judgment unless we keep in mind that courts-martial try common law and statutory offenses as well as purely military offenses. At the time I made my inspection at Leavenworth in 1911, a time which reflected peace conditions and peace-time administration of military justice, the percentage of common law and statutory offenders only, convicted by courts-martial, to the total number in confinement there was 8 per cent. In 1917 the figures show that it was 10 per cent at Fort Leavenworth Barracks; and in 1918, 19 per cent; and without pursuing these statistics further it will be sufficient to say that during the war period the number of soldiers convicted of common law or statutory offenses on the one hand as compared with military offenses on the other, was 14 per cent.

Senator LENROOT. How do you explain that? Would not one assume, rather, that the reverse would be the case, that the percentage would be smaller?

Gen. CROWDER. I do not undertake to explain why the percentage is higher for the war period. My point is made when I call attention to the fact that the proportion between military offenses and civil offenses is, for the war period, about 86 of the former to 14 of the latter; and for the peace period the proportion of military offenses is even greater. Eighty-six per cent of the cases you are called upon to consider in providing a code of military justice are essentially military cases, and 14 per cent common law and statutory cases. And the fact that affects my judgment when I come to consider this question of an appellate tribunal—and I am going to refer to it later—I am just reserving the question now, and saying only that I think the fact profoundly affects the conclusion to be reached as to the character of the appellate tribunal, that in time of war not more than 14 per cent of the cases that would come before such a tribunal are common law and statutory cases, and that 86 per cent of the cases that would come before it are offenses against the discipline of the Army. I say I just reserve that to be discussed when we come to discuss the question of appellate power.

Senator LENROOT. I want to go back just for one question: With reference to the excessive sentences, including those for absence without leave, did I understand you to state that those were solely for absences without leave at the port of embarkation?

Gen. CROWDER. No; I just gave that as one illustration. I would not like to have the thought rest in anyone's mind for a moment that I was trying to cover the case——

Senator LENROOT. No; I just wanted to know what the fact was.

Gen. CROWDER. Would you like to have in the record at this time a statement showing the number of men confined in disciplinary barracks and penitentiaries during the war?

Senator LENROOT. I think that is already in the record, but if it is not I think it ought to go in.

Gen. CROWDER. I doubt very much whether it has been presented by any other witness before you.

Senator LENROOT. Then it may go in.

Gen. CROWDER. Before the war was declared, namely, on April 1, 1917, there were in the three disciplinary barracks 2,101 men, and 212 men in the penitentiaries.

Between April 1, 1917, and July 31, 1919, there were sent to the disciplinary barracks 11,492, and to the penitentiaries 1,352.

So that the total is 13,593 in the disciplinary barracks, as against 1,564 in the penitentiaries.

Of the men remaining in confinement on July 31, 1919, there were 3,839 in the disciplinary barracks and 835 in the penitentiaries.

Now you will say, or will have the right to say, that these figures are not consistent with my percentages of convictions mentioned a while ago. The explanation lies in this, that in the 1916 revision of the Articles of War it was provided that desertion in time of war and repeated desertion in time of peace should constitute felonies, and a good many of those men who are serving in the penitentiaries are deserters in time of war or repeaters, and not the usual common law and statutory felon.

Senator LENROOT. Where is the line drawn between absence without leave and desertion?

Gen. CROWDER. The distinguishing element is the intention not to return, or to permanently abandon the service.

Senator LENROOT. I knew that, but the difference in administration is what I was getting at.

Gen. CROWDER. The effort we make in practical administration, to draw that line. There is one merit about the pending Chamberlain bill that ought not to escape notice, and that is the creation of what the British call short-time desertion. It is provided for in the Chamberlain bill, but not under that name. If we had had a statute of that kind, these more than 14,000 men that were absent at Hoboken at the time they were expected to embark could have been tried for short desertion, or an abandonment of the command at a time of perilous duty. They distinguish that in the English articles as short-time desertion, and in effect, though not in name, it is made short-time desertion in the Chamberlain bill, and I want to commend that part of the bill. I believe it would be an improvement, and if we had that legislation these absentees would have been "short-time deserters," punishable under article 55 of the Chamberlain-Ansell bill with death, and presumably then the voice of criticism hurled against the sentences of lesser severity actually imposed upon these men for absence without leave would not have been so audible.

I now come to the second subdivision of my remarks, the Bill of Rights and its applicability or nonapplicability to military accused persons:

Where I have undertaken to state the views of the critics of the present system, I have resorted to quotation marks, and given the page reference to the hearings, in the interest of absolute, unerring accuracy.

Gen. Ansell says on page 125 of these hearings:

> It had long been and still is the contention of the so-called lawyers of the War Department that not one single clause or legal principle in the Constitution, in the Bill of Rights, or any other of these ancient documents that have come down to us as a part of our birthright, to secure our liberties against government, not one is applicable to courts-martial—including this great protection against second trial. (P. 125.) (The double jeopardy principle of the Constitution.)

Frequent references of this character appear in the literature of this court-martial controversy. It was expected that, as announced, it would shock the country, and it has shocked the country. I want the attention of the committee to the following propositions:

A. It is true that the Congress of the United States has for more than a century legislated in substantial accord with the view which Gen. Ansell condemns.

Permit me to show just what Congress has done in this regard by citing the several clauses of the Bill of Rights and the corresponding provisions of the Articles of War enacted by our Congress.

BILL OF RIGHTS.	ARTICLES OF WAR.
No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger. (Fifth amendment.)	By express provision this amendment does not apply to the land forces.
Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. (Fifth amendment.)	No person shall be tried a second time for the same offense. (Art. 87, Code of 1806; art. 40, Revision of 1916.)
Nor shall be compelled in any criminal case to be a witness against himself. (Fifth amendment.)	No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before any military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him. (A. W., 24; Revision of 1916; act of Mar. 2, 1901; 31 Stat., 950, 951.)
Nor be deprived of life, liberty, or property without due process of law. (Fifth amendment.)	What is due process of law in criminal prosecutions? It includes jurisdiction by trial court of person and subject matter, notice of charges upon which an accused is to be tried, opportunity to be heard thereon in a fair trial and under equal and uniform rules of procedure. As said in Reeves v. Ainsworth (291 U. S., 296, 304): "To those in the military or naval service of the United States the military law is due process." In other words, due process of law is afforded the accused when he is tried by such procedure as acts of Congress and the common law, military, have provided.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. (Sixth amendment.)	No person put in arrest shall be continued in confinement more than 8 days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within 8 days after his arrest, and that he is brought to trial within 10 days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within 30 days after the expiration of said 10 days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. (Revision of 1916, A. W. 70; origin, first sentence, art. 79, Code of 1806, rest of provision, act of July 17, 1862.)

By an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. (Sixth amendment.)

And to be informed of the nature and cause of the accusation. (Sixth amendment.)

To be confronted with witnesses against him. (Sixth amendment.)

While the trial is not required by statute to be always public, it is the almost universal practice, departed from only in rare instances and in case of necessity, where the evidence must because of the military situation be kept secret, or because it is otherwise of a character which requires the court to sit behind closed doors.

Held in ex parte Milligan (71 U. S. 2. 123) not to apply to courts-martial, in language as follows: "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before anyone can be held to answer for high crimes, 'excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;' and the framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."

See A. W. 70, last above quoted, and act of July 17, 1862.

Congress has legislated in the teeth of this provision, authorizing depositions in all cases not capital. The first enactment on this subject is found in article 74 of the Code of 1806; carried forward in the Code of 1874, article 91, and, in both codes, gave this authority to take depositions to both Government and accused persons upon reasonable notice, as a right. The existing provision is found in articles 25 and 26 of the existing code and continues in that code as a right, not a privilege. So it is that from the very beginning of our Government down to the present time Congress has recognized the inapplicability of this particular clause of the Bill of Rights to military accused persons.

Senator LENROOT. I would like to ask you right there what you have to say, aside from the practice adopted by Congress, or of the proper construction we may say, given by Congress to that, in view of what was said in the Milligan case? The Milligan case draws the distinction, or rather goes back to the inception of a military court, in the way of indictment or information, as sustaining its position in the right of trial by jury. But do you think that same thing should apply in case of the right to be confronted with the witnesses?

Gen. CROWDER. Yes; I am coming to that, in the language of the Supreme Court itself.

Senator LENROOT. That is what I was coming to.

Gen. CROWDER. The next is:

To have compulsory process for obtaining witnesses in his favor. (Sixth amendment.)	Right fully secured by article 22. Judge advocates have the same power to compel witnesses to appear and testify as criminal courts of the United States. Failure of civilian witness to obey process is made punishable by A. W. 23, and such failure of military witness is likewise punishable. (Origin of A. W. 22, act of Mar. 3, 1863, and of A. W. 23, act of Mar. 2, 1901.)
And to have the assistance of counsel for his defense. (Fifth amendment.)	Existing article of war 17 provides that "The accused shall have the right to be represented before the court by counsel of his own selection for his defense if such counsel be reasonably available, but should he for any reason be unrepresented by counsel, the judge advocate shall, from time to time throughout the proceedings, advise the accused of his legal rights." (Judge advocate to protect accused, act of Apr. 10, 1806, art. 69. Rest of provision, act of Aug. 29, 1916.)

Now, you will at once say that that is not the substantial right to counsel that is enjoyed by a civil accused in civil courts, and I admit it. Let us have no question about it. The provision here "reasonably available," is sought to be eliminated in the bill before you (art. 22) and it will bring up for consideration the case that I presented to the committee at the time the 1916 revision was under consideration, an actual case of an officer being tried by a court-martial in Alaska for embezzlement, making an application for the professor of law at the Military School, Staff College, at Leavenworth, to be sent all the way to Alaska for his defense. It might result in an accused person undergoing trial in Mindanao, in the Philippine Islands, applying for some man serving in Alaska to act as his counsel. Upon that explanation, the Military Committee of the House, which first wanted to grant the right of counsel in absolute terms, qualified it by the language "If such counsel be reasonably available.' The corresponding provision of the pending bill is that military counsel of the accused's selection shall be assigned, unless the appointing authority shall certify that "serious injury to the service" would result from the detail. What is serious injury? Is it to be measured in dollars and cents of transportation or mileage? Is one class of duty to be measured against another? Are we here in the field of prejudicial error; or, because compliance with a statute is involved, are we in the field of jurisdictional error?

No provision is made in the existing code for civil counsel, because it is not of record, I believe, anywhere, nor do I believe it is true that an accused who sought to be represented by a civil counsel before a court-martial was ever denied that right. You have gone further in the pending bill and have provided that that civil attorney shall be paid by the Government if the accused is found not guilty, I believe, and if he is convicted civil counsel is to be paid by the man. I think that is the provision of the pending bill. But what I wish to emphasize is that Congress did not fail, in the revision of 1916, to extend to an accused right of counsel, and leave you to judge of the

[illegible] provision and the necessity of strengthening [illegible]

[illegible]	[illegible] all unknown in military service
[illegible] punishments [illegible]	[illegible] of the existing code or [illegible] that "Punishment by flogging, [illegible] branding, marking, or tattooing the [illegible] prohibited." (Comp. Stat. Art. [illegible]).
[illegible] discretion	Whenever the punishment for a [illegible] offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe. Present 45th article of war. (Comp. Stat. [illegible] Sept. 27, 1890).

[illegible] the beginning, taking the articles of war of 1775, the next [illegible] of 1776, the amended articles of 1786, the adaptation [illegible] Articles of War articles to the Constitution by the [illegible] of the United States in 1806, the Articles of War as they existed from 1806 down to 1874 when the revised statutes were enacted, and down to September 27, 1890, the punitive articles generally contained with the language "shall be punished as a court-martial shall direct." It was not until 1863 that we had any provision of the statute law respecting cruel and unusual punishments. [illegible] Congress prohibited flogging and branding in the Army. Flogging had been a punishment in the early days, but it had not survived in an aggravated form when Congress abolished it; but branding of the deserter with the letter "D" on his cup had survived, and Congress abolished it in the early war period. But down to September 20, 1890, with the exception of capital punishment which could not be inflicted except where expressly authorized, there was nothing to regulate maximum punishments, and the result was, as I recall the situation when I was serving in the Department of Texas, one set of punishments in one military department and another set in another, with varying degrees of punishments for the same offense. Finally Congress was compelled to establish some kind of regulation, and enacted the act of September 27, 1890 (26 Stat. 491, supra), at the request of the War Department.

Immediately upon the passage of the act of September 27, 1890, the President got out maximum limits of punishment for all offenses that were punishable at the discretion of the court, and we consulted in the preparation of that list of maximum punishments the penal code of the United States, and, of course, the customary war punishments for military offenses, which were not covered in the penal code of the United States. There has been, since that date, a continuing regulation of maximum punishments for time of peace. When war breaks out this statute ceases to operate. I venture the assertion that if we had entered the war with that phrase "in time of peace" eliminated, you gentlemen would never have heard anything, nor would the country have heard anything, about excessive sentences. If I had my way about it I would regulate the whole thing by striking out the words "in time of peace," and leave this maximum punishment order to operate both in peace and war, at the discretion of the President,

who would lay before Congress periodically his orders on the subject. I think if you would take the maximum-punishment orders that have been issued since this legislation was enacted, you would be struck with the care that has been exerised and the humane provisions made in them on the general subject. Had it been in operation during the period of this war, I can readily conceive of the President prescribing that in home territory, 3,000 miles from the theater of war, the conditions of service sufficiently approximate a period of peace to recognize certain perscribed limits of punishment. He might have said, "We will leave that matter in the theater of war to the discretion of courts-martial." He might have said with greater propriety to the military force operating in Siberia under Gen. Graves that we would leave the discretion to courts-martial; or even in the Archangel theater. But, in any event, he could have moved as the situation justified, to establish these limits. There has always been a strong army opinion against regulating the discretion of courts-martial as to punishment in time of war, and the Kernan-O'Ryan-Ogden report, which is before you, takes very advanced ground on that subject. I dissent in that regard from the Kernan-O'Ryan-Ogden report. I want this other method tried as a practical means of regulating what has disturbed the country a great deal.

Now, of course, you will reach your conclusion after due consideration of the very forceful argument submitted by the Kernan-O'Ryan-Ogden Board. It might be well to hear some of the commanders of fighting units in France on the question whether it is practicable to regulate the discretion of courts-martial in matters of punishment in the zone of actual military operations. But my judgment, as at present advised, is to the effect that it would be wise to have the President clothed with this authority, to be exercised or not as he saw fit. Certainly the responsibility would be definite, for the establishment of safeguards against excessive punishments, if this statute were operative in time of war as well as in time of peace.

Senator LENROOT. Let me ask you this question: If the committee should determine to revive the maximum sentences, and have them apply to time of peace only, but give the President the power to make regulations applying to time of war, what would you say?

Gen. CROWDER. That would be the least objectionable way of placing the matter under congressional regulation; but I should like to ask this question: Why disturb the operation of a law that has worked so satisfactorily in time of peace heretofore? Take the actual administration of military justice since September 27, 1890, down to April 6, 1917, and see if there is any occasion for Congress to fix arbitrarily the limits of punishment by courts-martial. If this other scheme has worked, why abandon it? Of course, that will be one of the matters for the committee to determine: Have there been any abuses during this peace period? I have read the testimony before this committee carefully, and no one so far as I can find has argued the failure of the act of September 27, 1890, and executive orders issued thereunder, to operate effectively to safeguard the administration of military justice in this regard. I do not feel like making a change unless there is some necessity for it.

Senator LENROOT. Do you think it is desirable, General, to have the court-martial inflict what are really excessive punishments, so that as a rule they are reduced?

Gen. CROWDER. No; I do not.

Senator LENROOT. Is not that one of the questions?

Gen. CROWDER. Yes; for the war period; but, as a rule, they did not have to be reduced during time of peace.

Senator WARREN. The President makes those orders. Would they not come naturally, almost entirely and exclusively, from opinions rendered to him by the Judge Advocate General?

Gen. CROWDER. Clemency orders? Yes; almost entirely.

Senator WARREN. From his advice?

Gen. CROWDER. The clemency section of the Judge Advocate General's Office is always a very busy section, going over the records every time an application for clemency comes in, and measuring out to a man all the clemency that his offense will admit of or his good conduct merits.

Senator WARREN. Yes; I understand that; but my idea was, the President issuing regulations from time to time in the matter as to what should be the degree of punishment, whether he would not be obliged to get the suggestion and arguments and reasons from the Judge Advocate General? Would the matter not go back to the Judge Advocate General's office?

Gen. CROWDER. I understand. You are speaking, not of clemency orders, but of these maximum punishment orders. I can say this, that during my period of service as Judge Advocate General, now exceeding eight years, every revision of the maximum punishment order has been prepared in my office, and I have reason to believe that prior to my day, under Gen. Lieber and Gen. Davis, every maximum punishment order was prepared by the Judge Advocate General. We never had but one issue with the General Staff as to limits of punishments, and that was as to the limit for desertion. The General Staff thought that the limit of confinement should be equal to the period of the enlistment; if the enlistment was for five years the desertion should be punishable with a sentence of five years. It was at one time adopted and almost immediately abandoned. I led the fight to have it abandoned, because there is such a difference between desertion committed in the first 30 days of a man's enlistment and a desertion committed in the last 30 days of the man's enlistment.

Now, resuming my discussion of the protection accorded to military accused before courts-martial, I think it is obvious, from the foregoing comparison, that notwithstanding the fact that the rights and privileges accorded by the bill of rights to persons accused of crime have not been recognized by Congress as applicable to military offenders or offenses; nevertheless the Congress has by statute—the Articles of War and Rules of Procedure issued thereunder—with few exceptions secured those rights in large measure to such offenders, the noticeable exceptions being, trial by jury and the right to be confronted by witnesses in noncapital cases. With these two exceptions, practically every provision of the Bill of Rights, which individuals in general are entitled to invoke, is accorded by statute law in the measure deemed advisable by Congress, to offenders against military law. This may be shown more clearly by the following summary:

(*a*) Provision that there shall be no second jeopardy of life or limb is amply secured by the fortieth article of war which provides that "no person shall be tried the second time for the same offense."

ıe provision for a speedy and public trial is amply secured by) of the Articles of War; but no provision for such trial in the ·r district" in which the crime is committed is made, because ɔossible of application to military offenses, particularly in war or public danger. While the trial is not required by the to be always public, it is the almost universal practice, departed from only in case of necessity, as where evidence ɔt be disclosed, being of a military nature arising in the ɔf war, or where scandalous in nature and of a character vil courts close also.

e impartiality of the members of the court is secured by the challenge for cause. (A. W. 18.)

ve not the peremptory challenge, as you know, but they are ;o introduce it. We will speak of that later.

ıe requirement that no person be compelled in any criminal ɔe a witness against himself is not only found in our statute likewise in the Manual, and is in practice carefully observed. I., pars. 214–215, pp. 103–104; pars. 234–236, pp. 115–118; ł; Ops. J. A. G., 1912, p. 502.)

ıe accused is also protected from unreasonable search, pro- ɔ produce private books, papers, or effects to be used against ıis trial. (M. C. M., pars. 214–215, pp. 103–104; pars. 234– 115–118; A. W. 24; Ops. J. A. G., 1912, p. 502.)

ıe accused is likewise to be, and is, informed of his rights to r to refrain from testifying in his own behalf, and any state- confession made before the trial is carefully scrutinized to ıe that it is not obtained under any compulsion or duress. M., par. 215, pp. 103–104; pars. 225–226, pp. 110–113; par. 40.)

ıe right of the accused to have the assistance of counsel for ıse is accorded in the Articles of War, and the Manual ex- provides for this right in cases of general or special courts- and permits counsel of his own selection if such counsel be ɔly available (M. C. M., pars. 108–110, pp. 51–52; A. W. 17). vilian counsel is not provided for at Government expense, the ıitation upon the right of the accused to have civilian counsel mposed by his own financial ability. By amendments to the for Courts-Martial which were promulgated July 14, 1919, on ɔmmendation, every officer convening a court-martial is now uired, in the convening order, to detail a defense counsel for rt, to act for all accused persons who do not have their own ; and to be available, if desired by the accused, as associate when the accused has counsel of his own. Provision is also ɔr excusing military counsel from other duties, to give them ɔpportunity to prepare the defense of the case. (Changes No. . M., July 14, 1919, pars. 108–109.)

'he right to be confronted with the witnesses against him is d the accused in capital cases, and habitually in noncapital ılthough the Articles of War secure to both the Government e accused the right to take depositions in noncapital cases. 25; M. C. M., par. 165, p. 80.)

'he right to compulsory process for obtaining witnesses in ɔf the accused is fully recognized and secured by the practice ı cases, although reasonable limitations are imposed because

of the nature of military service. (M. C. M., par. 161, p. 78.) In practice any witness requested by the defendant is usually summoned, and I know, after prolonged military service, of no instance where a witness requested by a military defendant has not been summoned where the denial would constitute prejudicial error.

It is easy to imagine a case where an accused in the Philippines asks for a witness from Alaska, that that witness be sent all the way to the Philippines to testify in a noncapital case, the answer would be, "Congress has provided for that case, and you will have to have these depositions."

Senator LENROOT. Right in that connection, I think you stated that you have a decision in the Supreme Court of the United States upon that question of being confronted with the witnesses.

Gen. CROWDER. What is that?

Senator LENROOT. Did you say that the Supreme Court had passed upon the question of the right to be confronted by witnesses?

Gen. CROWDER. No. Further on I will show you the scope of the judicial decisions. That is the next part of my statement.

Senator LENROOT. Very well.

Gen. CROWDER. (*j*) The right to be informed of the nature and cause of the accusation is fully secured and copies of the charges are required to be served on the accused in time to prepare his defense. (M. C. M., pars. 79–80, p. 42; par. 96, p. 48; A. W. 70.)

(*k*) The only prohibition against the infliction of cruel and unusual punishments and excessive fines in military cases is found in article of war 41, prohibiting flogging, or branding, marking or tattooing of the body, and article 45, which regulates maximum punishments in time of peace. It should, in my judgment, be made effective in wartime punishments by extending to the President the power to regulate maximum punishments at such a time, and thereby render impossible of occurrence some very excessive sentences which marked the administration of military justice during this war. If any good can come from the provision of the pending bill (art. 44) in enacting the general language of the Constitution prohibiting cruel and unusual punishments by courts-martial, let it be done; but while excessive punishments have been alleged and proved, not one that was cruel and unusual in kind or degree has been alleged.

(*l*) The security against conviction of treason, except upon confession in open court or the testimony of two witnesses to the same overt act, is expressly secured to persons in the Army accused of that crime. (M. C. M., sec. 248, p. 122.)

(*m*) There is no suspension of the privilege of habeas corpus, as applied to persons in the Army, except upon the same terms as applied to persons generally, and military persons are as free to use that writ as are civilians.

Now, my second proposition is this:

B. It is likewise true that the courts of the United States have announced the view of nonapplicability of the Bill of Rights, so vigorously condemned by Gen. Ansell.

Among the judicial pronouncements on this question is Ex parte Milligan (71 U. S. (4 Wall.), 2, 123), decided in 1866. Mr. Justice Davis, delivering the opinion of the court, said:

The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad

enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before anyone can be held to answer for his crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger": and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

In the concurring opinion of Mr. Chief Justice Waite, we find the following language:

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power.

Senator LENROOT. That, however, is not a majority opinion.

Gen. CROWDER. No, but it is a concurring opinion. (Continuing reading:)

"Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Those are the three judges that joined with Chief Justice Waite. [Continuing reading:]

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.

Now, that was not the opinion of Chief Justice Waite only, who was the Chief Justice at that time, but also of the three judges that concurred with him.

In re Bogart (Fed. Cases, No. 1596), decided in 1873, is another case directly in point. In that case Judges Sawyer, circuit judge, and Hoffman, district judge, sitting at circuit, squarely held (quoting from syllabi):

4. The power of Congress to provide for the government of the land and naval forces is not affected or limited by the fifth, or any other amendment.

In addition to the foregoing, there is the following supporting dictum from Ex parte Milligan, supra,

The discipline necessary to the efficiency of the Army and Navy requires other and swifter modes of trial than are furnished by the common-law courts; and in pursuance to the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service.

My third proposition is this:

C. It is likewise true that military text writers have adopted the view of the nonapplicability of the Bill of Rights condemned by Gen. Ansell.

Winthrop—and Gen. Ansell very properly refers to him as the Blackstone of military law, a man of superb reasoning power—Winthrop, in his Military Law and Precedents, vol. 1, page. 241, discussing the right of an accused to counsel, and announcing that orders of

the War Department require that commanders of posts shall detail without request of an accused a suitable officer as his counsel, says:

But in general it is to be said that the admission of counsel for the accused in military cases is not a right but a privilege only—

Citing in support of this view the following text writers: McArthur, writing between 1792 and 1813; McComb in 1809; Tyler in 1814; Benét in 1863–1868; Hough in 1825–1855; Hughes in 1845; and Kennedy in 1847. As against this he cites a single American author—De Hart in 1846–1862. Winthrop continues his comment, that notwithstanding it is held to be a privilege only, it is—

Yet a privilege almost invariably acceded to, and as a matter of course; and that, whether the counsel proposed to be introduced be a military or civil, professional or unprofessional person.

In a foot note, Winthrop further discusses the matter in language as follows:

Article VI of the amendments to the Constitution provides that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defense." The reference here is to prosecutions before the criminal courts of the United States only. (Barron *v.* Mayor of Baltimore, 7 Peters, 243; Ex parte Watkins, Id. 573; Twitchell *v.* Com., 7 Wallace, 326; Edwards *v.* Elliott, 21 Id., 557; Walker *v.* Sauvinet, 92 U. S., 90; Pearson *v.* Yewdall, 95 U. S., 294; I Bishop, C. L. No. 725; Wharton, C. P. & P. No. 290.) Military courts, however, though not bound by the letter, are within the spirit of the provision.

Now, that is a summary of the views of text writers.

Next I come to a rather important part of this subject. Upon this question of the applicability of the Bill of Rights to military accused and military offenses, I have reviewed under heading "A" the legislative precedents showing that Congress has legislated upon the theory of the nonapplicability of the Bill of Rights; under "B" the judicial precedents down to 1873, showing that the courts of the United States adopted that view of nonapplicability; and "C" the textbook doctrine to the same effect. But Gen. Ansell says that all of this doctrine of nonapplicability was swept away in a leading case in military law (Grafton *v.* U. S., 206 U. S., 333, 348) decided in 1907. He says:

There was involved in that case an issue in which I was then and still am deeply interested, and that is, the very character of these courts-martial, and how far these principles of the Bill of Rights and the other principles of the law—common law, Anglo-American law—are applicable to these courts-martial in order to secure a fair trial. I say this was the issue involved. (Record of Hearings, p. 125.)

Then he proceeds with this statement:

The court took occasion to say this: "We base our decision not upon the fact that this clause of the Constitution of the United States has been carried to the Philippines by congressional enactment; we do not base this decision on the fact that Congress has enacted, in the old fortieth article of war, an inhibition against double jeopardy. We base it upon the fact that the Constitution of the United States applies, regardless of legislation." (Record of Hearings, p. 126.)

Gen. Ansell adds the further comment:

And yet, apparently, the Judge Advocate General's Department of the Army up until recently have never seen the great point of that case. (Record of Hearings, p. 126.)

Gen. Ansell says further:

The Grafton case holds that the protection against double jeopardy a man gets when tried by court-martial comes not from statute, but from the Bill of Rights of our Constitution (p. 264).

I am frank to say to this committee that if the language which Gen. Ansell here attributes to the Supreme Court in this case were, in fact, uttered by the court, it would determine the question in accordance with his contention. I have been unable to find that language, and three officers of my department who have been given the task to scan the decision fail to find this language in the decision of the Supreme Court.

I want you gentlemen now to look at Ansell's testimony, where it is put down. I would like to ask, first, whether or not he is attributing that language to the Supreme Court, and then whether it can be found.

Senator LENROOT. What is the volume of the Supreme Court decisions; have you the citation there?

Gen. CROWDER. I have the citation right here. It is the case of Grafton v. United States (206 U. S., pp. 333-348).

Now, it is a serious thing to charge, and I do not charge, Gen. Ansell with having attributed language to the Supreme Court which it did not utter, but I ask you whether or not this ought not to be verified before it goes out to the public as having been stated before the Military Committee?

Senator LENROOT. Did you note this language, Senator [indicating record]?

Senator WARREN. Yes.

Gen. CROWDER. I can not find it. I mentioned the matter to a Senator who happened to be in my office, and he said, "You must be mistaken. No man would attribute language to the Supreme Court that can not be found." Then I asked another lawyer to come over here to the Capitol and examine the original opinion and briefs in the case, to see if that language was used by the court or in any of the contending briefs, and he reported back that that language was not to be found.

Let me say further: In the Grafton case, counsel for the accused contended that his acquittal by the court-martial forbade his being again tried in the civil court for the same offense, basing that contention in part upon that clause of the fifth amendment of the Constitution providing: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," and in part upon the act of Congress of July 1, 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act likewise embraced a double jeopardy provision in language reading somewhat differently from the double jeopardy clause in the fifth amendment, to wit: "No person, for the same offense, shall be twice put in jeopardy of punishment" (32 Stat., 691); and the court in concluding its opinion said:

> But passing by all other questions discussed by counsel or which might arise on the record and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory.

In other words the court refer to one of the contentions, namely the contention that the act of 1902 applied, and say, "consistently

with that act" we hold, etc. Now, there is some other language in the decision of the Supreme Court which I want to quote, in all fairness to Gen. Ansell. The only language of the decision in the Grafton Case which in any manner tends to support Gen. Ansell's construction is the following:

The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently a civil court proceeding under the authority of the United States can not withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter.

But construing this with the closing language of the opinion cited supra, only that was decided in the Grafton case which had to be decided to dispose of the case. It follows that so much of the discussion of the court as is broader than the clear issue under the statutory jeopardy clause enacted for the Philippines is in the nature of "obiter dictum" and without binding effect.

An analysis of Grafton *v.* United States shows that that case by no means disposes of the doctrine of the applicability to courts-martial of the jeopardy clause of the fifth amendment to the Constitution.

Senator LENROOT. Your position, then, is that the Supreme Court has never authoritatively passed upon the position at all?

Gen. CROWDER. First, my position is that I can not find this language attributed to the Supreme Court. If it was there, I would concede the point.

My second point is that the Grafton case does not dispose of the question.

Senator LENROOT. Generally, your position is that the Supreme Court has in no case decided this question?

Gen. CROWDER. I do not find that it has.

Senator LENROOT. You read the Milligan case and the other case, and there they did not pass upon it?

Gen. CROWDER. There the statement is that neither the fifth nor any other amendment is applicable.

Senator LENROOT. No; not in the majority opinion.

Gen. CROWDER. Not in the majority opinion; but in In re Bogart, which followed it seven years later, that point was decided.

Senator LENROOT. That is obiter.

Gen. CROWDER. No: I quote right from the syllabus of the case. In In re Bogart the ruling was direct to the point that neither the fifth nor any other amendment is applicable.

Senator LENROOT. No; but that is not the Supreme Court.

Gen. CROWDER. Not the Supreme Court.

Senator LENROOT. I said the Supreme Court has never passed upon it.

Gen. CROWDER. It has not passed upon the exact question, so far as I can find.

Senator LENROOT. I just asked as to the question, whether it was an open question with the Supreme Court of the United States?

Gen. CROWDER. It seems to be. If there are any questions I will be glad to answer. That finishes all that I have to say on the Bill of Rights.

I want to deal next with courts-martial as "executive agencies" and try to answer this question of whether we have any courts that are obeying orders of military commanders.

Senator WARREN. If you prefer to suspend now, General, if you want to leave town——

Gen. CROWDER. No; I prefer to go ahead. I will remain.

Senator WARREN. Then we shall take this up again to-morrow morning, and if I can get Senator Chamberlain here, I will do so. I think I am justified in saying that you would prefer to give your testimony when he is present?

Gen. CROWDER. Yes; I would much prefer that he should be here. I would like to have his interrogation on these points, because I shall shortly reach a stage where there are many disputed questions of fact.

(Thereupon, at 1 o'clock p. m., the subcommittee adjourned until to-morrow, Saturday, October 25, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, OCTOBER 25, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations, at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Lenroot.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER—Resumed.

Gen. CROWDER. Gentlemen, I have a duty to perform to the American Bar Association, and particularly to the committee of that association charged with the investigation of military justice during the war, which it would have been more courteous to perform when I first appeared before this committee.

This committee admitted as relevant to the inquiry it is conducting a letter addressed by Gen. Ansell to Judge Page, president of the American Bar Association, on July 17, 1919, embodying his complaints against the committee of that association and its procedure (pp. 211-214), and there was considerable colloquy in the testimony respecting that letter, a part of which I wish to bring to your attention. This is an inquiry addressed to Gen. Ansell:

> Senator CHAMBERLAIN. Did you not, as a matter of fact, charge the committee itself with being a packed committee?
>
> Mr. ANSELL. I did. (Record, p. 211.)

Gen. Ansell puts in his letter of accusation of July 17, 1919 (pp. 211, 212, 213, 214), and follows that by stating:

> Two of the members were committed from the beginning to the other side, and had so declared themselves, and they were chosen as the result, whether they knew it or not, of strenuous effort being made by the War Department to bolster up their cause. It is true. (P. 214.)

In the matter of expenses of witnesses called by that committee, Gen. Ansell in his letter to Mr. Page of July 17, 1919, made the following statements:

> Of course, if the hearings were to be fair and impartial, the committee should have been equally desirous of hearing witnesses on both sides and should have, if possible, secured equal facilities for their appearance. * * * The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense. (Letter to Mr. Page of July 17, 1919; p. 213.)
>
> These matters * * * are nevertheless not only significant of the attitude of the committee and the department, but were very real obstacles to a fair presentation of

the question as well. In my own case, having nothing of this world's goods and having expended already too much of my meagre salary in behalf of the advancement of the cause of military justice, it would have been a hardship for me to go to Chicago at my own expense. (Letter to Mr. Page of July 17, 1919; p. 214.)

In his testimony before this subcommittee, Gen. Ansell says further:

* * * I did suggest witnesses to the committee of the American Bar Association, but in their telegrams or letters sent out, about which some of the witnesses have told me, they put the cautionary statement, "We have no funds to pay for your attendance here, and if you do so you will do so at your own expense"; * * * Whatever respect anybody else may have for such a committee, I, for one, as long as I live, will not express any respect for any such committee (p. 214).

Answering Senator Chamberlain's question referring to the "uneasiness" which induced the Secretary of War to appoint a strictly military tribunal (the Kernan-O'Ryan-Ogden board), Gen. Ansell replied:

* * * It was thought—it was in the air—that this bar committee report might be unfavorable to the department. That was not so obvious to me, because two of the members were stacked, and the personnel had been picked; the committee had been hand picked and personally conducted by the department satellites (pp. 214-215).

Gen. Ansell's letter of July 17, 1919, to Mr. Page, president of the American Bar Association, embodied many other complaints against the committee of the American Bar Association appointed by him. Mr. Page referred the letter to Judge Gregory, president of the association committee appointed to investigate military justice.

I learned these facts, and inquiry was made of the secretary of the American Bar Association to know if Mr. Gregory had answered these charges. He said that he had no reply. You are aware that he resides in Baltimore, and the inquiry was made over the telephone. Further inquiry was made over the telephone of Col. Hinkley, likewise a member of that committee and a resident of Baltimore, who had not a copy of it.

I then caused inquiry to be made over the telephone of the next nearest member of that committee, Mr. Conboy, of New York, and he procured a copy of Mr. Gregory's reply, which he sent me.

Senator WARREN. His reply to whom?

Gen. CROWDER. To Mr. Page.

Senator WARREN. From Mr. Gregory to Mr. Page?

Gen. CROWDER. Yes, sir. I then telegraphed Mr. Gregory to know if it would be proper to put it in the record, and he wired back his permission, and in a letter he said that he had consulted Judge Page, of the American Bar Association, who agreed with him as to the propriety of putting in his reply to these charges, and I now offer it in the hope that it will be received and given the same prominence as was the accusation. I ought to say, before submitting it, that Mr. Gregory not only replies to complaints, but questions of personal veracity between himself and Gen. Ansell are discussed.

(The letter referred to is here printed in full in the record, as follows:

AUGUST 12, 1919.

Hon. GEORGE T. PAGE,
President American Bar Association,
Federal Building, Chicago.

DEAR JUDGE: I duly received copy of letter of Gen. S. T. Ansell, to you, dated July 17, in which he protests and insists considerably as to the investigation made by the special committee on military justice of the Bar Association, appointed by you, and of which I was chairman.

s the fitness and qualifications of the members of the committee are con-
lo not deem it proper to say anything. You appointed the committee. I
are that any member of it sought that appointment. So far as I know, and
elieve, no one of them did.
: manner in which the committee discharged its duties. I can only say that
ıy observation has extended the committee, made up as it was of busy
id the best that it could to conduct a fair, and, so far as time admitted,
nquiry as to the subject of the administration of military justice in the
) doubt men who have reached the age of members of the committee have
dices and preconceived notions, which can not be altogether laid aside,
s the action of the committee is concerned, I believe that it will be found
ry to be fair and impartial in seeking information on this topic. That its
o not altogether agree is due probably to the inherent difficulties of this

say a few words as to the specific statements made by Gen. Ansell in this
is a man with a grievance. He feels that he has been unjustly treated by
y authorities. As to that, the committee has made no investigation, and
m concerned, I have no knowledge as to whether this is so or not. I do say,
at it seemed to me to be rather inconsistent with efficiency either in the
ewhere to keep a man at the head of an important department who was con-
iling at everybody in that department and denouncing its methods pub-
ersistently, and also criticizing with great severity, and, as it seems to me,
with marked injustice, his official superiors. Gen. Ansell seems to have
that this committee was constituted to try the great case of Ansell v.
hat as plaintiff he was entitled to take charge of his side of the case, to have
med, and to prosecute it—the committee to act as a court. This was not
tanding of the committee. We did not propose to have Gen. Ansell take
ır inquiry and run it, but we proposed to run it ourselves, in our own way,
every opportunity to be heard and to have people that he thought should
rought before the committee, or their views presented, as they saw fit.
en. Ansell's first charge is that the committee immediately got in touch and
ully with the Secretary of War, Chief of Staff, Judge Advocate General of
and the Acting Judge Advocate General of the Army. Facts in this regard
own to Gen. Ansell, as I personally stated them to him, and they are largely
ou. You never acted in this matter at all until you had seen Gen. Ansell
ed with him fully. You and I saw Gen. Crowder at Washington and had
w with him, I suppose of two hours, before the committee was appointed.
er seen him since, and I have no knowledge that any member of the com-
seen him since. I have never seen the Chief of Staff, and would not know
v him. Judge Bruce and I did confer with the Secretary of War once, and
ence he dictated a letter to Brig. Gen. Kreger, Acting Judge Advocate
questing him to furnish the committee everything in the way of attendance
s and records, etc., that the committee asked for. Prior to this, the com-
ny invitation met Gen. Kreger at luncheon. As we were anxious to find
nethods obtained in the office of the Judge Advocate General, we had
l to get into communication with Gen. Crowder, thinking he might be back
He was not, so we took the matter up with Gen. Kreger. We had no
ompel the attendance of witnesses, and the War Department could have
stalled any adequate inquiry had it seen fit to do so, by preventing the
of men in the military service. We were not familiar with the organization
nel of the Judge Advocate General's office, and naturally sought to get that
pose of ascertaining what methods did obtain in that office before we pro-
riticize. I think now and still think that this was the proper course to take.
Gen. Ansell states that it was known in the War Department, whether the
knew it or not, that, while the committee was sitting in Washington, the
litary authority in the department said that they were ordering before the
those who could give it the military view; that is, the departmental view,
nmittee got little else. This is not the fact. In the first place, while Gen.
gested the names of officers who were connected with the Judge Advocate
Department, and one or two others, so that we might get at first hand the
of the usual methods employed in that office, beyond this the selection of
vas made almost entirely by myself, and everyone that we asked to have
ore us was produced as a witness, except as in the case of Gen. Edwards,
e appeared to be some reason why this was not convenient or practicable.
vitness, I think that appeared before the committee was a very excellent
plished officer Col. Beverly A. Read. He was chief of the division of
stice in the Judge Advocate General's office, and Gen. Kreger suggested

that we should call him. The great point which Gen. Ansell insists on is that there should be an appellate tribunal, not subject to military direction, with plenary authority over the action of general courts-martial, the judgments of which shall be binding and conclusive on the War Department, the President, and the rest of mankind, and that is the great point about which controversy has been raging in the War Department for perhaps over a year. Col. Read, being one of those witnesses selected by the authorities, according to Gen. Ansell, to establish that he was wrong, declared emphatically in favor of such a court. When I called his attention to the fact that Gen. Crowder took the contrary view, he promptly said, "I dissent," and said he had never seen Gen. Crowder's letter until that time, when I think I showed it to him. This all appears in the evidence. I may add that nearly all the witnesses who spoke on the subject recognized that excessive sentences had been imposed. Maj. Sanner referred to them as terrific. Col. Read said they were some of them grotesque—that this was not the way to enforce discipline; and numerous other witnesses and officers now in the service expressed the same opinion. So the statement that these men supported the existing system—referring to the witnesses whom we summoned in Washington—is absolutely unfounded, and if, as Gen. Ansell says, he has read the record, this statement is a gross impeachment either of his candor or his intelligence.

Third: Another absolutely unfounded statement made by Gen. Ansell is that if one could have believed the witnesses appearing before the committee, courts-martial were all but unknown in our Army. It appears by the testimony of Maj. Rigby before the committee that prior to the war, for a certain period of years, we had in the Regular Army an average of 4,600 general courts-martial a year, or 1 to every 30 men in the Army. Not only is this true, but it appears by the statement of Gen. Crowder in his letter of March 10 to the Secretary of War, which has been printed and given extensive circulation, that in the year ending June, 1917, in our Regular Army of 127,000 men, we had 6,200 trials by general courts-martial—practically 1 for every 20 men. Both of these facts are referred to in the minority report of the committee, and these facts appear in the evidence before the committee.

I may say, in addition, that very many witnesses, including, I think, Gen. Wood, deprecated the unnecessarily large number of court-martial trials in the Army. That the number was excessive and ridiculous, I think, was perfectly apparent from the testimony, and I must leave Gen. Ansell to explain what he means by the impudent statement that if one could have believed the witnesses appearing before the committee, such were all but unknown in our Army. It is a statement inspired by ignorance or mendacity, and absolutely without foundation.

Fourth: Gen. Ansell complains that the bill that he has drawn amending the Articles of War was subjected to prejudiced and uncomprehending criticism, and a hostile and uninformed analaysis by Col. West, of the Judge Advocate General's office. He also states positively that the committee had it subjected to such analysis in that office. The latter statement is absolutely untrue. Col. West was summoned before the committee at Chicago. He had made quite a careful study of this bill, and he gave the committee the benefit of his criticisms. I did not agree with all of them, and do not now. I do not undertake to express any opinion of this bill as a whole but I do say that in many respects the criticisms of Col. West seem to have some considerable foundation.

Fifth: Gen. Ansell says that many high ranking officers in the Regular Army appeared before the committee, and that on inquiry of several he finds that their appearance was regarded by the department as a military duty, and that appearing on duty in accordance with direction of the department, they received their pay and traveling allowances; that the committee did not ask the department, so far as he is advised, to direct any officer of the Army whose name was cited by him to appear before it and consequently any officer or other person whom he desired called in opposition to the system could appear only by taking leave, if entitled, and at his own expense.

It is necessary to consider in this connection the facts as to our communication with Gen. Ansell. On Thursday, the 17th of April, at about 10 o'clock in the morning, all the committee then in Washington went from Gen. Kreger's office to that of Gen. Ansell. We invited him to appear before us, and as Judge Bynum had expected to go home that evening, and was very anxious to hear Gen. Ansell, he asked him if he could not go on that afternoon. He answered that he could not. We did not intend holding a session Friday, the 18th, and asked him if he could go on Saturday, but he indicated that he could not, and that he would prefer to go on Monday morning. This date he asked to have changed for Monday afternoon, and he appeared Monday afternoon and was heard before the committee for three days—something more, I think, than a third of the time that the committee was in session in Washington. When I saw him Thursday morning, the 17th, I told him that if there was anyone that he desired to have called to appear before us he should give us their names.

e not, as stated by Gen. Ansell in this letter, then about to conclude our because we remained in Washington through the whole of the week fol- ncluding our hearings at 6 o'clock or after on Saturday evening, April 26. ese names from Gen. Ansell on Friday, the 24th, just one week after I had that he give us these names. I wired all those living anywhere in the Washington on that date, asking them if they could appear before the com- Washington on Friday or Saturday. Only one of them, Lieut. J. B. W. lid so appear. We received statements from others, however, in writing, y Judge E. C. Raymond, of Newcastle, Wyo., Hon. Henry A. Wise, 11 treet, New York City, and W. T. Chantland, then with the Federal Trade n at Washington, and those statements are on file with the secretary as part rd in this case. There were others also. On the 29th of April I addressed the gentlemen whose names had been given to us by Gen. Ansell, at the it he had given, a letter in the following form:

ı are probably aware, a committee appointed by Judge George T. Page, of the American Bar Association, has been conducting an inquiry into the tion of military justice. In appearing before that committee, on the 24th ıth, Lieut. Col. S. T. Ansell, at the conclusion of his statement, in response ons from the committee, made a week beforehand that he do so, requested rite yourself, among others, to convey to the committee, in such way as you er, your views upon this important topic.

be glad to receive them in writing, if you care to submit them. It is not e, however, that the committee may hold some further sessions in this city ne next. If you think it likely that you would prefer to attend before the and convey your views orally and will so advise me I will see that you are the date and place of such session, if we have one."

these letters were answered, some were not. None of the persons named, ıber it, appeared before the committee at Chicago, though, as already indi- ral of them submitted their views in writing. There were a few that I ad- ıre of the War Department, or The Adjutant General, and that I assumed titles and their addresses were in the Army. These gentlemen made no hatever to my communications. Had they done so and indicated that d to attend I would have been glad to ask the necessary order from the War ıt, as I did in other cases. Where they lived near New York I put in also a hat they might confer, if they preferred, with Mr. Conboy, who was vice of the committee, as he lived in New York. I think there were only two lemen that Gen. Ansell named that were connected with the service; they Eugene F. Ladd and Col. H. H. Sargent.

e committee met in Chicago I personally made special efforts to secure, and , the attendance of a number of privates and noncommissioned officers as so as to get, so far as I could, their side of this controversy. I suppose these tnesses referred to by Gen. Ansell as "those pitifully few, and generally of nk and humbler station in life, who expressed opposition to the system." ke to say to the General that before an American lawyer sitting in any kind al capacity, if he is true to the ideals and standards of his profession, the poor corporal or humble private is just as audible as that of a major general with all the blazon of rank that a military tailor can equip him with. I ther he is enough of a lawyer to appreciate how true this is.

ien. Ansell admits that the committee notified him that they would hear cago, if he chose to appear, but says that the committee did not request the it to send him to Chicago; his appearance, of course, would have had to be ı time and at his own expense, and that he had already expended too much ıger salary in behalf of the advancement of the cause of military justice, ıld have been a hardship to go to Chicago at his own expense. I take it ıe reading this statement, and having no other information on the subject, ıme that the committee simply offered Gen. Ansell the right to be heard. er of fact, what occurred was that on the 29th of April, when I wrote the , whom Gen. Ansell had requested that we summon, I wrote him a letter, n that I was writing to all these proposed witnesses, except Lieut. Gardner, ppeared before the committee, and giving him a copy of the letter. I con- ıt letter with this paragraph:

also say for your information that it is not impossible that the committee will sion in this city on or before the 10th of June next; that if you desire to d make some further statement on that occasion, I think the committee disposed to allow you about half a day, and if it would facilitate your attend- sk that the necessary orders detailing you for that purpose be issued by the thorities."

I am unable to see how a self-respecting man, mindful of what is due from an officer and a gentleman, can be guilty, in view of the plain facts, of making a statement such as that made by Gen. Ansell in regard to this incident. To that letter I never had the common courtesy of a reply.

I wish to say in conclusion that I endeavored to treat Gen. Ansell with great consideration. I publicly commended his efforts to secure reforms in the administration of military justice, and spoke highly of what he had done in that regard. He at once followed that up by a most impudent and insolent public attack upon the committee of such a character that we would have been justified in declining to hear a word from him, but out of regard for his somewhat overwrought condition, and assuming his sincerity and earnestness in a good cause, the committee ignored all this, although what he said did not go without rebuke, and listened to him for three days, and then offered to give him a further hearing, and to have him directed by the War Department to come here, so that he could get his pay and allowances, with the result that he has made the statement to you to which I have just referred. I write this not with any purpose of endeavoring to satisfy Gen. Ansell, because he has got himself into a state of mind and a state of exaggerated self-appreciation where nothing would satisfy him, except complete submission to his ideas; but I do wish to have you and the executive committee understand that your special committee endeavored to treat him considerately, to make a careful and absolutely impartial investigation upon this important subject, and to report honestly and fairly the conclusions of the members of the committee as a result of this investigation. So far as I am concerned personally, my own recommendations were so far in advance of Gen. Ansell that he could not agree to them, as he stated when he was before the committee. Therefore my withers are unwrung; but I can not understand how an officer and a gentleman who refers with apparent pride to his professional reputation and well-known record in the Army, can conduct a controversy in the manner in which Gen. Ansell has conducted the controversy with this committee, which he has himself created, after the most liberal and considerate treatment at the hands of this committee, and after they had ignored conduct of such grossly offensive character as was entirely sufficient to forfeit every right to consideration, or even to a hearing which Gen. Ansell might otherwise have had. I do not wish to magnify this matter, nor to make much out of nothing. The statements of this eminent lawyer and mighty warrior do not worry me in the least, but I propose to have the facts as they actually existed stated to you, so that they will be available to you and to the executive committee. Let the gallant general fret his little hour upon the stage—it will be brief—and let him extract all the satisfaction and glory he can out of it.

Yours, truly,

S. S. GREGORY.

I find I am in error as to Col. Sargent. He did reply, but said never having considered the subject he had no views to impart.

Gen. CROWDER. When the committee adjourned yesterday, we were discussing the nonapplicability of the Bill of Rights to military accused, and the extent to which Congress by special enactment had extended to military accused by statutory law the protection of the Bill of Rights. It occurs to me that I ought to connect up what I said there with the pending bill which you gentlemen are called upon to consider. You would expect that the pending bill prepared by Gen. Ansell would respect the theory as to the applicability of the Bill of Rights to military accused announced by him. But this bill does not secure to the accused, other than to one who is charged with a capital offense, the invariable benefit of the constitutional guarantee of being "confronted with the witnesses against him." (Sixth amendment.) Article 30 of the bill makes admissible in evidence against the accused, on trial for any noncapital offense before a special or summary court-martial or before a military commission, the depositions of witnesses taken at distant places to which the accused, as a practical matter, could not possibly go, and at which, in at least a large proportion of the cases, he would be unable to procure the services of counsel to cross-examine the witnesses for the prosecution.

ll seeks, apparently, to justify depriving the accused of this n on the ground that it occurs only in trials for minor But this explanation is not satisfying for two reasons: ı officer or soldier is triable under article 14 of the bill before court, and a soldier under article 15 before a summary court, nost serious, noncapital offenses known to the law; offenses ı, if the case were tried before a general court, the latter flict a very serious punishment under the terms of the bill; nce, by imprisonment for 20 years (arts. 78, 79), or for 5 ·ts. 88, 92). It is true that a conviction for these very ffenses in a special court could not result in more than six imprisonment and in a summary court could not result in n one month's imprisonment. But a light sentence by a court ent to punish more severely, is slight comfort to a man of ıg whose career is wrecked by the stigma of conviction of he equivalent of a grave felony. A military accused needs ·ction against conviction for such an offense, and if he is to it as of constitutional right, how can he be denied it ass of cases by statute law as provided in the pending bill? t depositions may, under the terms of the pending bill, be in evidence in disregard of the alleged constitutional safe- ıot alone in the class of cases already mentioned, but also that may result in long-term imprisonment. For mili- nmissions are among the tribunals in which depositions · admissible against the accused by the terms of article 30 hamberlain bill; and military commissions are empowered : bill not simply to convict on depositions for grave offenses ıg to serious felonies, but to inflict long-term sentences of nent commensurate with such offenses. Before military ons, depositions are admissible against the accused under) in any noncapital case.

; that the very bill which is before this committee does not he theory of the applicability of the Bill of Rights, which claimed by Gen. Ansell to be universally applicable to cases :y accused.

come to the third subject that I wish to talk about, courts- ıs executive agencies, and to answer the criticism under l.

e the following from Gen. Ansell's brief of December 11, 76 of the hearings):

> in a double-leaded heading in his work on military law says that : court" 'not a part of the judiciary, but an agency of the executive depart nent.' beginning and the cause of the difficulty. * * * His text continues: ıging to the judicial branch of the Government, it follows that courts' st pertain to the executive department; and they are in fact simply instru- ı of the executive power provided by Congress for the President as Com- Chief to aid him in properly commanding the Army and Navy and enforcing therein and utilized under his orders or those of his authorized military ives."

sequitur here is absolute and obvious. "Not belonging to the judicial the Government," he says, then courts-martial must necessarily belong cutive department, are merely instrumentalities of Executive power and ıder his orders. Since the days of Winthrop this has been the height of , and we have all been steeped in the teachings that follow upon that d fallacious syllogism.

Frequently throughout his testimony he recurs to this view of Winthrop and severely condemns it. On page 112 I find the following:

The ultra-military bureau chiefs of the War Department came to the support of the existing system, as they have ever done, with the slogan that the relationship between courts-martial and the power of military command for the enforcement of discipline must be conceded; that the courts can not be independent of the military command; that the law of the courts is the will of the military commander, and is subject to his judgment and discretion and his command.

And again on page 123, I find the following:

But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of a military commander.

And, in his brief, he lays down that it was an inevitable corollary of Winthrop's doctrine that:

Being Executive agencies, they are subject to the power of command.

Adding that these teachings of Winthrop were all wrong, and that the sooner we abandon them the better (p. 124).

And then proceeds to announce the conclusion which he says follows logically upon the reasoning of Winthrop, namely: That courts-martial "are only agencies of military command, not courts of law." That "their proceedings are not regulated by law;" that "their findings are not judgments of law" (p. 103).

This general line of criticism runs through his whole argument. If there ever was a case of Don Quixote charging a windmill, we have it here. He misstates the doctrines laid down by Winthrop, and then proceeds to demolish his own man of straw.

Let us first deal with his unfairness to Winthrop. The excerpts from Winthrop first above quoted are taken from his chapter entitled: "The Court-Martial—Its History and Nature."

In this connection I wish to place upon your table the two volumes which constitute the life work of Winthrop, whom Gen. Ansell in another part of his testimony speaks of as the military Blackstone, and refers to his intellectual power.

A perusal of this chapter discloses to even the most casual reader that that illustrious text-writer, having in contemplation the scheme of Government of the United States with respect to its three coordinate branches, namely, the executive, judicial, and legislative, was seeking one of these branches into which he might place our system of courts-martial. It is equally apparent that Winthrop, as he was frequently wont to do, was discussing the particular subject more or less discursively.

It is inexplicably astounding that Gen. Ansell displays what appears to be a careful and studied discrimination in the selection of excerpts from the text, by quoting only those portions thereof which seem to support his criticisms and contentions, and by adroitly omitting those portions in which the author claims a judicial character and quality for the court-martial. Remarkable as it may seem in the light of Gen. Ansell's arraignment, Winthrop, in the same chapter denominates the court-martial as "A court of law and justice," and says:

Notwithstanding that the court-martial is only an instrumentality of the Executive power having no relation or connection in law with the judiciary establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully

a court of law and justice as is any civil tribunal. As a court of law it is bound, like any other court, by the fundamental principles of law and, in the absence of special provision on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts. * * * In the words of the Attorney General courts-martial are—'In the strictest sense courts of justice' (pp. 61–62, vol. 1).

Again, in the same chapter and under the heading, "As Assimilated to a Civil Judge and Jury," the illustrious writer says:

As illustrating the function of a court-martial to administer law and justice, it may be noted that this court, though an "exceptional forum," is not without close analogies in its personnel to the ordinary civil tribunals. Thus it has been frequently compared, as to some of its powers and proceedings, to a judge and, as to others, to a jury. Indeed, in its taking of statutory oath, its being subject to challenge, its hearing and weighing of evidence, its findings of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused its entertaining of special pleas to its jurisdiction or competency as a court and objections to the sufficiency of the pleadings and the admission of testimony its authority to grant continuances and to adjourn, and its power to impose sentences, it is more clearly assimilated to the judge. The further comparison by Attorney General Cushing of a court-martial to a "grand jury" in that its members are "changeable in numbers and personality within certain limits," is a much less obvious analogy (pp. 62–63, vol. 1).

The foregoing significant quotations make it obvious that Winthrop did, in fact, ascribe to courts-martial those very qualities which Gen. Ansell claims that Winthrop and the Judge Advocate General deny to them, of functioning as judicial tribunals with a special and limited jurisdiction.

He is equally unfair in his statement of my own position, for in his letter of March 11, 1919, he says:

He [the Judge Advocate General] insists that courts-martial shall be subjected from beginning to end to the power of military command (p. 218 of these hearings).

What are the facts? Gen. Ansell had before him and was directly replying to my two letters of February 13, 1919, and March 8, 1919. In the former I express myself on the subject as follows:

* * * Although the theory of military justice does differ slightly from the theory of civil justice, yet in substance and in practice both of them, in our inherited Anglo-American system, are fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law. * * * The contrast of theory between the two is well set forth in a statement of Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War:

"The object of the civil law," he says, "is to secure to every human being in a community the maximum of liberty, security, and happiness consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation."

But once this difference of theory and purpose is conceded, the two systems proceed in identical methods, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand and the inflexible rigor of automatic penalties on the other hand.

* * * * * * *

This system of military justice thus established is one of law and orderly procedure, not one of arbitrary discretion of the commanding officer. The proceedings are so conducted as to preserve for scrutiny of the superior authority every point of law which can possibly be raised for the protection of the accused. The accused is furnished a copy of the proceedings on request. This record goes up to the reviewing authority, and then to the Judge Advocate General. The Judge Advocate General's ruling on revision represents the application of all those legal principles which are required by the law and regulations to be observed definition of offenses, organization of the court, due procedure, sufficiency of proof, limitations of penalty, and so on. And the judgment of the Judge Advocate General, embodying those principles, is practically enforced and put into effect by the commanding officers with virtually the same effect as the decision of an appellate civilian court. The picture drawn of

an arbitrary commanding officer contemptuously ignoring the limitations of law as embodied in the opinion of the Judge Advocate General is incorrect. In justice to officers of the Army who have in the stress of war acted as convening authorities, it should be dismissed from the minds of the American people.

In my letter of March 8, 1919, I express myself on the subject as follows:

The system of courts, procedure, and defined offenses is one of law and order and not one of arbitrary discretion of the commanding officer. The proceedings follow the fundamentals of our criminal common law—the accused has his challenges; he may have process for his witnesses; he has counsel without cost, either selected by himself or assigned by the proper authority; he is not compelled to testify against himself; he is furnished a copy of the testimony and proceedings. The proceedings are so conducted as to preserve for scrutiny of a superior authority every point of law that can be raised for the protection of the accused.

Certainly there is nothing in these two excerpts from my letters, which constitute an expression of my views in the exact point of the controversy, that would justify Gen. Ansell in saying that I was of the view that courts-martial should be subjected from beginning to end to the power of military command.

"But Col. Winthrop was first a military man" (p. 123).

Here is a statement of the military service of William Winthrop, late of the United States Army, compiled from the records of The Adjutant General's office:

He served as a private of Company F, Seventh New York State Militia, from April 17 to June 3, 1861; first lieutenant, First United States Sharpshooters, October 1, 1861; captain, First United States Sharpshooters, September 22, 1862; honorably mustered out September 16, 1864; major and judge advocate of Volunteers, September 19, 1864; transferred to Permanent Establishment, February 25, 1867; major and judge advocate, United States Army, February 25, 1867; lieutenant colonel and deputy judge advocate general, July 5, 1884; colonel and assistant judge advocate general, January 3, 1895; retired, August 3, 1895; died, April 8, 1899.

Brevetted lieutenant colonel of Volunteers March 13, 1865, "for faithful and meritorious services in his department in the field," and colonel of volunteers March 13, 1865, "for faithful and meritorious services in the field and in the Bureau of Military Justice."

It is a career limited, so far as military service in the line is concerned; and a very extended and distinguished career so far as legal service in the legal department of the Army is concerned.

Senator WARREN. He served until 1864 in the line?

Gen. CROWDER. And after that in the Judge Advocate General's department.

Senator WARREN. Yes.

Gen. CROWDER. Now, if there is dictation by military authorities to courts-martial; if commanding generals do control their deliberations and their decisions, it ought to be evident in some specific act charged against them. I have tried to find from the testimony before this committee some arraignment of some military man for some arbitrary act in his relations with courts-martial convened by him. I have found one concrete charge of this character. Gen. Ansell says that in recommending clemency to the President and the subordinate commanders in General Order No. 7 cases "frequently we got very sharp retorts from them to the effect, 'You had better mind your own business; we know what this requires.'"; (p. 182, Hearings).

I have had a diligent search made of the records of the department to see what evidence there was of resistance by the President and department commanders to the recommendations of the Judge Advocate General, and especially for examples of the curt language which was attributed to them. Col. Rigby called your attention to the fact (p. 531, Hearings) that in all cases handled from October 1, 1917, to August 31, 1919, there were 28,463 cases examined and 275 returned to commanding officers, and there were 4 instances where the commanding officer refused to follow the advice of the Judge Advocate General for modification or disapproval of sentence on legal grounds. I have here two cases illustrative of the kind of so-called "sharp retorts" from commanding generals, alleged by Gen. Ansell. I brought them along with me in order that you might see just what kind of "sharp retort" there was in those two cases.

Gen. Arthur Murray, commanding the Western Department, at San Francisco, said in a letter of April 23, 1918, to the Judge Advocate General, as follows, with reference to one of those cases. It appears that it was a case where our office had recommended that the dishonorable discharge be suspended. The letter is as follows:

WAR DEPARTMENT,
HEADQUARTERS WESTERN DEPARTMENT,
San Francisco, April 23, 1918.

From: Commanding general.
To: Office of the Judge Advocate General.
Subject: United States *v.* James E. Meline (J. A. G., No. 112698).
Reference: Your letter of April 8, 1918.

1. Copies of the orders promulgating the case are inclosed.

2. In view of the fact that the prisoner, in case discharge is suspended, must be carried on the rolls of his organization as a soldier absent in confinement, for the term of his confinement, which in this case is 10 years; of the fact that under statutory authority the Secretary of War may restore the prisoner to duty when discharge has not been suspended to the same extent as when it has been suspended; of the fact that section 340 of the Court-Martial Manual states that the War Department policy there set forth carries no substantial mitigation as to other than peace deserters; and of the further fact that section 393 requires discriminating action on my part in passing upon sentences, I considered it proper exercise of discretion to omit suspension of the discharge in this case and I am still of such opinion.

ARTHUR MURRAY,
Major General Commanding.

Senator WARREN. Gen. Murray was formerly at the head of the Coast Artillery?

Gen. CROWDER. He was the Chief of Coast Artillery before he became a general of the line.

Senator LENROOT. Have you the recommendation of the Judge Advocate General's Office in that case?

Gen. CROWDER. I have not. It could be procured.

Senator LENROOT. Perhaps you could tell me, anyway: There was no recommendation as to remission of sentence?

Gen. CROWDER. Apparently none, because the order is not responsive to that. It is responsive to a recommendation that the dishonorable discharge be suspended.

Senator LENROOT. It was not based upon prejudicial error in the case?

Gen. CROWDER. No.

Senator LENROOT. It was a matter of disagreement as to the punishment, or what the punishment should be, and not a matter arising out of any errors in the trial?

Gen. CROWDER. No, sir.

Senator LENROOT. I think it might be well, if you can find the letter, to put it in.

Gen. CROWDER. I shall insert it at this point in the record:

APRIL 8, 1918

From: The Office of the Judge Advocate General.
To: The commanding general headquarters Western Department, San Francisco, Calif.
Subject: Record of trial in the case of Pvt. James E. Meline, Coast Artillery Corps, Eighth Company, San Francisco, Calif.

1. The record of trial in the case of the man named above has been examined in this office and found legally sufficient to sustain the findings and sentence of the court.

2. It is the opinion of this office, except in very rare and exceptional cases, whenever a soldier is sentenced to confinement in a disciplinary barracks, that it is best to suspend that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, unless sooner ordered by competent authority, so that he may be saved to the colors in the event that his conduct while in confinement shall merit restoration to duty. It is thought that this case falls within the spirit of this policy.

3. The file number of the record of this case in the office of the Judge Advocate General is 112698. For convenience of reference and to facilitate attaching the published orders in this case, when received, to the record, please place the said number in brackets at the end of the published order, as follows: [J. A. G. O. 112698.]

E. G. DAVIS,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

Gen. CROWDER. The second letter from Gen. Murray bears the same date and is couched in practically identical language. I will insert that letter and the office letter to which it was a reply.

APRIL 8, 1918.

From: The Office of the Judge Advocate General.
To: The commanding general headquarters Western Department, San Francisco, Calif.
Subject: Record of trial in the case of Recruit Antonio Forcelini, Coast Artillery Corps, Fortieth Company, San Francisco, Calif., National Army.

1. The record of trial in the case of the man above named has been examined in this office and found legally sufficient to sustain the findings and sentence of the court.

2. It is the opinion of this office, except in very rare and exceptional cases, whenever a soldier is sentenced to confinement in a disciplinary barracks, that it is best to suspend that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, unless sooner ordered by competent authority, so that he may be saved to the colors in the event that his conduct while in confinement shall merit restoration to duty. It is thought that this case falls within the spirit of this policy.

3. The file number of the record of this case in the office of the Judge Advocate General is 112699. For convenience of reference and to facilitate attaching the published orders in this case, when received, to the record, please place the said number in brackets at the end of the published order, as follows: "[J. A. G. O. No. 112699]."

E. G. DAVIS,
Lieutenant Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

WAR DEPARTMENT,
HEADQUARTERS WESTERN DEPARTMENT,
San Francisco, April 23, 1918.

From: Commanding General.
To: Office of the Judge Advocate General.
Subject: United States *v.* Antonio Forcelini (J. A. G. No. 112699).
Reference: Your letter of April 8, 1918.

1. Copies of the orders promulgating the case are inclosed.

2. In view of the fact that the prisoner, in case discharge is suspended, must be carried on the rolls of his organization as a soldier absent in confinement, for the term of his confinement which in this case is 10 years; of the fact that under statutory

ıe Secretary of War may restore the prisoner to duty when discharge has spended, to the same extent as when it has been suspended; and of the that section 393 requires discriminating action on my part in passing upon considered it proper exercise of discretion to omit suspension of the this case, and I am still of such opinion.

ARTHUR MURRAY,
Major General, Commanding.

· LENROOT. Those letters you have are both from Gen.

ROWDER. Both from Gen. Murray.
ut of 182 cases submitted to the War Department with ıdations based on grounds of illegality, the Secretary of · effect to the recommendation of the Judge Advocate Gen- 6 cases, and disagreed with the Judge Advocate General in so that is the amount of resistance by the Secretary of War encountered by the Judge Advocate General between Octo- 7, and August 31, 1919, on the recommendations that he .

ecretary of War, I think, is prepared to speak on the question erence of opinion. He told me when he consulted me about ırse I had nothing to do with those cases—that it was a of opinion as lawyers.
: WARREN. That was while you were serving as Provost General?
ROWDER. I was on duty as Provost Marshal General. I had o do with the cases. The points of difference were not l in any case of which I was in charge, or which I presented.
r LENROOT. What would you say of the cases where the ıdation was followed, in cases where it was based upon ıl error; did even the granting of the recommendation stice?
ROWDER. I want to be sure I understand you.
r LENROOT. Would the granting of the recommendation be on of a sentence or remission of whatever verdict there ?
ROWDER. It might be a disapproval of the findings of the

r LENROOT. It might be.
ROWDER. Yes, frequently; and it might be a disagreement approval of the sentence. In fact, it might happen, and y has happened, that it was a disapproval of both the and sentence.
r LENROOT. Then, can you tell me, where the Judge Advo- eral's Office has made a recommendation based upon preju- ror, whether in all cases where a recommendation has been at all it has been a disapproval of the findings?
ROWDER. A disapproval of the- - —
or LENROOT. Wherever the Judge Advocate General's Office mmended a disapproval of findings, that recommendation granted except in cases — - -
ROWDER. There are 10 cases, according to this table, to be p, and I can assume, for the purposes of this discussion, that them dealt with reversible prejudicial error. Let us assume he record is, 10 instances of disagreement in a total of 457 turned with the review of the Judge Advocate General, 4 of

which have been by department commanders or reviewing authorities below, and 6 of which have been disagreements with the Secretary of War.

Senator LENROOT. Then let me ask you this as to the practice of the department. Whenever your department is of the opinion that prejudicial error has been committed, does it then recommend disapproval of the verdict—of the findings?

Gen. CROWDER. Oh, yes; when it is a reversible error; that is, affects the substantial rights of the accused. Since General Order No. 7 was issued, in January of 1918, we have reserved the power in the very terms of the approval of the commanding general below to reach out against the findings and the sentence in all cases involving death, dismissal, or dishonorable discharge, which are all the graver cases, and disapprove findings as well as sentences.

Senator LENROOT. How was it prior to that time?

Gen. CROWDER. Prior to that time the review of the reviewing authority below was final as to prejudicial error, but not as to jurisdictional error.

Senator LENROOT. And the other was merely a carrying out of the power of clemency?

Gen. CROWDER. Yes, sir. Before that, unless the error was jurisdictional, our only remedy was clemency; and I am glad you asked the question, because there ought not to be any doubt in anybody's mind about it. Prior to the issue of General Order No. 7, where the error was not jurisdictional, the finding of the authority below was final, and the only power which we had was constitutional pardon, or executive clemency.

I encounter another statement of Gen. Ansell's in his testimony, which is germane to this topic. He says:

> The French punishments are comparatively very light indeed (p. 275).

He cites no authority for this statement and gives no statistics. It has been found impossible to get statistics from the French authorities covering the severity of sentences and the number of death sentences imposed during the war. The impression of American officers in touch with the French who have made inquiries on the subject is that the French habitually imposed heavy sentences during the war and that it is for that reason that the present government is not willing to give out statistics on the subject. Col. Rigby informs me that it has been authoritatively stated verbally, for instance, that approximately 1,600 death sentences were imposed during the war for the one offense alone of "misconduct in the face of the enemy," and that between 1,000 and 1,100 of these death sentences were actually carried into execution. That is the best information we can get on the subject.

But recurring to our problem, all the time there existed this power of clemency that could have been invoked at any time as against any excessive sentence. I find Gen. Ansell stating on page 186 of the record as follows:

> The man who did institute the procedure (i. e., clemency) was myself, * * * a man who had had to fight to get such clemency as we had already. (Hearings, p. 186.

There were cited on the floors of Congress, in debate, 6 cases of severity of sentence, and the country was asked to form an impression of court-martial procedure from what was said in regard to those

Three of them were sentences in which Gen. Ansell himself ed clemency. These cases are as follows:

No. 113076, Pvt. Walworth, 10 years' sentence for sleeping letter of Gen. Ansell, November 7, 1918, recommending lemency.

No. 115506, Pvt. Sabbri, 10 years' sentence for sleeping on ter of Gen. Ansell, November 22, 1918, recommending lemency.

No. 119328, Pvt. Robbins, 25-year sentence for desertion, without leave, and breaking arrest, letter of Gen. Ansell, r 8, 1918, recommending against clemency.

alworth and Sabbri cases were among those cited by Senator lain in his speech in the Senate December 30, 1918, as duly severe; and the Robbins case was cited in the House sentatives by Representative Burnett, February 19, 1919, y severe.

ct, of course, that we will recur to these several topics later we get to discussing the pending bill, and I am not attempt- mplete the presentation at the present time, but to make a tatement which will introduce the subject in such a way iries and answers may be concrete.

next to the subject of prejudicial error.

r LENROOT. Do you intend to take up the case of these s?

ROWDER. Yes. I intend to.

nsell's statements to the committee on this subject of pre- rror are as follows:

> Under the practice of the War Department, as suggested at that time, he proceedings might contain errors of law that at least measured up to error if not annihilating error, it was the practice of the War Department l to act accordingly, that notwithstanding such error it was not reviewable erefore incurable. In other words, the War Department at that time held roceedings, findings, and judgment of a court-martial are final beyond all curative power, when those proceedings and final judgment are once ap- the commanding general who brought that court into being, regardless of errors of law were committed in the proceedings; and that, conceding that was full of such errors, it could not be examined (p. 55) * * *.
>
> the situation at the beginning of the war was and it is still largely the that a court-martial judgment can not be modified by any power on earth what prejudicial errors of law were committed in the proceedings. It is t proposition that the whole controversy if we can refer to it as a contro- l I presume we may revolves (p. 56).

here in his testimony Gen. Ansell states:

> Well, in any event, the situation when this war began was this: No matter l the judgment, it could not be reviewed (p. 99) * * *.

statements which I have read of Gen. Ansell illustrate the that can be made of language the literal accuracy of which be disputed. He speaks of reversible error and leaves you rbed in the view that that term "reversible error" describes e class of error in civil jurisprudence as in military juris- e. He fails to remind you in this connection that the term tional error in military jurisprudence is much more broadly e of error, particularly upon the procedural side, than is m as applied in civil jurisprudence. He fails to give you in nection a distinction between the court-martial as a court ial and limited jurisdiction and the civil court of general

jurisdiction, in so far as this distinction affects the question of jurisdictional error. He fails to remind you that the court-martial is of the class of inferior courts of limited jurisdiction, and not on the same high ground with superior courts of record. (Ex parte Watkins, 3d Peters, 207.)

I am speaking now with citations to decisions of courts.

Jurisdiction generally: A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved (3 Greenl. Ev., sec. 470; Brooks *v.* Adams, 11 Pick., 441, 442; Mills *v.* Martin, 19 Johns., 33; Duffield *v.* Smith, 3 S. and R. (Pa.), 590, 599).

To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it has jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was comformable to law. (Dynes *v.* Hoover, 20 How., 65, 80; Mills *v.* Martin, 19 Johns., 33.)

There are no presumptions in its favor, so far as these matters are concerned; and it is not enough that they may be inferred argumentatively. As to them, the rule announced by Chief Justice Marshall in Brown *v.* Keene, 8 Pet., 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: "The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively. (Runkle *v.* U. S., 122 U. S., 543; 7 S. Ct., 1141; 30 U. S. (L. ed.), 1167. McClaughry *v.* Deming, 186 U. S., 49, 22 S. Ct., 786; 46 U. S. (L. ed.), 1049.)

A court-martial is wholly unlike a permanent court created by the Constitution or by a statute and presided over by one who has some color of authority although not in truth an officer de jure, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected.

(See "Courts," vol. 7, Ruling Case Law, pp. 976, 999; "Judges," vol. 15, ib., pp. 519, 542.)

But the court-martial that has jurisdiction over any offense must, in the first place, be legally created and convened. Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. This court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when he appoints as members of a court-martial persons whom the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over

either the subject matter of the charges or over the person of the accused. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacks any statutory authority for its existence, and it lacks, therefore, all jurisdiction over the defendant or the subject matter of the charge against him.

(McClaughry *v.* Deming, 186 U. S., 49, 66; 22 S. Ct. 786; 46 U. S. (L. ed.), 1049.)

It is a well-recognized principle of law as applicable to trials in the civil courts that where a court is without jurisdiction of the subject matter, such jurisdiction can not be conferred on the court by the consent of the parties. In such cases the question is not whether a competent court has obtained jurisdiction of a party triable before it, but whether the court itself is competent under any circumstances to adjudicate a claim against the defendant.

(See "Courts," vol. 7, Ruling Case Law, p. 1039.)

This principle applies with full force to a court-martial, and if such tribunal is convened in direct violation of statute, as where a court-martial under the former statute to try a volunteer officer was constituted of Regular Army officers, no consent on the part of the accused will give the court jurisdiction. The objection may be raised at any time and is not waived by a failure on the part of the accused to object thereto at the time of the trial.

(McClaughry *v.* Deming, 186 U. S., 49; 22 S. Ct., 786; 46 U. S. (L. ed.), 1049.)

Persons belonging to the Army and the Navy are not subject to illegal and irresponsible courts-martial when the law for convening them and directing their proceedings or organization and for trial have been disregarded. In such cases, everything which may be done is not merely voidable, but void (Dynes *v.* Hoover, 20 How., 65; 15 U. S. (L. ed.), 838), and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment of a court-martial. (Wise *v.* Withers, 3 Cranch, 331; 2 U. S. (L. ed.), 457. Dynes *v.* Hoover, 20 How., 65; 15 U. S. (L. ed.), 838.)

What is the application of all these opinions? I take it that it is this, that wherever a procedure has been violated—a statutory procedure—it becomes jurisdictional error. Take the case of a failure to give a man, Senator Lenroot, the full right of challenge. That would be prejudicial error in a civil court. It is jurisdictional error in a military court.

Senator LENROOT. That is because the statute specifically gives him that right.

Gen. CROWDER. Yes; wherever in such case there is a substantial right and that right is violated, it is jurisdictional error in a court of special limited jurisdiction.

Senator LENROOT. Yes; but let me put this case to you and get your view of it: Suppose in a trial there is admission of evidence of some other offense. That would not be permitted in civil courts, and in that case it would be treated as reversible error because of the probability that it would influence the minds of the court.

Gen. CROWDER. Yes.

Senator LENROOT. What would you say in this case?

Gen. CROWDER. That is prejudicial error.

Senator LENROOT. But not jurisdictional error?

Gen. CROWDER. Not jurisdictional. That is prejudicial error, against which we had no remedy until General Order No. 7.

Senator LENROOT. That is what I was getting at.

Gen. CROWDER. Yes. But, take the case of an insufficient charge—where no offense has been stated. I would classify that as jurisdictional error.

Senator LENROOT. Yes.

Gen. CROWDER. Take the case where the evidence failed to support the charge at all; where there was a failure of proof. I should say that error was jurisdictional. The man has not been tried. The line of demarcation between the two—jurisdictional and prejudicial error—is sometimes difficult to trace; but extreme liberality in classifying error as jurisdictional error, i. e., fatal to the validity of the trial, has always characterized our court-martial system. The point I want to make is this, that fatal error is much larger in the case of a court of special and limited jurisdiction than it is in the case of a court of general jurisdiction, where the law presumes so much in favor of the sufficiency of the record.

To show the classes of error which we have held as invalidating the record I will read here from a book, a military law textbook, under the heading entitled "Fatal Defects in the Record," for which the reviewing authority is to set aside the proceedings. I know that this book was written in the eighties; I know I am in disagreement with some of the statement; but it will show you how far the practice was carried in the direction of recognizing what is sometimes called prejudicial error, as error fatal to the validity of the trial. [Reading:]

1. Where the record does not contain a copy of the order appointing the court, or copies of all orders modifying the detail in any manner.

I think ordinarily the reviewing authority would take judicial notice of the orders that had issued at his own headquarters. [Continuing reading:]

2. Where the copy of the order in the record does not show by what officer the court was convened.

4. Where the record does not show that the court met pursuant to the order constituting it.

Where the record does not show that the court was organized as the law requires

To state in the record, "The court being in session proceeded," etc., does not sufficiently set forth the organization.

Where the record does not show how many members were present each day and took part in the trial, or how many were present at a reassembling for revision.

Where the record does not show that the judge advocate was present during the trial

Where the record does not show that the order convening the court was read in the presence of the accused or that he had opportunity of challenge afforded him, either to a member then sittting, or to one who subsequently took his seat.

Where the record does not show that the members of the court were severally duly sworn by the judge advocate in the presence of the accused.

Where it does not show that a member who subsequently took his seat was thus sworn.

Where the record does not show that the judge advocate was duly sworn by the president in the presence of the accused or that a new judge advocate who subsequently took his seat was similarly sworn.

Where the record does not contain a copy of the charges and specifications upon which the accused is tried.

he record does not show that the accused was allowed to plead, or shows
s tried without pleading to the merits, or does not contain his entire plea.
ne record shows that the accused was arraigned and pleaded prior to the
n of the court.
ie record does not show that the witnesses were sworn.
y were not sworn in the presence of the accused would not constitute a
.
does not set forth the testimony of the witnesses.
sufficient to set forth a summary or such portion as the judge advocate
erial. The full testimony of the witness in his own language should be

ie record does not show that a clerk, or reporter, who recorded the pro-
the court, was sworn to a performance of his duties.
does not show that an interpreter was so sworn.
erpreter was called to interpret the testimony of a single witness, and the
not show that he was sworn, it would not be a fatal defect, provided there
nt evidence to convict without the testimony of this witness.
e record does not show that the court was closed for deliberation on findings
ce.
iere is a fatal variance between the name of the party in the specification
finding or sentence.
i the case of a capital sentence, the concurrence thereon of two-thirds of the
the court does not appear from the record.
e proceedings are not authenticated by the signature of both the president
idvocate.
oceedings are not signed by the president of the court, and the court is
he sentence is wholly invalid, and the order approving it must be revoked.
d of a trial by a military court is, furthermore, incomplete and insufficient
eviewing officer fails to state his "decisions and orders" at the end of the
s. And it is not sufficient to state such decisions, etc., at the end of a series
sed upon by the same reviewing officer; it must be stated independently
of each case. To annex a copy of the general order promulgating the pro-
a collection of records is not deemed a compliance with the law.

r WARREN. Has your manual anywhere in it that matter or
iatter?

ROWDER. Not in the detail which is contained in this book.
iot going to read any more of this. The author (Ives) lists
lefects in the record calling for disapproval, which illustrates
ality of the legal authorities of that day in finding fatal
i the record. Instead of illustrating the harshness of mili-
ice, it illustrates the extreme liberality in classifying as fatal
rrors of procedure leading to decrees of nullity.
t is fair to say that most of these are on the procedural side.
want to give you the impression for a moment that prior
suance of General Order No. 7 we had any adequate remedy
orejudicial error in the admission or rejection of testimony.

r LENROOT. Let me ask you, in that connection: Prior to
nce of General Order No. 7 was it the position of the de-
t that there was no jurisdiction to issue such an order under

ROWDER. On the part of the President or superior authority?

r LENROOT. Yes.

ROWDER. Prior to the revision of 1916; yes, out of deference
octrine laid down by Winthrop, who says (p. 687):

and how far the proceedings and sentence, or any part of the same, shall
d, etc., is a subject wholly within the discretion of such officer (referring
iewing officer). As to this he is invested by the article with the sole
and can not therefore be directed either by the President or other superior.
erring to any known views of a superior as to any question of law or dis-

cipline involved in the particular case, it is yet his duty, as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment and in the light of the facts and the law as understood and held by himself.

The legal sanction of G. O. 7 is found in new articles 37 and 38 of the revision of 1916. Since then we have had authority to issue such an order; but unquestionably the practice down to the beginning of this war was as laid down by Winthrop. I do not mean to say that the Winthrop doctrine had the concurrence of all military men. I have always felt that it was an open question whether this power did not inhere in the office of the President of the United States; and, even further, whether or not discipline was not an essential part of command, and that the President as Commander in Chief could exercise the appellate authority over these tribunals that was necessary to give effect to his own judgment respecting the findings and sentences of courts-martial. But I have always approached the subject with hesitation, because I believed it would take a decision of the Supreme Court of the United States to put the question at rest, and therefore when the necessity of this appellate power became manifest my first instinct was to come to Congress with a proposition to confer it upon the President, so that it would not be the subject of cavil or dispute.

I wish next to take up some inaccurate statements that have been submitted to the committee respecting the British court-martial system. I find on page 271 the following statement of Gen. Ansell:

Now, a field general court-martial is the general court-martial which accompanies the army when it is actually fighting in the field, for the trial of enlisted men—not officers. The law does not provide for this law officer with that court.

(Referring to the law officer who, under the British system, attends meetings of courts-martial and passes upon the admissibility of evidence.)

Senator WARREN. I will say, as you go along, that we have had Col. Rigby here, and he went very fully into the British system, etc., and he has had an opportunity to look over his notes, but unfortunately there was so much going on at the time on the floor of the Senate in which Senator Lenroot was interested that he was not able to be present much of the time. I say that as you go along so that you may elaborate a little more in what you are saying. I am telling you that so that you may remember to make your statement as full as you can, as you go along.

Gen. CROWDER. I so understood. To continue with what Gen. Ansell says [reading]:

The law does not provide for this law officer with that court; but the regulations have done so, *and every field general court-martial for the trial of enlisted men for any offense, however slight*—they do not try them for the slight offenses we do, however—*has this law officer*, and he is commissioned because his position is rather unstable, as you will see by reading this article and as I saw it (p. 271). (Italics supplied.)

The truth is that the British field general court tries officers as well as enlisted men without distinction.

The truth is that the "law officer," that is, the court-martial officer attached to the headquarters of the command, who is detailed as an additional "specially qualified member" of the court, does not attend every trial. On the contrary, he will be appointed to membership in every field general court organized within the command, but is not required nor expected to attend every session of every court of

which he is a member. The regulation provides: "No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers." (Circular Memorandum on Courts-Martial on Active Service, August, 1918, sec. 12–(b).) The convening authority determines which cases are so "difficult, complicated, or serious" as to require the attendance of the specially qualified member of the court.

Gen. Ansell says further:

> We see that at the top of the (British) judicial hierarchy is a civilian, a barrister, answerable now to the secretary of state for war, and never to any military commander (p. 271).
>
> * * * * * * *
>
> Never any report of the judge advocate general of England goes to the commander in chief of the army or to any military commander (p. 271).
>
> * * * * * * *
>
> The authority that is actually exercised over him by the secretary of state for war is a formal one (p. 272).

The truth is, to the contrary, that the judge advocate general of England reports to the secretary of state for war through the deputy adjutant general (of the army council, the body corresponding to our General Staff), who carefully examines the record in each case and sometimes disagrees with the recommendation of the judge advocate general. The practice is substantially the same as that in this country, as appears from the signed statements of the British judge advocate general, and of Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B., in evidence before this subcommittee, introduced by Lt. Col. Rigby.

Senator LENROOT. That has been the practice since general order No. 7?

Gen. CROWDER. Both before and since. But Gen. Ansell's proposition is largely to divorce the administration of military justice from the command of the Army. The English code has been cited as a precedent, and the facts have been inaccurately stated.

Now, passing to the French system, Gen. Ansell says as follows:

> The French * * *. A man may not be court-martialed there until a quasi-judicial officer does look over the charges, and does look over the evidence to see whether there is a prima facie case (p. 275).

The truth is that, in the armies on active service, no preliminary investigation whatever is required, but the commanding general may, in his discretion, order any soldier or other military person before a court for trial, without any investigation whatever, by what is known as a "direct order," under article 156 of the Code de Justice Militaire.

Gen. Ansell further says:

> Such officer is not under the control of military authority either (p. 275).

Again, the truth is to the exact contrary of Gen. Ansell's statement. The "rapporteur," whether in the territorial armies or in the armies in active service, is required to be an army officer and is appointed either by the minister of war or by the commanding general; and in the armies on active service he must be taken from among the officers serving in that command. (Code de Justice Militaire, arts 7, 9, 22, 34.)

Gen. Ansell says further:

> The French * * *. And after the man is tried, as I have indicated, he gets this review (p. 275).

The clear inference of this statement, and of all of Gen. Ansell's other statements, in his testimony before the subcommittee about the French system, is that the right of review is secured to every soldier before their military courts, always.

The truth is quite to the contrary.

1. There is no automatic review, such as we have; and no review at all unless, within 24 hours, the convicted soldier formally prays an appeal. (Code de Justice Militaire, secs. 141, 143.)

2. The right of appeal may be wholly cut off at any time by presidential decree in time of war or of a state of siege, or by the commanding general of a place actually besieged (Code de Justice Militaire, art. 71), as was actually done several times during the war.

3. No appeal whatever was allowed from the emergency war courts ("special courts") established for the war under the presidential decree of September 6, 1914 (decree of Sept. 6, 1914, art. 6: "Guide Pratique et Sommaire," p. 72). These "special courts" were extensively used during the war until abolished in the spring of 1918.

4. In time of peace the appeal is to the court of cassation, instead of the court of revision. In such case the appeal must be prayed within three days from the date of judgment.

Our system has been held up to unfavorable comparison with the French system, which, as I have pointed out here, was lauded as a system in which a man gets a review. Whether or not he gets a review depends upon accident. It may be shut off altogether, and it may be shut off altogether by the commanding general in a besieged place; so that there is no rigid statute under which the French soldier gets a review.

Gen. Ansell, speaking still of the French Army, says:

> My recollection of it is that, in time of war, they may have, and do have usually, on their court of military appeals men who are commissioned in the army; that is army men (p. 274).

Gen. Ansell's inference clearly is that the regular thing in the French Army is to have a military appellate tribunal composed normally of civilians, but that, in time of war only, it is permissible to have some military men on the court.

The truth is, to the contrary, that their courts of revision (which are their military appellate tribunals) are required by law to be, in every case, composed either wholly of military men or else predominatingly of military men. Their statutes require (*a*) in the armies on active service, or in a "state of siege," the court of revision shall be composed wholly of officers of the army, namely, of a brigadier general, two colonels or lieutenant colonels, and two majors (C. J. M., art. 40); and (*b*) that in the territorial armies—that is, in armies not in active service—three out of five judges of the court of revision must be army officers, the other two being civilian judges (judges of the civil court of appeals) (C. J. M., art. 27).

But in the zone of operations the moment war breaks out they wipe out even a minority civilian representation upon their court of appeals, and make it exclusively a military court; and even then give the President of France the right to shut off all appeals.

Senator WARREN. Somewhere, as you pass along, there is in this bill 64 a proposition of using enlisted men in courts-martial, and I think of one place they argue that in one or more of the countries

abroad they have that custom; and sometime, in your evidence, you might touch upon that.

Gen. CROWDER. I will come to that in treating of the bill.

I wish to speak now of the use of prerogative writs in England, and the corrective use that is made of them over findings and sentence of a court-martial. Gen. Ansell says:

> It is a remarkable fact that the courts-martial of England are subject to review by the civil courts, not only by way of the writ of habeas corpus but by writ of certiorari, by the writ of prohibition, and by the other common-law remedies; the relation of military justice to the civil judicial authority there is such as to permit that course (p. 125).

Here again you have a picture of an irresponsible military judiciary in this country operating independent of the civil courts, to an extent, at least, greater than is permitted under the English system. I propose to show that Gen. Ansell is wrong.

This statement of Gen. Ansell clearly infers that the British civil courts exercise a broader supervisory power over judgments of courts-martial than do the civil courts of the United States.

The truth is, on the contrary, that the rule as to the right of civil courts to interfere with the proceedings or judgments of courts-martial is precisely the same in the two countries. The rule in the United States, as laid down by the Supreme Court in one of the cases relied upon by Gen. Ansell in his testimony before this subcommittee (page 125), is that a civil court has no power to review the proceedings of a court-martial, "except for the purpose of ascertaining whether the military court had jurisdiction of the person and the subject matter, and whether, though having such jurisdiction, it has exceeded its powers in the sentence pronounced." (Carter *v.* Roberts, 177 U. S., 496, 498.)

That was the famous case of Capt. Carter of the Engineer Corps.

Senator WARREN. That was in a case of the embezzlement of funds?

Gen. CROWDER. Yes, sir. Now, the point is this, that precisely the same rule is laid down in the British Manual of Military Law in the following language:

> The members of courts-martial and officers in the exercise of individual authority are * * * amenable to the superior civil courts for injury caused to any person by acts done either without jurisdiction or in excess of jurisdiction- -

Almost the exact language of our own Supreme Court. Then the regulation continues:

> Although there is not, in the ordinary sense of the word, any appeal from the decision of a court-martial or from the order of an officer. (British Manual of Military Law, Ed. 1914; Ch. VIII, sec. 1, p. 120.)

The writ of prohibition is available for the same purposes in this country in the same way and subject to the same limitations as in England, except only that a question has been raised as to whether our Federal courts have power, under the statutes of Congress under which those courts are organized, to grant the common-law writ of prohibition; but it has never been decided that they have not such power; and on the contrary in the cases where the question has been raised it was assumed by the courts for the purposes of the decision that the power did exist (Smith *v.* Whitney, 116 U. S., 167, 175–176; U. S. *v.* Maney, 61 Fed., 140). But the courts of superior jurisdiction of the several States of the Union have precisely the same inherent power as

the superior courts of England to issue this writ (Smith *v.* Whitney, supra, 116 U. S., 167, 176; State *v.* Wakely, 2 Nott & McCord, 410; State *v.* Stevens, 2 McCord, 32; Washburn *v.* Phillips, 2 Met. (Mass.), 296). And in discussing the conditions upon which the writ of prohibition will issue against a court-martial, the United States Supreme Court cites and relies upon the decisions of English courts as stating the rule (Smith *v.* Whitney, supra, 116 U. S., 167, 176–179, 182–186).

Now, if there is a single question which can be raised in England by certiorari or habeas corpus or prohibition, which can not be raised by the use of corresponding writs in this country, I do not know what it is. I would like to have cited one single instance where the remedy in the United States procedure has been less comprehensive than it is in England. The English system has been mentioned as something sui generis, having no counterpart in any other country. That has been one of the arguments against our system, that it is not under the usual supervision of civil courts.

Senator LENROOT. Let me see if I follow you. In England, take the case of a conviction without jurisdiction. Does any writ of the civil courts apply?

Gen. CROWDER. Of course, the writ of habeas corpus would lie, and probably a writ of prohibition would lie during the progress of the trial.

Senator LENROOT. Yes, but after——

Gen. CROWDER. And a writ of certiorari might run to the court-martial to certify up the record and the questions.

An attempted use of the writ of prohibition issuing out of a United States court to a court-martial is found in the case of the United States *v.* Maney. I happened to be stationed at Omaha at the time. Maney, a lieutenant of the Fifteenth Infantry, had shot and killed Capt. Hedler. He had been tried in the United States court at Chicago for manslaughter, and had been acquitted. Charges were brought against him, military charges, for the same act of manslaughter, alleged as conduct to the prejudice of good order and military discipline under the sixty-second, the general, article of war. The court was convened at Fort Snelling. I was interested in those matters at the time, and took the trip up there to observe the progress of the trial. The accused, through counsel, Frank P. Blair, came before the court and made a plea in bar of trial, alleging that the court was without jurisdiction to try him because he had been previously in jeopardy. The court overruled the plea. Counsel applied to Judge Caldwell for a writ of prohibition, but he declined to issue it. Finally counsel obtained the writ from Judge Nelson, and the case was argued before Judge Nelson. In his reported decision, he referred to the fact that the authorities were somewhat confused as to whether or not a United States court could issue the common-law writ of prohibition, but he said he would concede that the writ would issue for the purpose of examining whether it ought to issue in this case, and then pointed out what is familiar law, but was apparently not familiar to these officers, that a plea of former jeopardy does not raise any jurisdictional question; but is a matter of defense which the court-martial has jurisdiction to pass upon and, having determined it adversely to the accused, was at liberty to proceed with the trial.

tor LENROOT. Would not the same thing have followed if the ıad not determined it, if it found that it had jurisdiction to ine it; if it had not made that finding?

CROWDER. In that case the court had decided that it had no :tion. Would the prohibition have then gone to it?

tor LENROOT. No; if the writ had been asked for a military nd the court-martial had not ruled on that subject, would not ng have been the same under the theory that they had juris- so to find?

CROWDER. Yes; the ruling would have been the same. There me, it seems to me, after a man has been put in custody with to military trial, when some wıit will not issue in his behalf. ›ment any ıestraint is applied, the writ of habeas corpus would ıe moment that charges have been preferred it seems to me .e writ of prohibition would lie, either against the court or the preferring officer, providing the common law writ of tion can issue out of a Federal court.

tor LENROOT. Have we ever had any cases other than of the corpus remedy, in the Supreme Court?

CROWDER. It has been attempted in two cases, one, the case :h *v.* Whitney when Mr. Whitney was in the Cabinet, and in se a writ of prohibition was sued out of the Supreme Court of ›trict of Columbia against Mr. Whitney as Secretary of the ınd a naval court-martial convened by his order, to prohibit deration or revision of the proceedings of the court-martial had been returned to it for that purpose by the Secretary of ıvy. The Supreme Court of the District of Columbia dis- the petition for want of jurisdiction. On appeal to the Su- Court of the United States, the latter court raised the ques- the power of the Supreme Court of the District of Columbia, other courts organized under the laws of the National Gov- ıt, to entertain writs of prohibition; but avoided a decision question, saying:

> e not inclined in the present case either to assert or to deny the existence of er, because upon settled principles, assuming the power to exist, no case is ›r the exercise of it. In deciding the case upon the facts before us, and ex- no opinion upon the broader question, because the determination of the case : require it, we take the same course that has been followed by eminent judges in disposing of applications for writs of prohibition under similar :ances (pp. 175–176).

court held that the writ could not issue against the Secretary Navy, and then proceeded to discuss the question whether, merits of that case, it should issue against the court-martial, ›ld, upon the merits of the case, that the writ ought not to citing and relying upon English decisions relating to writs of ›ition against courts-martial. In other words, the United States me Court in that case applied the same principles of law which ›en laid down by British courts in like cases. (Smith *v.* Whit- upra, 116 U. S., 167, 175–176, 176–186.)

n there was this case of United States *v.* Maney, to which I :alled your attention. They are the only two cases I know of. ıere is no restraint that can not be reached by some writ, and ›urts will review for lack of jurisdiction or for excess of juris- n, which is the sole power of the British courts. The British › may employ more writs than we habitually do, but the military

courts-martial of the United States are under the same accountability to the civil courts of the United States as are their courts-martial to the courts of England.

I come now in natural order to the November briefs. These briefs were directed to the existence of appellate power in the Judge Advocate General. Senator Chamberlain concurs in the view that Gen. Ansell expressed, that section 1199 of the Revised Statutes confers that appellate power and, in the course of his speech on August 20, said:

> The Judge Advocate General had the power, if he had seen fit to use it, without any additional legislation to modify or to revise sentences of courts-martial, notwithstanding his present opinion to the contrary. (Cong. Rec., Aug. 20, p. 4338.)

And again:

> might, if he had seen fit, have alleviated the suffering and humiliation that fell to the lot of thousands of American boys. (Cong. Rec., Aug. 20, p. 4339.)

In language like this, it has been sought to convey the impression to the country that the construction adopted by the War Department was a narrow, technical one, and that we were at liberty, had we seen fit, to have exercised an appellate jurisdiction under the existing law.

Much emphasis has been placed upon the fact that 17 civilian lawyers of repute, on duty in the Judge Advocate General's office, concurred with Gen. Ansell in his construction of this statute.

It is proper to invite the attention of the committee—

(1) To the fact that 2 of the 17 lawyers concurring in the brief of Gen. Ansell have subsequently appeared before the Senate Military Committee and withdrawn that concurrence. I believe if all were summoned here that all except two would similarly withdraw their concurrence.

(2) That the Bar Association committee, appointed to examine into this case, have expressed their unanimous nonconcurrence in Gen. Ansell's construction. (See p. 20 of the report of the American Bar Association committee.)

(3) That Maj. Runcie, one of the critics, and lined up generally with the two other critics, has likewise expressed his nonconcurrence in the brief of Gen. Ansell (p. 31 of Maj. Runcie's testimony before the Senate Military Committee.)

I propose now, briefly, to review the opinion rendered and show how impossible it was for any man who had given proper study to the legal questions involved to have reached a conclusion that section 1199 Revised Statutes did confer any appellate power upon the Judge Advocate General.

Gen. Ansell says that when he was conducting these studies and conferences with the 17 officers on section 1199, Revised Statutes, I visited the office one day, and that we engaged in a conversation, he and I, in an adjoining room, and that he told me of the study that the office was prosecuting and its probable result, namely that they would agree that appellate power of the Judge Advocate General could be deduced from that section; and that I told him to go to it, and put it across; but that he might have some difficulty with military men under article 37. (Hearings, p. 220.)

I do not recall that conversation, but I seem to recall that at another time the question of whether appellate power could be found

in the Judge Advocate General came up for discussion, and a part of the language he attributes to me is language I am afraid I habitually use, namely "go to it," and "put it across"; but I know the processes of my own mind, and I know that I assumed that the sense of duty and obligation that induced Gen. Ansell to communicate to me the fact that the study was in progress, would have led him to communicate to me the results of that study before he undertook to act upon it. I never knew that he had submitted a conclusion to the Secretary of War until November 23, 1917. The date on his brief announcing his conclusion and the concurrence of these 17 officers is November 10.

On November 23 the Secretary of War sent for me and we had a conversation in his office—not in a room in the Army and Navy Club, as Gen. Ansell states. I remember the conversation well enough to be entirely accurate in presenting it, although I can not attribute to the Secretary his exact language, nor probably repeat my own, so that it could be put in quotation marks, but there will be no error of substance. The Secretary asked me how long I had been Judge Advocate General. I answered "A little over six years." The next question was, "Why have you not advised me of the existence of an appellate power in the Judge Advocate General to reverse, modify, or affirm sentences of courts-martial?" I replied that had never been the view; that no Judge Advocate General has ever expressed such a view; that one Judge Advocate General had taken the contrary view; and the department has followed that opinion; that I had followed it, as my immediate predecessor, Gen. Davis, had followed it. He said that Gen. Ansell had placed in his hands a very powerful brief on the subject which had challenged his attention, and asked me if I would take it and give it some study. I told him I would be very glad to do so. He asked me to submit my own views, and at the end of four days, on November 27, I submitted a reply brief. I want to discuss it briefly. Gen. Ansell argued for the existence of this power upon five principal propositions.

His first proposition was that the Circuit Court of Appeals of the United States had deduced an appellate power to modify or reverse in bankruptcy cases from the single word "revise" in a statute substantially similar to section 1199, Revised Statutes.

His second proposition was—I may not state them in their exact order—that the legislative history of section 1199 of the Revised Statutes supported his construction.

His third proposition was that all Judge Advocates General had acted upon that view until the days of Lieber, who, in an ill-considered opinion, had reversed the practice of the War Department.

His fourth proposition was that no civil court or other civil authority of the United States had ever questioned the existence of the appellate power he contended for.

His fifth and final proposition was that the British judge advocate general exercised this power.

Anyone accepting those five propositions of Gen. Ansell would have proceeded with him to his conclusion. My attention was especially challenged to his proposition No. 1, that the United States Court of Appeals had deduced this appellate power in bankruptcy cases from the single word "revise" in a provision of law which was substantially identical with section 1199 of the Revised Statutes.

What was my surprise to find out that Gen. Ansell had not brought to the attention of the Secretary of War a previous paragraph in the section which he was discussing, and which conferred the appellate power in express terms. The court, In re Cole, 163 Fed., 180, 181—the case relied upon by Gen. Ansell in his brief, on this point (hearings, p. 59)—was not deducing appellate power, because that had been given in express terms. The Secretary of War had no information from Gen. Ansell's brief that the statute from which he was arguing—the concealed part of it—conveyed appellate poer in express terms, and that all the court was trying to do in re Cole was to deduce from the word "revise" in the second paragraph, the power, the collateral power, which would enable it to inform itself of the scope of matters that could be inquired into upon the petition in bankruptcy cases. So that his proposition No. 1 fell of its own weight.

I examined the history of the legislation, section 1199 of the Revised Statutes, in Congress, and my conclusion was, what I think yours must necessarily be, that it does not furnish any suggestion of an interpretation such as Gen. Ansell advanced.

As to his proposition No. 3, that Judge Advocates General prior to Lieber had held that this power existed, I found there was no proof of it from the records, after the examination of a great many cases; and even to-day, with all of the publicity that has been given to this, nobody has ever been able to point to a single case in which any Judge Advocate General ever sought to exercise this power.

Judge Advocate General Holt had not. He was the first Judge Advocate General we ever had, and remained in office from 1862 to 1877. Before becoming Judge Advocate General he was, as you know, Secretary of War. He was one of the distinguished jurists of this country. He is the father of our military jurisprudence. He never claimed that the power existed. He never exercised the power. So that we have to part company with proposition No. 3.

Proposition No. 4 was that no civil court of the United States, or other authority, had ever ruled on this question; when, as a matter of fact, in the case of Ex parte Mason, the Circuit Court of the United States for the Northern District of New York had ruled upon the precise question, and held that the power could not be deduced from section 1199.

Senator LENROOT. What case is that?

Gen. CROWDER. The case of Ex parte Mason, the sergeant who shot at Guiteau. These things I am not going into in greater detail because they are all in my opinion.

Proposition No. 5 was that the British judge advocate general exercised this power. We all know that that is not true. That is conceded now. You do not have to deal with it.

So that all five propositions from which Gen. Ansell argued in his November 10 brief were misleading propositions, to put it mildly; and as I say, two of the officers who concurred with him, when the facts were laid before them, and they subsequently appeared before this committee, have, I believe, withdrawn their concurrence. What the other 15 would do if they had an opportunity is a question, but I do not see how they could reasonably avoid a similar course. Certain of them I have talked to, and they have told me they acted without inquiry or question upon these five propositions of Gen.

Ansell. With such an attitude, of course, they must proceed with him to a conclusion.

Now, further, we have the concurrence of the Secretary of War as a lawyer upon this construction, we have the concurrence of the Bar Association Committee, and we have an undisturbed pronouncement of the Federal courts upon this subject. Is it any longer a question that we could have exercised this power if we had chosen to do so? I will jump as many hurdles, and as high, as anyone, to deduce a power to meet an emergency; but I do not propose to jump any hurdles when it comes to assuming a jurisdiction in a judicial procedure.

Immediately upon turning in that opinion we commenced to look around for an available means to get this power, because Gen. Ansell had certainly demonstrated that it was a necessary power in this World War. However well we may have gotten along without it before, it was a necessary power with 4,000,000 men in the field with new officers. I said to the Secretary of War, in concluding my opinion, "that I would try to find it by construction in the President of the United States under his constitutional authority to command the Army, but that it would be a difficult and prolonged study."

In the meantime I asked him to do immediate justice, as nearly as he could do justice, to the enlisted men in the Texas mutiny cases, which were the occasion of the presenting of this brief, by ordering an honorable restoration to duty in all those cases. The cases of those enlisted men I will insert in this connection, if I may. The point I wish to make is this, that Gen. Ansell has represented to this committee that they were reenlisted, and they lost their continuous service status and their continuous service pay because they were under the necessity of reenlisting. My memorandum, when submitted, will show that on the contrary they were restored to duty under the statute to which I called your attention yesterday, and that they did not lose, upon restoration, either their continuous service status, or their continuous service pay. This information I got direct from the finance department.

Senator LENROOT. Now, you restored them to all their rights and privileges as if that had not happened?

Gen. CROWDER. All the rights; and except that they had been subjected during that period to confinement, everything was as if it had not happened. It was not a complete remedy. Let us admit that. It, however, did restore them to their original status, except that one of them, I think, lost his rank. He went back as a private. He had gone out as a sergeant. The noncommissioned officers went back as privates. Whether they speedily regained their rank I do not know.

Senator WARREN. Was that one the only noncommissioned officer?

Gen. CROWDER. I do not remember; but I can say this, Gen. Ansell referred to them as men of 15 to 20 years' service. As a matter of fact, they were all in their first enlistment, I think, except one. My memorandum, when I discover it, will show all the facts.

Senator WARREN. That will contain all these particulars, will it?

Gen. CROWDER. Yes, sir.

Senator WARREN. I would like to know if there was more than one. You say one was reduced. We have heard that these men

were all old in the service, and we were told that the effect of this action was to reduce these men, to take their stripes off; in other words to reduce them to the ranks.

Gen. CROWDER. Of course that resulted from a dishonorable discharge.

I have talked here without notes and without reference to the information. This seems to be a matter upon which a great deal depends. I would like to be subjected to cross-examination upon section 1199, if it is still an open question. I do not know of anyone who has studied the authorities who adheres to the position that appellate power can be deduced from section 1199; nor do I think, although my opinion on that subject is of course not very valuable, that if the proposition was before Congress to-day to vest in the Judge Advocate General of the Army this appellate power, to reverse, modify or affirm, in a way, to conclude the President of the United States, the commanding general of the Expeditionary Forces and all commanding generals under him, it would command very many votes in either House. And I say to you this: Give the Judge Advocate General that power, and I care not whom the people may elect President of the United States or whom that President appoints as commanding general of the Army, the Judge Advocate General will administer the discipline. There will be no question about that.

Senator LENROOT. I think that would be true under the broad powers. But supposing that that power so revised was limited to revision for jurisdictional defects or prejudicial errors of law; you would not make that statement as broad, then, would you?

Gen. CROWDER. The difficulty would always be in determining what is a question of law, and I am going to bring out that difficulty as plainly as it can be brought out when I proceed with my next topic, actually to try out the application of the pending bill to a military case. That is my next subject.

Senator LENROOT. Now, to drop that, I would like to ask you, General, with reference to the General Order No. 7 and the power that you did find to be vested in the President. Upon what did you base that?

Gen. CROWDER. Of course it was manifestly opposed to the doctrine I read to you from Winthrop.

Senator LENROOT. Certainly.

Gen. CROWDER. We deduced it out of Articles of War 37 and 38 of the existing code, new articles of the Revision of 1916, and also out of the exigencies of the case as a step we must take at once awaiting the grant of appellate power from the Congress of the United States. All we said to the lower authorities was in the nature of a rule of procedure under article 38, viz: "Suspend your action, until we can pass upon the case." All we did after we passed upon the case was to address their discretion. We did not ourselves exercise the appellate power. And it seems to me that in every case where we addressed their discretion on the question of prejudicial error there was acquiescence, except in a limited number of cases to some of which I have called your attention. This may not be entirely accurate, but it is substantially accurate. In effect, we got the results of an appellate jurisdiction; but, as I say, we had the right to command them not to take final action in the case. That was unquestionably the right of the President under new article 38 of the 1916 revision;

and we had a right to address the discretion of reviewing authorities below, as to what their final orders should be, until its modification, General Order No. 84, laying down a rule for the branch offices in France, came along and directed the reviewing authorities in France, to comply with the recommendations of the Acting Judge Advocate General in France. Then the question of full appellate power was boldly presented. That was the order that was finally canceled, that was issued without full appreciation by the War Department of what it was intended to accomplish. In other words, it established the appellate jurisdiction in France, while withholding it here. I hope I make that plain.

Senator LENROOT. Yes.

Senator WARREN. Gen. Bethel was the superior over there, was he not?

Gen. CROWDER. No; Gen. Bethel was on duty with Gen. Pershing. The branch office in France was under Gen. Kreger.

Senator WARREN. Gen. Kreger was not there all the time. Who was, then?

Gen. CROWDER. Gen. Kreger was there from the time it became effectual. Gen. Bethel was there waiting for Gen. Kreger to arrive; and Gen. Kreger, when he was there, represented the Judge Advocate General over there.

Senator WARREN. Gen. Bethel was the judge advocate general of the American Expeditionary Forces there, with office in the field?

Gen. CROWDER. Yes, sir. After General Order No. 84 was issued, and until it was revoked, the acting judge advocate general in France was supposed to be vested with authority to control the discretion of reviewing authorities and convening authorities of the expeditionary forces, including Gen. Pershing.

Senator WARREN. Was there an incident something like this, after Kreger had gone there and established himself—of course I did not ask this when he appeared before us; it came up in another way—that he was brought home with the intention, at the time, of his not going back; either to discontinue the kind of service that he was there doing, or to put somebody else in his place; do you know?

Gen. CROWDER. Kreger?

Senator WARREN. Yes; Kreger.

Gen. CROWDER. I do not connect up with that thought, at all.

Senator WARREN. His service over there was continuous from first to last?

Gen. CROWDER. It was. He had a successor in office when he was drawn back here to take my place in the office when I was ordered to Cuba.

Senator WARREN. It was continuous over there, was it?

Gen. CROWDER. The office continued to function over there under Col. White, after Kreger left, and went on for some time. First they issued an order to discontinue it, but Gen. Pershing sent us some telegrams from his department, all indicating that it would be a matter of embarrassment if it were discontinued, and Col. White continued.

Senator WARREN. That is what I wanted to know, whether there was considered at the time the discontinuance of this office in the service over there?

Gen. CROWDER. Yes.

Senator LENROOT. When this General Order No. 7 was issued, was this the situation, that although the commander in chief formally disapproved of findings of a court-martial, nevertheless that finding could be ignored, and to that extent the subordinate was superior to his chief?

Gen. CROWDER. That finding could be ignored?

Senator LENROOT. Yes; disapproved.

Gen. CROWDER. By whom?

Senator LENROOT. By the commanding officer creating the court: the final power?

Gen. CROWDER. There was but one reviewing officer prior to General Order No. 7.

Senator LENROOT. Yes.

Gen. CROWDER. That was the convening authority.

Senator LENROOT. Yes. Now, the President reviews, under General Order No. 7?

Gen. CROWDER. No; under General Order No. 7 we review the case and return it to the convening authority.

Senator LENROOT. Yes.

Gen. CROWDER. And he issues the order in accordance with our opinion.

Senator LENROOT. I thought you said, if I understood you, that you found that there was in the President this right.

Gen. CROWDER. I found that there was in the President the right to issue an order to the reviewing authority below not to make his action final, but to send up the case in such a form as that it would give an opportunity for review here and recommendation to the convening authority.

Senator LENROOT. In other words, to suspend his action?

Gen. CROWDER. To suspend it, pro tanto, until we had reviewed and reached a conclusion and communicated that conclusion to the convening authority.

Senator LENROOT. Then after all, the only effect that had, legally, was to suspend the action, beyond that which the practice had been theretofore?

Gen. CROWDER. Yes, sir; to give an opportunity for a legal study of the case.

Senator LENROOT. And the action of your department, legally, was no more effectual than it was before that order—legally, I am speaking of?

Gen. CROWDER. Legally, yes. In practice it was, with the exception of the very small number of cases, effective with the exception I have stated; just as effective as if we had had the power ourselves to issue the order; because in only a very limited number of cases did the reviewing authorities disagree with us.

Senator LENROOT. At some point I would like to get your views upon the report of the Kernan Board as to the power of Congress as against the absolute power of the commander in chief that is upheld. I do not know whether you care to go into it now.

Gen. CROWDER. I think I have probably indicated my view. I am not predisposed to question the constitutionality of laws; and I am more in the attitude of assuming, and I am at present in the attitude of conceding, that Congress, in the exercise of its power to make rules and regulations for the government of the land and naval forces, may

a court of appeals. I am willing to assume, anyway, that
and rest the whole case upon the expediency and advi-
f locating the power in such a way as to shut the President
ommanding generals under him off from the consideration of
vital to the discipline of the Army.

· LENROOT. That was all I wanted to know.

ROWDER. I think there are certain papers that I would like
r and introduce, at this point. Perhaps I had better take
the question of the pending bill, because when I get through
ing to have all these situations we have discussed before us
ncrete form, and I think it will be very helpful in concluding
ony on matters directly relevant to the real issues.

· WARREN. I want to ask you one question, and perhaps I
to ask it. I notice that Senator Chamberlain as a member
ocommittee, put the question directly to Gen. Chamberlain,
ctor General, if there was any personal feeling in the matter
mination and report. In your examination of the case, or
dence, and your alluding to your relations to Gen. Ansell, is
y special feeling of enmity between you, or is it a review
oints, apart from any feeling?

ROWDER. I believe you asked Gen. Ansell that question at

· WARREN. I did not, as I was not present.

ROWDER. At least it was referred to, and he answered that
ertain time our relations were pleasant.

etter make a frank statement, and you can judge whether
to leave it in the record.

I became Judge Advocate General, some time in 1910 I
ved, though I did not know him personally, what I thought
meritorious legal work performed by the then Lieut. Ansell.
tationed, I think, in New York Harbor. I wrote him a let-
him when he came to Washington to drop in and see me,
might discuss some matters of mutual interest. In a few
came. I told him about this work that I had noticed of
ersed with him about legal matters, and turned aside to
papers. When I was ready to resume the conversation——

r WARREN. Was he in the line at this time?

ROWDER. He was in the line. When I was ready to resume,
that he was visibly affected. He apologized, saying that it
unusual experience for him to have a superior officer dis-
his own motion any merit in his work; that he had thought
le for a man to work his eyes out in the United States Army
r gain any recognition. I said to him then, "How would
to come into the Judge Advocate General's Department?"
time I was senior assistant, but expected to be appointed
dvocate General in a few weeks. He said that, of course,
his life's ambition. I told him I had nothing to offer him
vacancy among the Acting Judge Advocates with station in
o, but that something better would develop after a while,
d him if he would take that? He said that he would like
lt with his family about it. He went home, and in a short
ote me that he would take it, and he was ordered out there
t to Gen. Pershing, who was in command. In about a year
letter from Gen. Pershing thanking me for sending him such

an able man, saying that he knew more law than all the judges in Mindanao put together. The same mail or the next one, brought me a letter from Gen. Ansell saying that Pershing was an impossible man to serve with, and asking to be relieved. I saw that there was a situation there that did not make for efficiency. I relieved him and brought him home and assigned him to duty in New York Harbor, and later, in March, 1912, my high estimate of him continuing, I brought him to the office here in Washington.

I want to say right now that I do not know of a more acute legal mind than Gen. Ansell has. He is a very able man, and has rendered the department, and me, conspicuous service. Our relations for the next four years were as intimate as relations well could be between officers who worked in daily contact with each other and what those relations were is evidenced by some letters I received from him. These I think are the most convincing answer that could be made to your question.

Ordinarily I would hesitate to utilize these letters which, though not marked personal, breathe a personal relation, and a man ordinarily keeps such on his private files. However, these letters do establish a fact responsive to your inquiry, viz, that the most cordial, intimate personal and official relations existed between Gen. Ansell and myself, after four years of daily contact, and that these first four years of our relations can be dismissed from your mind as furnishing any incident whatever out of which the vindictive hostility he has recently expressed toward me could have grown, and by necessary inference negative many of the personal allegations against me that he has recently made.

Senator WARREN (after reading letters). Would you like to have these letters go into the record?

Gen. CROWDER. I would rather decide that question after I complete my statement.

Senator WARREN. That will rest entirely with you, whether they shall go in or not.

(The letters referred to are here printed in the record, as follows:)

(Letter undated, envelope bearing post-mark Washington, D. C., July 26, 9.30 p. m., 1916.)

STEAMER "NORTHLAND."

MY DEAR GENERAL: While waiting for the "cast off" whistle, I am going to obey a present impulse and, in a word, express, however inadequately, my great gratitude for all that you have done for me.

You and your sentiments toward me have exerted a wonderful influence over my life. Without you and them, without your unfailing kindness, without your confidence in me—which has served as an inspiration—my life in the Army would have been a desert. Under you and with the opportunities so generously afforded me I no longer remember, much less experience, the restricting influence and environment of military life. Under you I have had the opportunity of developing intellectual integrity through intellectual liberty. Else than this is the meanest slavery and yet as I saw it at least, intellectual slavery was my lot before coming to you.

This phase of my service with you means much more than I can express. Had you done nothing more for me, you had done enough.

Your little kindnesses—such as bringing me to the boat—make service with you a personal pleasure as well. In your office my life seems filled with the little things and the big in ungrudging measure. Because of these my life is one of real happiness.

I wish you but had your just deserts.

May God forever and ever bless you.

S. T. A.

Gen. CROWDER. After receipt of the foregoing letter, the following undated letter was received:

Gen. CROWDER:

I had an unexpected call this morning from Gen. J. A. Johnston (accompanied by a classmate of mine), who, though I have never known him, apparently came for no other purpose than to tell me of some very laudatory things you said of me last night in his presence.

Such praise, though it is unmerited, works in me a new and vigorous inspiration to do all that a limited capacity will permit. Praise from a discriminating superior is always gratifying, and it is especially so where, as in this case, it is the expression of a disinterested and appreciative soul.

I resort to this note to express a sentiment which I could not express orally without embarrassment and which a sense of gratitude will not permit me to leave unspoken.

Gratefully,

S. T. ANSELL.

Both of these letters were written after an intimate office association of four years.

There is one other memorandum, written on April 24, 1917, to the Secretary of War, the underscored sixth and seventh paragraphs of which would seem to bring our friendly and cordial relations down to a still later date. I insert this memorandum in its entirety for the further reason that certain of its statements furnish proof of the plan that the War Department had conceived and confidentially communicated to governors of States which Senator Chamberlain has made an issue in this investigation. The memorandum follows:

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 24, 1917.

Memorandum for Secretary Baker.

1. I have just returned from a conference with Congressman Bankhead and others, had at your direction with reference to the pending bill. I think I discern a situation in the House (or one certainly affecting many Members of it) which is of such im-importance and affords such an opportunity for effective service that I ought to present it to you now.

2. The bill does, as it must, and as you, we, and perhaps they, know it must, clothe the President—that is, in fact, the War Department—with extraordinary power and discretion as to the methods and means of executing the draft. This is the crux of the situation. The necessary vagueness, uncertainty, and even inability to express the details give rise to vague apprehensions. It is here that assurance is needed, and I feel that you, right now, may properly give it, and, if my judgment is worth anything, ought to give it.

3. The difficulty concerns itself more with the matter of personnel, agencies, and methods of administration than with legal principles. Conscription is, though it ought not to be, esteemed as an odious term. It suggests not only the strong arm of an all-powerful central government, but the military arm at that. The prevalent idea is that a man wearing the military uniform of his government—which is synonymous with an authority to exercise physical force and compulsion without legal limit—invades the order of civil life and ruthlessly takes from his home a free man and makes him a sort of government serf. The idea is that the military mind is mechanical, harsh, unsympathetic, with a leaning, perhaps, toward the aristocratic classes. The prevailing idea is that the central administration, the head, the agencies, the furthermost tentacles of the system are to be purely military. Putting myself in the place of a Congressman, as one must do in order to understand his difficulties, I can appreciate the reasons for the inquiry and the desire to receive assurances that the methods of administration will be such as to insure absolute fairness and based upon a knowledge and regard for our institutions, our people, and their daily lives.

4. Government to our people is a fearsome thing, a thing not understood, a thing that seems to be mechanical and unhuman, a thing that takes no note of the individual except perhaps to crush him. We must tear aside the veil and reveal the fact that the President, the Secretary of War, and the highest military officers are just plain ordinary human beings, like all others, who do understand our people, who come from

them, and who are sympathetic with and for them, and who will respect as far as on principle we can respect, their human qualities.

5. While, of course, the greatest argument in favor of the draft system is that it is the only effectual one, to my mind the greatest political argument is that it is the only fair one. Ordinary human beings will be far less concerned with the effectuality than with the fairness of the system. Fairness is the greatest text, it seems to me, that a Congressman can have to convert his people to the idea.

There is a fear that this vast Executive power will be organized and exercised so as to fear some and favor some and result in unfairness. Many questions are raised. Who will determine who shall go and who shall stay? How will the fact be determined? Who are going to administer the law? Will it not be oppressively administered? Will we be approached by the military authorities in the spirit of having us cooperate or of regarding us as a driven herd?

The strong arm of the military must not be too apparent. You have planned that it shall not be. You have decentralized. You intend to intrust the execution of the law as it affects our people directly to their accustomed officials. There is to be no military member of the local boards. When all this is revealed much apprehension will be allayed.

6. But central administration must be intrusted to careful hands. The law must be administered in such a spirit of common understanding and a capacity to cooperate; with such sympathy for all civil institutions, our traditions and even our prejudices as to be worthy of and to receive the confidence of our people. I have said before that, loving the Army as I do, I can not assume, and it is no reflection upon officers of our Army for one not to assume, that the ordinary officer has the requisite qualities. I have already said that there is one man in this department whom I believe to be superbly qualified. I believe that assurances should be given that the central administration will be guided by a man who is a lawyer as well as a soldier, knows our institutions, our people, and their human qualities.

7. All this is leading up to my suggestion, which is: The letters which have been sent to the governors ought, in my opinion, to be given to the press with an appropriate statement, and assurances should further be given that the central administration is to be under legal supervision, in strict conformity with the law, with nothing omitted to insure fairness, and everything done to obviate all suggestion of oppressiveness.

S. T. A.

So far as I know, these relations continued down to his appointment as brigadier general in the Judge Advocate General's Department in October of 1917.

I never began to suspect any other than a loyal attitude toward the office and myself until there occurred the incident of his addressing me on the subject of being named Acting Judge Advocate General under the provision of section 1132 of the Revised Statutes. I was not giving much time to the office. I was very much engrossed with the selective draft.

Senator LENROOT. About when was that?

Gen. CROWDER. That was about November 3, 1917. He has put the correspondence in the record. (See pp. 52–53 and pp. 221–22, Ansell's testimony before this committee.) As I say, I was not giving much attention to the affairs of the department—I was too much engrossed with the draft. I did not know what the thoughts of the Secretary of War might be. I knew he shared my estimate of Gen. Ansell's legal ability, and it would have been reasonable if he had desired Gen. Ansell to exercise full control. We were all looking forward to the probability that the war would collapse. In this view I replied to Gen. Ansell, telling him to take the matter up with the Secretary of War directly, and whatever order the Secretary of War made would be satisfactory to me. I said "directly with the

Secretary of War" for a purpose. I suppose that 60 per cent of the Judge Advocate General's business with the Secretary of War the Chief of Staff does not see at all. It goes direct. The Secretary of War is much concerned in getting a Judge Advocate General who can handle the civil part of his jurisdiction, such as contracts, river and harbor work, real property, and execution of the law of navigable waters. Much of his civil jurisdiction presents very many complicated questions. This was well known, of course, to Gen. Ansell and I expected that he would go direct to the Secretary of War with the proposition. Instead of doing that he went to the Acting Chief of Staff with a statement that I concurred in the issuing of an order for my relief and his designation. The Acting Chief of Staff never even submitted it to the Secretary of War, and the order was marked for suspended publication. I think that on November 10, when he submitted this brief contending for appellate jurisdiction in the Judge Advocate General, reversing the whole practice of the administration of military justice, he really believed that he was in charge of the office and was thereby absolved from the necessity of consulting me.

I never knew that the order had issued until November 17, when the Secretary of War sent for me and handed me a list of appointments that Ansell had recommended—judge advocates from civil life—and asked me what I thought of it. I looked them over and I told him I had a personal knowledge of many of the men, and that I thought they were all good appointments. He said that he had asked Gen. Ansell whether he had submitted the list to me and that Ansell had replied that he had not, and then said he had brought him an order relieving me as Judge Advocate General and designating himself. I told him of the correspondence between Ansell and myself on this subject, but that I knew of no order having issued. He replied that the order had issued without his knowledge. This, you will understand, was six days before I ever heard about these November briefs.

Senator WARREN. Who was Acting Chief of Staff at that time?

Gen. CROWDER. Gen. Biddle was Acting Chief of Staff. Well, the Secretary of War explained to me that he did not intend that I should be relieved; that he expected to confer with me from time to time about legal matters, and it would be embarrassing or inconvenient not to have me in charge of the office. There followed the following correspondence between us:

NOVEMBER 17, 1917.

MY DEAR GEN. CROWDER: As the time approaches for the reassembling of Congress and the consideration of many actively controverted questions of legal policy affecting the Military Establishment, I write you this personal note to inquire something of the present character of your burdens as Provost Marshal General.

You will recall that in our discussions on your assumption of that work, I had a certain hesitancy, which was due to the fact that you would necessarily be withdrawn for a substantial part of your time from the active guidance of the Judge Advocate General's office, where I have learned so confidently to rely upon you, and I then expressed the hope that after the great machine necessary for the mobilization of the selective Army had been organized it would be possible for you gradually to give it less time—to leave it under your supervision still, but demanding less of your actual presence—so that you could, with justice to both offices, resume your activity in the Judge Advocate General's Department.

I am writing this note not in any way to question the wisdom of the apportionment of your time which you have so far made. The fine perfections of the results of the administration of the selective-service law could have been attained in no other

way than by the sleepless vigilance with which you have applied yourself to it. But I shall be happy when that work is so far advanced as to be more nearly automatic and to leave you free to return to your task here, and so I am making this inquiry as to your own estimate of the situation.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

Gen. E. H. CROWDER,
Provost Marshal General.

NOVEMBER 18, 1917.

MY DEAR MR. SECRETARY: I am deeply appreciative of the statements in your personal letter of this date respecting my resumption at an early date of my supervision of the Judge Advocate General's Office and Department.

In response to your request that I fix a date when I could, with justice to both offices—the Provost Marshal General's and the Judge Advocate General's—resume my activity in the Judge Advocate General's Department, I have to advise you as follows:

The revised regulations providing for a national classification and governing the second and subsequent draft have been printed and distributed to boards. The organization of the medical and legal advisory boards in the several States is well under way and will be completed at an early date. I may say for your information that State headquarters, district boards, and local boards have been so enthusiastic in their approval of the new scheme and have evinced such a complete understanding of it that I do not anticipate great administrative difficulty in connection with the future administration of this department.

I feel myself free to advise you that I can resume my active supervision of the work of the Judge Advocate General's Department at once, to the extent of giving at least half of my time to that office and continue at the same time an efficient adequate supervision of this office. This is my estimate of the situation.

I thank you for the terms in which you have expressed yourself in your letter of this date.

E. H. CROWDER,
Provost Marshal General.

Upon receipt of my letter, the Secretary of War canceled the order making Gen. Ansell Acting Judge Advocate General.

It is true that Gen. Ansell's attempt to secure an order giving him my functions as Judge Advocate General was practically concurrent with his preparation of a brief urging a revolution in the military system and his circulation of a document of such grave consequence among every officer in my office without giving me the slightest information of his efforts; but it is not true that I knew of the brief until after the Secretary of War directed the rescinding of the unpublished order appointing him Acting Judge Advocate General.

It is further true that the brief of November 10, filed by Gen. Ansell, did not tend to increase my confidence in Gen. Ansell. In that brief a decision was referred to and a statute quoted only in part which, when read in full, rendered the decision of no value to the proposal it was invoked to support. Dicta, in a compendium of judicial definition, concerning the word "review" were cited from a page upon which were found more pertinent definitions absolutely refuting his view, and no reference made to the more pertinent definitions. It was urged in that brief that the power which it was contended had been granted by section 1199, Revised Statutes, had been used during the Civil War and for a considerable period thereafter; when the most cursory review of the records was convincing that such was not the case. It was stated further that the question had not been addressed by the Federal courts, when the most frequently consulted volume in the office disclosed that such was not the case and referred directly to the instance in which the question had been addressed and the contention overruled, and further the case was found pasted in our

office file of the Federal Reporter. Finally, it was urged unequivocally that such a power resides in the British judge advocate general, when exactly the reverse is true, the actual point having been authoritatively decided in a joint opinion of the attorney and solicitor general of Great Britain in 1873.

When it is remembered that this was in no sense a controversial brief, but a memorandum addressed to the Secretary of War by Gen. Ansell, who stood in the rôle of his legal adviser, and that it was intended to commit the Secretary to a course as revolutionary as any ever taken by an administrative officer, I think I may be justified in the feeling of caution that replaced my former implicit trust.

I think I can fairly say, however, that this feeling of caution was in no way permitted then, or at any time thereafter, to interfere with the full use of his conceded talents in the task to which he had been assigned.

And this seems to be the view of the Inspector General of the Army, who has inquired into the administration of the office, and who finds, if I read his report correctly, that on and after this incident, although his order was canceled detailing him as Acting Judge Advocate General—leaving him to function as such by virtue of seniority—his initiative was in no manner impaired or disturbed.

My own thought and feelings toward Gen. Ansell are fairly set forth in what I here say. However, Gen. Ansell interjects a matter into his letter of March 11 which connects up with this period, and which was intended to show that I had largely abandoned the office and interest in its administration, and that his actions respecting the issue of executive orders relieving me and detailing himself in full charge of the office, as well as in submitting the November brief without my knowledge, were "in due course"—I refer here to a statement which is set forth in the record of hearings, page 220, as follows:

> When I came to be the head of this office in the latter days of August, 1917, Gen. Crowder at that time, doubtless placing in me the utmost confidence, came to me and said that he never intended to return to this office again: that he had always aspired to a line command, and that he intended to use his office of Provost Marshal General in the raising of this new Army to secure for himself a field command. He told me to manage the office in my own way and without further reference to him.
>
> I particularly asked whether I should consult him upon matters of general policy, and especially upon appointments, of which many would have to be made. He said "No," but added, "If I should wish the appointment of any particular Judge Advocate for my special purposes, I will let you know" (p. 220).

I take it that there is no one within the Army with whom I was in any sort of personal contact who did not know of my very great desire for assignment to field command in this World War. But the inference which the reader of this charge of Gen. Ansell's is left free to make is that I proposed to administer the selective draft in such a way as to make necessary my assignment to a field command, and that I proposed to bestow a few appointments in the Judge Advocate General's department to further this same special purpose. Of course, no conversation between Gen. Ansell and myself, capable of being so construed, ever occurred. If it had occurred, Gen. Ansell had a very plain and obvious duty—first, to decline to take over the affairs of the department which was to be corruptly administered in part by me for such a purpose, and second, to report the matter to superior military authority with a view to my trial by court-martial. Failing to adopt either course, it must be assumed, I think, that this construction of our conversation is an afterthought, expressed by him now for the purposes connected with the present investigation.

This invention of Gen. Ansell has not even the merit of plausibility. He says that the conversation occurred in the latter part of August. The first appointments to field command in the National Army were announced on August 5, 1917. Shortly thereafter I was informed that, although recommended by Gen. Bliss, Chief of Staff, I was not recommended by the General Staff, and that the Secretary of War had adopted the view of the General Staff. My relations with Gen. Ansell at the time (August, 1917) were sufficiently direct and personal to make it probable that he knew from me the facts that I have related above and further that after these first announcements I dismissed all hope of appointment to command rank. But Gen. Ansell says that the conversation between us took place after the events above narrated occurred.

From and after the first appointments, which included many of my juniors, I had given up all thought of appointment to command rank and assignment to field duty in France. It is a fact that I never again contemplated field assignment until a year later, in August, 1918, when the press reports gave first mention of the probability of an expeditionary force to Russia. Then I took up with the Secretary of War, directly and in a personal interview, my claims for field assignment to Russia. I do not doubt that the Secretary of War will recall this personal interview and my statement to him at the time that I had regarded his decision in early August of 1917 as settling the question once and for all, that I was not to be given command rank and field assignment in France, but that I felt that the problem in Russia would be both a reconstruction and a fighting problem; and that as I had had extended experience in provisional military government, both in Cuba and the Philippines, I felt justified in being even aggressive in laying claim to the Russian assignment. If he has any difficulty in recalling the facts I think most of them can be gleaned from a letter which I sent to the Secretary of War on the day following this personal interview, confirming my statements in that interview, which letter went by reference from the Secretary of War to the Chief of Staff and is doubtless on file in the office of the Chief of Staff.

Undoubtedly I had conversations with Gen. Ansell about the conduct of the office of the Judge Advocate General. I think it quite possible that I told him that he was to have a free hand in the management of that office, and I know that it was in my mind to say, and I probably did say, to him, that in respect of appointments of judge advocates there were several cases to which I had given consideration and that I wished to be consulted in order that I might reveal the status of those applications. The statement that I used language indicating that I desired to use these appointments as a means of building up an influence which would help me to secure a line appointment is wholly untrue.

That Gen. Ansell was not fully cooperating in the administration of the approved policies of the office is evidenced by his attitude toward the issue of General Order No. 7, about which so much has been said. In respect of this order, Gen. Ansell has said of record:

But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this

ed as a limitation to that effect, and there had been no recommendation for
consequent upon these reviews and studies we made since the time of the
on of General Order No. 7 until after I got back (p. 182, Hearings).

on in his testimony Gen. Ansell makes a claim that this
on upon the power to recommend clemency, which was sought
educed from General Order No. 7, "applied, as well, to recom-
ions addressed to subordinate commanders, as to the Presi-

ite the attention of this committee to General Order No. 7,
s published in this record, pages 132–133, and ask your de-
judgment as to whether that order could reasonably be con-
as limiting in any way the power of the Judge Advocate
to initiate recommendations for clemency. I can not discuss
ion very well which does not arise out of some concrete
e of the order issued. Gen. Ansell, in his reference to this
cites you to no such language, and yet he says that, when he
k from his trip to Europe, he—

bull by the horns, because it was nothing less than that, and I reversed what
g Judge Advocate General had in my absence very properly, as a matter of
to be the limitations placed upon our office to recommend clemency, and
d the boards to review and recommend clemency in proper cases. (P. 182.)

the fact is that the practice of the Judge Advocate General's
n recommending clemency was never interrupted. Recom-
ions for clemency in appropriate cases have always been made.
found in General Order No. 7 prevented or restricted that
. I never knew that such an interpretation of the order was
ed by anyone until I read the testimony and read Gen.
statement to the contrary. He did not raise that objection
eral Order No. 7 in the memorandum he filed in objection to
der (pp. 93–94), although he says he was not consulted about
e of the order; nor did he, while acting on such cases, entertain
view. The proof of what I say is record proof. As late as
7, 1918, two months and a half after General Order No. 7 had
it in force, and just before Gen. Ansell's departure for France,
elf returned a record to a division commander with the advice
e sentence was legal, coupled with a recommendation that it be
ed (Case 112666, Clifton Cox, Apr. 17, 1918). During Gen.
absence in France, the Acting Judge Advocate General was
mes J. Mayes, who certainly recommended clemency in one
thin General Order No. 7 (Case 115198, James Cox, June 19,
Whatever instructions Gen. Ansell gave upon his return to
end clemency in proper cases, inaugurated no new practice in
spect, and it was never necessary to do violence to General
No. 7 in recommending such clemency. I treat this matter
xtensively in Appendix No. III(e) of my testimony, and show
onclusively by testimony given by Col. Clark and Col. Davis
e office construction of General Order No. 7 was not what
nsell states it was.

Gen. Ansell consulted in the preparation of General Order
On page 134 of his testimony before this committee Gen.
says that he was not so consulted, in the following language:
gh I had brought them to the attention of the department, I
t invited to participate in those matters," but goes on to say:

ficer in the department, however, handed me the original draft of the order,
lt so strongly on the matter that I took it to Gen. Crowder and said, "It is true

this is a step in the right direction, but it does not go far enough. * * *." And after some two or three weeks' argument the order was finally amended and probably published in February, so as to stay all sentences in cases not only of death but of dismissal and of dishonorable discharge, until we could study the record and advise—having no authority—the commanding general. (P. 134.)

The truth is that so far from Gen. Ansell not being consulted about these matters, there is positive evidence that he did participate in the general consideration of this order when in preparation, in a memorandum which is on file in the department, dated January 12, 1918, entitled "Memorandum for Gen. Crowder" and signed "S. T. Ansell" discussing the proposed General Order No. 7 which was known in the office as "Maj. Davis's proposed rule," which memorandum is set forth on pages 93 to 94 of the testimony of Gen. Ansell before this committee.

When I review all of these facts in connection with your question as to the relations between Gen. Ansell and me I discover him, from and after the turning down of his November 10 brief contending for appellate power in himself, in an attitude which can not be said to have been a cooperative one with the established policies of the office. While occasionally using the power of clemency recommendations, it was not used vigorously to correct an evil which, according to his own testimony, was of growing magnitude. Unquestionably he would have dealt with these matters efficiently enough if he had been allowed himself to exercise appellate power, but his attitude seems to have been that of a man who would put out a fire with his own hose or would otherwise let the building burn.

I need not speak of later events. The utterances before this subcommittee indicate such a hostile attitude toward me as to leave you in no doubt. But it would seem that I share this hostility with practically the whole Army.

May I digress for a moment to make what appears to me a very pertinent inquiry? Why is it that the Navy, with a system of military justice identical with that of the Army, has gotten through this World War without any agitation against their system, for I assure you that the systems are identical as to fundamentals; and the conditions were more or less identical. They are lacking in this appellate power. They expanded from 50,000 to 750,000 men, or more than 1,400 per cent, while we expanded from about 200,000 to nearly 4,000,000—or about 2,000 per cent.

Senator WARREN. Now, General, right there; they did not have men at the front in battle, and that might be stated as some reason. But, if I understand you correctly, and the other witnesses that have been before the committee, these sentences—that is, on the minor offenses, and very severe sentences, long-time sentences, etc.—occurred in the Army here.

Gen. CROWDER. A good many of them occurred in the Army here. That is what makes the comparison between the naval service and our own appropriate.

Senator LENROOT. Were there such long sentences in the Navy?

Gen. CROWDER. Apparently the Navy found a way of controlling the matter of long sentences, whether by use of the power of clemency or by admonition to courts, or by duly promulgated admonitions upon the measure of punishment, I do not know. They drew their officers and jackies from the same American homes from which we drew our officers and soldiers. They had the same problems of

discipline before them—and yet they seem to have gotten through the war without any public agitation or scandal. How did they do it? I think that the answer will be found to be that they had an energetic, alert man at the head of the Department of Naval Justice, supported by a loyal, enthusiastic personnel, and using every authority which they had under the existing law, but assuming no extraordinary authority like appellate power in the Judge Advocate General to keep down the measure of punishment. The fact is that they achieved good results by proper administrative methods under a system that is fundamentally identical with our own. If our code is a code of organized injustice, "unworthy of the name of law," so, too, is theirs. If radical amendments are to be made in our code along fundamental lines, radical amendments should be made in the naval code as well.

Certainly the Congress of the United States is not going to extend relief to the Army in such a matter and leave the Navy to live under a code which is a code of organized injustice, "unworthy the name of law." There would be something very inconsistent in finding the Army system fundamentally wrong, and, by new legislation, destroying its fundamentals, as it is proposed to do in the pending bill, and in leaving the Navy under the kind of a system which is so severely condemned for the Army.

Senator WARREN. Just an instant, General. I had occasion to appeal to the Navy, both in the regular naval service and the marine service, which is like our Army, of course, in two or three cases, and I have had—I will not say instant action, but action very soon, where a man has been tried and sentenced to dishonorable discharge and confinement, where the man has wanted to go back into the service and reenlist and cure his misdoing. They have been very quick to act upon it; and I know of two or three cases, one of which was in the marine service, where simply the request was all that was necessary. It was so, very, very frequently. I suppose the same thing was done in the Army.

Gen. CROWDER. It ought to have been done.

Senator WARREN. It could be done?

Gen. CROWDER. It could be done.

Senator LENROOT. Do I understand that it is your thought that the courts-martial in the Army felt that these excessive sentences were rather favored by the War Department, and that was one of the reasons for them?

Gen. CROWDER. No; I do not think they felt that they were favored by the War Department, but they thought that the deterrent effect of the heavy sentences was needed, and they found themselves unchecked by the War Department.

Senator LENROOT. And you think they were checked, probably, by the Navy Department?

Gen. CROWDER. I do not know what happened in the Navy Department. I know that they got through without any of this agitation, when they had the same kind of law to enforce that we had, and practically the same conditions to face.

There is no effective regulation by statute of maximum limits of punishment in the British service. I noticed, however, a circular issuing out of the British war office cautioning the courts upon the subject of unequal sentences during the war, and admonishing them

that punishment within certain limits would, in the judgment of the war department, meet the requirements of discipline.

Senator LENROOT. Do you think that would have been within the proper jurisdiction of the Judge Advocate General's office?

Gen. CROWDER. To suggest to the President?

Senator LENROOT. Yes.

Gen. CROWDER. To ask the issue of an order of that kind, to suggest, yes; the Judge Advocate General could have done it at any time. And when I went back to the office to catch this storm of accusation, the first thing I did was to request the issue of that kind of an order, reminding the field commanders that the armistice had been signed, that hostilities had ceased, and that the old presidential limits of punishment ought to be observed except in cases where they were willing to make of record the existence of circumstances which would justify a higher punishment than was provided in the President's limits governing in time of peace. That order was issued.

Now, when I was preparing that order I called into conference the head of the military-justice section, and he said he could supply me with the verbiage of the order, because he had submitted to Gen. Ansell the propriety of issuing or requesting the issue of that kind of an order back in September, 1918, and he said that Gen. Ansell directed that an order be prepared of that general character for submission to the War Department; but, he said, "We lost sight of it in some way, and it never was done."

Senator LENROOT. It never was submitted?

Gen. CROWDER. It never was submitted to the Secretary of War or to the Chief of Staff.

Senator LENROOT. I want to ask you, generally, so far as these excessive punishments related to this country, could there be any possible good in the way of discipline or otherwise, or what could have been in the minds of these officers on these courts, in inflicting these very excessive punishments?

Gen. CROWDER. Solely, as I see it, the deterrent effect; most of them having been adjudged after the call came from France that they needed bullets rather than bread, and when our commands were disintegrating through absences without leave and other offenses that seemed to show a lack of the discipline that the Army would have to have if it was to go up against as determined an enemy as the Hun. And they adopted the view then and there that the only means that they had to strengthen the discipline of the Army was heavy sentences of courts-martial—not the only means, but the essential one.

Senator LENROOT. Do you think, from the standpoint of deterrent effect alone, that there is any difference between a 10-year sentence and a 25-year sentence?

Gen. CROWDER. Personally, I do not.

Senator LENROOT. No.

Gen. CROWDER. I think it was a mistaken view, and that was the time to speak a word, especially to Army commanders in this country, and I believe if that word had been spoken we would have heard nothing about this, because I have yet to encounter a disposition

he part of commanding generals in the field to reject advice ; from the War Department, or a disposition on their part to themselves into any kind of hostility to duly communicated tion or request. It is true that the Secretary of War could ve directed or controlled courts as to the quantum of punish- nor the commanding generals as to the amount of punishment ould approve, but he could have requested them to observe limits, and I believe that request would have been effective; alert man at the head of the department would have followed ourse where it was necessary to keep down these heavy sen-

tor WARREN. As I understand it—and I want you to correct I am wrong—the machinery of your department when you is a matter of fact, the Judge Advocate General, and Gen. was acting, was somewhat out of gear during these times when ought of severe punishments, etc., came up; there was not that ay of action that had preceded.

CROWDER. Strange to say, I was so absorbed in the draft had little or no knowledge of the fact that these sentences were given, and there was little discussion between Gen. Ansell yself regarding them prior to the armistice, that I can now t; certainly, I had no adequate warning from him of the condi- hich he has sensationalized before the country. As I say, when oubled the number of men to be furnished in March of 1918, the number for April, and trebled it again for May and and then put upon me the almost insurmountable task of 401,000 men in July, I lost all contact with the rest of the I was oblivious to what was going on up there in the Judge ate General's office along those lines; and I never got the ntil I went back after the armistice to take control of the nent. Since then I have had the duty of trying to explain ing to the American people and to Congress, as they called for ation.

ve remaining, this matter of trying to interpret the pending d its application to a particular case, but I notice that it is o'clock.

tor WARREN. Yes; I have to go into a conference with the at 2 o'clock, and Senator Lenroot has a matter upon the floor Senate, so that we shall have to adjourn over.

tice that permission was given to Gen. Ansell while he was ng to say what he chose about anybody or anything, practi- and for that reason I wanted to say that so far as the com- was concerned there was nothing held back.

CROWDER. There is a mass of accusation and defamation ich I shall call the attention of the committee later. In ; it—quoting it—I exhausted an alphabet, and then some, ersonal accusations against myself.

tor WARREN. Do you mean that you have assembled all that?

CROWDER. Of one witness only, Gen. Ansell, and there are al accusations against the Secretary of War that carry you through the alphabet to V, as I now remember; and there are al accusations against the American Bar Association com- , against the bureau chiefs, against Gen. Kreger, against the

Inspector General, and against ex-President Taft, and I have it all extracted here; and before I get through with my testimony I want to pass up to the committee the responsibility of leaving it unanswered. If it is true, if it is only half true, yes, if it is one-tenth true, it is the duty, it seems to me, if I may be permitted to suggest it, of the House of Representatives, to present articles of impeachment, and of the Senate to organize itself into a high court of impeachment, and it is the duty of the President of the United States to take personal control of the War Department and order a few courts-martial.

Senator LENROOT. You think that court-martial would not be sufficient, and we would have to take up impeachment?

Gen. CROWDER. Yes; I think impeachment would be necessary.

(Thereupon, at 1 o'clock p. m., the subcommittee adjourned until Tuesday, Oct. 28, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

TUESDAY, OCTOBER 28, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Lenroot.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER—Résumed.

Gen. CROWDER. Gentlemen, I thought I had discovered at our last session a desire, and, of course, a commendable one, to finish at the earliest date possible.

Senator WARREN. We certainly do not want to cut you off at all.

Gen. CROWDER. I can abridge what I have to say by introducing certain memoranda that I have prepared—personal accusations and my replies thereto—and would unhesitatingly follow that course but for the fact that it might be said by some that in following such a method I was avoiding cross-examination on my testimony. If I could be relieved of that inference, I would go ahead and greatly abridge the hearings by submitting these memoranda without reading them.

Senator LENROOT. I think that course will be entirely satisfactory to the committee; and, of course, if we desire to cross-examine you upon any points, we can do that later.

Gen. CROWDER. That will, of course, help out quite a good deal.

In the discussion of the November briefs at the last hearing, a reference was made to the Texas case, and at least one inquiry was made respecting the rank of the soldiers tried and the administrative course pursued with respect to them subsequent to the trial. Were they honorably restored to duty to serve out their original enlistment periods or were they permitted to reenlist? Did they lose their continuous-service status and their continuous-service pay?

TEXAS MUTINY CASES.

In speaking of these cases, Gen. Ansell says (p. 118):

> Now [the Secretary], upon the advice of the Judge Advocate General * * * says to these unjustly convicted men: "I will do convenient justice: I will permit you to reenlist" * * * the Secretary said: "I will permit you to reenlist under

a statute which says that when a man has been properly convicted and the Secretary of War believes that he has actually expiated his offense and has shown that he is a good man, the Secretary may then waive the inhibitions placed upon his reenlistment by the act of 1894, to the effect that no man who has been dishonorably discharged from the Army can be reenlisted therein. * * * Thus, these men are graciously permitted their reenlistment as a privilege in an Army from which they have been illegally expelled and in which they can start to work up again. They lose, besides, their right to continuous service and continuous-service pay." (P. 118.)

This statement is erroneous in the following regard: The men were not reenlisted, but were honorably restored under the act of March 4, 1915, which abolished military prisons and substituted in their stead the United States Disciplinary Barracks. That law permitted either reenlistment or honorable restoration—this honorable restoration to be effective to revive the original enlistment contract for a period equal to the period not served. Upon the completion of the full period, which would be the original period, a man with a good record after restoration would be entitled to an honorable discharge from that enlistment. The actual orders issued in the case of these men were the following:

JANUARY 2, 1918.

From: The Adjutant General of the Army.
To: The Commandant United States Disciplinary Barracks, Fort Leavenworth, Kans.
Subject: Restoration to duty.

In the case of each of the following-named general prisoners, the unexecuted portion of the sentence published in G. C. M. O. No. 1174, Southern Department, October 16, 1917, is remitted; he is honorably restored to duty under the enlistment entered into by him on the date set after his name; is transferred as private to the Field Artillery, unassigned, and is detailed to duty at the United States Disciplinary Barracks for a period not to exceed three months:

Rupert P. Orndorff, formerly private, Battery A, Eighteenth Field Artillery, enlistment of December 22, 1913.

Roger Graves, formerly private, Battery A, Eighteenth Field Artillery; enlistment of December 12, 1916.

Andrew J. Brown, formerly private, Battery A, Eighteenth Field Artillery; enlistment of November 23, 1914.

John Van De Vooren, jr., formerly private, Battery A, Eighteenth Field Artillery; enlistment of February 7, 1916.

Frank J. Adamik, formerly private, Battery A, Eighteenth Field Artillery; enlistment of February 10, 1916.

John J. Puryanda, formerly private, Battery A, Eighteenth Field Artillery; enlistment of July 20, 1915.

Wilfred R. Knight, formerly private, Battery A, Eighteenth Field Artillery; enlistment of January 14, 1916.

Clarence Maheu, formerly private, Battery A, Eighteenth Field Artillery; enlistment of September 19, 1913.

Calvin E. Kunselman, formerly private, Battery A, Eighteenth Field Artillery; enlistment of November 29, 1916.

Ralph K. Green, formerly private, Battery A, Eighteenth Field Artillery; enlistment of November 29, 1916.

By order of the Secretary of War.

J. A. BARRY,
Adjutant General.

The statement is erroneous in another regard. Gen. Ansell states that these men lost their right to "continuous service" and to "continous service pay." This matter has been taken up by Maj. Bennett, of the Judge Advocate General's office, under my direction, and with the Auditor of the War Department and the Finance Officer of the War Department, with the result stated in the following memorandum:

OCTOBER 3, 1919.

stice.
'. A., SW.
um for Gen. Crowder:
ontinuous service pay—Texas mutiny case.

ordance with your direction, I have made an investigation as to the accu-
statement of Gen. Ansell before the Senate Military Committee to the
the 10 men sentenced to dishonorable discharge in the Texas mutiny case
eir rights, as a result of having been dishonorably discharged from the
continuous service pay.

men were not deprived of their right to continuous service pay by reason
shonorable discharge from the service and subsequent restoration. The
the finance officer of the War Department, and the Controller of the Treas-
where the facts are identical with the facts in the cases in question, are to
hat the act of restoration places the man back in his old enlistment, and that
ation of that enlistment period the man may, within the time specified in
ous-service-pay act, reenlist and be entitled to and receive the increased
ized for another enlistment period.

estion, so far as the records of the finance office and the office of the Auditor
Department show, has been raised as to the right to continuous service pay
he 10 men dishonorably discharged and later restored to duty. I was
the finance office and the auditor's office that should this question later be
ler the present facts they would hold these men entitled to continuous
.

C. A. BENNETT,
Major, Judge Advocate.

nsell, on pages 117–118, says:

us see what situation it left those men in, men of from 3 to 20 years' service:
sioned officers.

These men were branded as mutineers by the judgment of a court, irre-
Their service terminated that moment, their enlistment was cut short;
ity of their service was interrupted; their continuous-service pay had been
from them. (Page 118.)

cords of the office of The Adjutant General show that all of
n were serving in their first enlistment except one, Sergt.
Poryanda, who was serving in his second enlistment, upon
entered July 20, 1915; trial occurred September 17, 1917.
Ansell's statement, therefore, as to the length of service of
n, is erroneous.

ther discussing the November briefs, I referred to the fact
of the 17 officers concurring with Gen. Ansell upon his
lding that appellate power was vested in the Judge Advo-
eral by the terms of section 1199 of the Revised Statutes,
sequently before this committee withdrawn that concur-
d expressed their nonconcurrence in the conclusion. These
ers were Lieut. Col. Alfred E. Clark, a lawyer from Port-
egon, commissioned in the Judge Advocate General's depart-
d serving in the department throughout the war in the grades
and lieutenant colonel; and Col. E. G. Davis, a lawyer from
a graduate of West Point, but who, for many years, has
acticing law in the State of Idaho, at Boise. I promised to
the record where they had withdrawn that concurrence, and
and that to the stenographer to put in.

urged by Senator Chamberlain to shorten his testimony as
s possible on this particular point, Lieut. Col. Alfred E.
plied:

ood, I can conclude this then by simply saying that I did not finally agree
. Ansell. (P. 173, hearing before the Senate Military Affairs Committee
0, Feb. 26, 1919; see also, pp. 172 and 174.)

The second officer, Col. E. G. Davis, testifying on the same day (see pp. 203 and 204 of the same hearing), said:

> We (Col. Clark and himself) reached the conclusion that the better legal opinion was against the position which Gen. Ansell has assumed. (P. 204.)

I add these in order that my testimony may be complete by reference to the published hearings of the Senate Military Affairs Committee.

The reasons given by these officers are the foundation of my further statement that if all those gentlemen who concurred with Gen. Ansell on that brief were called before the committee and asked if they at present adhered to the view that section 1199, properly construed, conferred appellate power upon the Judge Advocate General, all but two or three might likewise withdraw their concurrence previously expressed. I have no personal knowledge of their views. I can only anticipate that when they are told that there was concealment in the November brief of an express grant of appellate power in the bankruptcy statute invoked as a legislative precedent; that the legislative history of section 1199 was inaccurately discussed, that the views and practice of Judge Advocates General Holt and Dunn upon this subject were misstated; that the statement that no court in the United States had ever passed upon the question was erroneous; and that the statement that the Judge Advocate General of the British Army exercised this power was likewise erroneous; when they realized that all five propositions upon which Gen. Ansell's construction was predicated were either misstatements or misleading statements, they would have no course but to withdraw their concurrence.

Further, in discussing the November 7 briefs, I referred to the fact that in concluding my opinion of November 27 I had promised a further study of this question of appellate power, first to see if it could not be deduced out of the inherent power of the President as constitutional commander in chief. I also stated to the Secretary of War that if it could not be deduced in that way I would present a project of legislation which would confer this appellate power upon the President in express terms. I prepared that project of legislation conferring upon the President in express terms this appellate power, and submitted it to the Secretary of War in January, which he, in turn, submitted to the chairmen of the two military committees of Congress on January 19, 1918, with an elaborate presentation of the reasons why such legislation should be enacted. In respect of this project I have to answer the following charges made before this committee by Gen. Ansell:

> I should like to say that I have never believed, and I have good reasons for not believing, that that bill was submitted to this body in good faith. That bill was drafted and submitted by the Judge Advocate General of the Army, through and with the approval of the Secretary of War. The question is, Did the Judge Advocate General of the Army and the Secretary of War at that time want any revisory power? And really, do they want any now? (P. 111.)

And further he said:

> It is significant also that his (the Judge Advocate General's) interest was not such as to produce subsequent effort to secure the enactment of this legislation. (P. 219.)

Further criticizing the bill, Gen. Ansell says that if the Secretary of War and the Judge Advocate General had intended any rea

revisory power, the bill itself is evidence to the contrary, and then adds that it gave the power—

(1) To set aside the finding of "not guilty," an acquittal, and to substitute for it a conviction; * * *

(2) To substitute a finding of a large offense for one of minor or lesser included degree; and

(3) To strike down a smaller punishment and substitute for it a larger one. (P. 110.)

He adds:

I can hardly conceive that anybody would submit such a bill as that to the Congress of the United States expecting it to pass upon thorough investigation, because few men in touch with the people of the United States, representatives of the people of the United States, would ever give their approval to a proposition that is so un-American, so basically illegal, and unjust and unfair, as to permit any man to strike down the judgment of a court to the disadvantage of the accused, substituting harsher punishment, harsher penalties, than the court awarded. (P. 111.)

I am frank to say that if the project of the bill formulated by me and transmitted by the Secretary of War to Congress means what Gen. Ansell says it means or can be reasonably construed to mean what he says it means, then I have given strong evidence of incompetency to discharge the duties of the office of the Judge Advocate General. Let us take up seriatim the construction Gen. Ansell places upon this bill.

In order for you to appreciate the points I have to make, it would be helpful if you had the bill before you.

Senator LENROOT. Where is that printed in this record?

Gen. CROWDER. It is on page 108 of this record.

Senator LENROOT. Yes; I have it.

Gen. CROWDER. I will wait long enough in my comment for you to glance over that bill. The italicized portion there.

Senator LENROOT (after examining the bill). Very well.

Gen. CROWDER. Now, the bill vests in terms in the President the power to set aside any finding in whole or in part. The words of grant in this project are "disapprove, vacate, or set aside," and that is all the power that the bill confers upon the President in respect of the findings. Where, I ask, is the power given to substitute a conviction for an acquittal?

Gen. Ansell's next contention is that the bill gives the power "to substitute the finding of a large offense for one of minor or lesser included degree." Where, I ask, is this power conferred? As I have said, the bill in terms gives the President the power "to disapprove, vacate, or set aside any finding in whole or in part." Is there anything said here about the power to substitute a finding of guilty of a larger offense for a finding of a smaller or included offense? Can anyone contend that under the language of this bill the President may substitute for a finding of guilty of manslaughter a finding of guilty of murder? Again I say it is impossible to understand how any such contention could be made.

Senator WARREN. Your contention is that it was all in the other direction?

Gen. CROWDER. But this construction of Gen. Ansell passed unchallenged, and a reader of what he said might conclude that his remarks were convincing to the committee.

Now, I have got something more.

Senator LENROOT. I would just like to ask you this: Your theory is that an acquittal, even though this would be translated as giving him a right to set aside a finding of an acquittal, and the court having dissolved, even if that had been set aside, there was no further power in the reviewing authority?

Gen. CROWDER. If the court had adjudged an acquittal both the reviewing authority and the President were absolutely powerless. They can not control the court.

Senator LENROOT. No; I mean under this bill.

Gen. CROWDER. This bill; it did not change the situation.

Senator LENROOT. Of course, technically, this would give power to set aside a finding of acquittal.

Gen. CROWDER. Yes; but the power of disapproval of an acquittal has been exercised from time immemorial under the common law, military, until recently when we changed all that by an Executive order. But there never was power in any reviewing authority, even the President, to substitute a conviction for the disapproved verdict of acquittal.

Senator LENROOT. Yes; but heretofore the President himself had no power to set aside a verdict.

Gen. CROWDER. Of acquittal?

Senator LENROOT. Yes.

Gen. CROWDER. Yes; he had, when he was the reviewing or confirming authority.

Senator LENROOT. Under what?

Gen. CROWDER. Under the common law, military.

Senator LENROOT. I had supposed the theory was that he had not.

Gen. CROWDER. Perhaps a part of our difficulty is in the use of words. I can not distinguish between the legal effect of the two terms, "disapprove" and "set aside."

Senator LENROOT. I had understood that it was taken for granted that while the President might disapprove a finding, that did not set aside the verdict. In other words, it did not remove the stigma, the mere disapproval, unless the court followed it out by action.

Gen. CROWDER. Disapprove a finding of acquittal?

Senator LENROOT. Yes; any finding.

Gen. CROWDER. If he disapproves a finding that is the end of the case; there is an absolute wiping out of the consequences.

Senator LENROOT. Oh, the consequences!

Gen. CROWDER. You can not disturb the historical fact that a court has met and has reached a finding of guilty.

Senator LENROOT. Yes.

Gen. CROWDER. But the reviewing or confirming authority is a part of the court. If he withholds approval of the findings of the court they have no validity; and yet we have always held that it had this much validity, that there has, in such case (except where the disapproval was based on jurisdictional grounds) been double jeopardy or a previous trial.

Senator LENROOT. I understand that; but I think it is very important whether I have misunderstood the theory throughout here. I had understood that one of the reasons why it was agreed by both sides to the controversy that there should be this appellate power vested somewhere, was that under the law as it now stands, while the

President could relieve the defendant from the consequences of a verdict, he had no power to set aside that verdict. Now, am I wrong about that?

Gen. CROWDER. I do not think there is any difference between us, if we can understand the terms in which we are talking. When he disapproves a finding and a sentence, I can not myself distinguish the difference between that and the setting aside of the finding and sentence, because neither has any validity until it has the approval of the superior authority; and lacking validity it remains not a finding of guilty, not a sentence. It is just as necessary, Senator, that the reviewing authority approve in order to give the finding and sentence validity as it is that the court should have adjudged the finding and sentence.

Senator LENROOT. I may have gotten an entirely incorrect idea of what this involved. I had supposed that the defect in the law was that, while they had the power to disapprove, it only related to the execution of the judgment.

Gen. CROWDER. Oh, no.

Senator LENROOT. And that the very purpose, both of this bill and of the legislation—to that extent both sides are agreed—was to vest the power in some appellate body to set aside actually and remove the stigma of a verdict, in case it was wrongfully rendered.

Gen. CROWDER. I now see clearly what obstructs a complete understanding. There are two classes of cases to consider. First, those in which the President is the reviewing or the confirming authority; second, the large class of cases where a subordinate commander is the convening and reviewing authority and whose action by way of approval or disapproval is final. Taking the latter class of cases, suppose the subordinate commander disapproves a finding of guilty; what is there left of the case? Nothing. That man is in the condition of a man who has been acquitted. You need no remedy to reach his case.

Senator LENROOT. That is where the convening authority reviews?

Gen. CROWDER. Where the convening authority reviews.

Senator LENROOT. Yes.

Gen. CROWDER. The same thing is true in the class of cases which come from the court to the President as the convening or confirming authority. He withholds his approval, or he disapproves.

Senator LENROOT. The language is very different in the two cases.

Gen. CROWDER. I do not understand so.

Senator LENROOT. The language is very different in the two cases, is it not; of the power of the President and the power of the convening authority to review?

Gen. CROWDER. Not where they are both convening authorities.

Senator LENROOT. No; I understand; but where they appeal to the President?

Gen. CROWDER. Where the President is the confirming authority?

Senator LENROOT. Yes.

Gen. CROWDER. Then he passes upon both the findings of the court and the action of the convening authority below.

Now, in the cases where—and they are the great majority—the action of the reviewing authority below is final. The President had no power to wipe out the stigma of conviction, even though he was satisfied of the existence of prejudicial error that would invalidate

that case. If it was not jurisdictional error he was without power, and the purpose of all this legislation is to give this power, so that the man will always have a remedy.

Senator LENROOT. Now you and I agree; but I do not understand the distinction that you make, General. Pardon me. I did not suppose that the power of the President to disapprove in any case as a confirming authority carried with it under existing law the power to set aside the proceeding itself.

Gen. CROWDER. As convening or confirming authority?

Senator LENROOT. Not of the convening authority, but of the President of the United States.

Gen. CROWDER. I have used both in my discussion of this subject.

Senator LENROOT. Oh, yes.

Gen. CROWDER. The power of the convening authority to disapprove a case, once exercised, is a complete absolution of that man. It has the full effect of an acquittal.

Senator LENROOT. Yes; of course, of the convening authority. Now, take it of the President as confirming authority?

Gen. CROWDER. Let us suppose that the convening authority below has approved. His action under the present code and until the issuance of the General Order No. 7, was final, except for jurisdictional error. The President was without any power. The purpose of all this legislation is to vest in the President, in this class of cases, the power to do just what the reviewing authority by law could have done, namely, to disapprove the findings and sentence.

Senator LENROOT. Then that is where I misunderstood you. What did you mean, General, when you said, as I understood you, that when the President of the United States disapproved the findings it set aside the whole proceeding under the existing law?

Gen. CROWDER. I meant that there was a limited class of cases in which the President is either the convening or the confirming authority, and in which limited class of cases his disapproval of the findings operates as an acquittal; but in the larger class of cases—the great majority—he is neither the convening nor the confirming authority, and has no power of disapproval under the present law.

Senator LENROOT. Yes; I understand that.

Gen. CROWDER. The President convened the court for the trial of Gen. Swaim, I think. He probably convened the courts for the trials of Gen. Hazen and Gen. Fitz-John Porter, but I am not certain.

Senator LENROOT. There he was the convening authority?

Gen. CROWDER. Yes; but more frequently is the confirming authority.

Senator LENROOT. Yes.

Gen. CROWDER. And what class of cases does he confirm? Cases of death and dismissal which the reviewing authority below has not the authority to confirm. In that limited class of cases he is the confirming authority. Now, in respect of those he has this same power that the reviewing authority below has to wipe the whole thing out by disapproval, and I think if your mind will rest upon this proposition you will have the issue clearly before you. Those two classes of cases in which the President is either convening or confirming authority you can largely ignore in discussing the necessity for appellate power, and fix your attention upon those cases where the action of the reviewing authority below is final under the present law,

except as General Order No. 7 has operated to reserve jurisdiction. There is where the necessity for this appellate power exists. Now, I do not say that that project did not give the President more appellate power than he has as convening or confirming authority, but I do say that he has now that power of disapproval, in all cases where he is convening or confirming authority. He has not, of course, the power to substitute a finding of a lesser and an included offense, as we intended to give it in that proposed new legislation, but he did have this power of disapproval; and when the President wipes out a trial below in the two classes of cases he is competent to consider, namely, cases where he himself has ordered the trial, and cases where under the law he is the confirming authority, it is just as if there had been no trial.

I am very glad that this matter was brought up, because it is very important to understand the scope of this new legislation that is being sought, and what classes of cases it is going to reach.

Senator LENROOT. I think I understand you now.

Gen. CROWDER. But, still more important, Gen. Ansell declares that under the terms of the bill prepared by me for increased appellate powers in the President, it would be competent for the appellate authority to increase sentences adjudged by courts-martial. Heretofore I have been dealing with findings. Now I ask you to look again to see what power that bill gives to the President over a sentence, because I want to be understood in regard to this. The language employed in that bill as to sentences is "to modify, vacate or set aside" sentences. Clearly the power to increase sentences can not be found in that language unless it is contained in the word "modify." Before, in discussing the findings, we were dealing with the language, "to disapprove, vacate or set aside." Now we are dealing with language in part new, to "modify, vacate or set aside sentences." Clearly the power to increase sentences can not be found in the language unless it is contained in the word "modify." It needs but a moment's reflection to perceive that the word "modify" used in a penal statute is not susceptible of the meaning Gen. Ansell attributes to it.

The Century Dictionary gives the following as the primary definition of the verb "modify": "To qualify; especially, to moderate or reduce in extent or degree."

The Standard Dictionary gives its first meaning as "to make somewhat different;" and then adds the following: "To make more moderate or less sweeping; reduce in degree or extent; qualify; as, to modify a punishment."

Etymologically, as the dictionaries show, the word means "to set bounds to."

The word has been judicially defined, notably in the case of State *v.* Lawrence (7 Pac. 116; 12 Oreg. 297), a case frequently cited and whose definition is quoted in the Century Dictionary. The court there said:

> What is meant by the words "may modify * * * grand juries?" In a general sense, to modify means to change or vary—to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary, and popular sense. A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, power or duties, purposes or objects, of the subject-matter to be modified, without

touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally existing thing.

It is true that there are some decisions which give to the word "modify" as used in civil statutes a meaning equivalent to "change"; but the weight of authority is against it, as pointed out in Louisiana Railroad Co. *v.* Crossman's Heirs (35 Southern, 784, 785; 111 Louisiana, 611). There a corporate charter empowered the district court to modify the report of commissioners to appraise property, and it was held that this did not give the court authority to increase the amount found by the commissioner. The Supreme Court said:

The views of the courts vary in these (the common-law) States. The weight of the decisions, however, does not sustain the view that it is the intention, in using this word, to enlarge or increase an amount allowed instead of, as expressed in the statute here, "to modify." See word "modify," 20 American and English Encyclopedia of Law, second edition, page 836.

In opinions containing this word the courts have not used it in the sense of completely setting aside the thing to be modified.

The lexicographers define it in the sense of limiting or reducing the thing to be modified in extent or degree.

Although there are some decisions which give to the word, when used in a remedial or civil statute, the meaning of change, vary, substitute, yet I am unable to find a single penal statute in which the word is so interpreted. Indeed it is clear that under the canons of construction a penal statute containing a power to modify a penalty could not be so construed in opposition to the lexicographers and against the plain meaning and common usage of the word, against the rights and interests of the accused.

The word, I think, takes its meaning from its setting, from its association with other words, "to modify, vacate, or set aside."

And of course the rule of ejusdem generis is clearly applicable and requires the conclusion that the word "modify" is of the same general meaning as the word "vacate," or the clause "set aside;" but you do not have to rely upon this familiar rule of construction to reach the conclusion, because the bill as drawn does not leave the use of the word "modify" open to such construction so long as the clause "to modify, vacate, or set aside any sentence, in whole or in part" is associated with the further clause "to direct the execution of such part only of any sentence as has not been vacated or set aside."

This subcommittee, as well as the full committee, has for a majority of its personnel lawyers. In view of the fact that it has been publicly charged that we submitted a bill which would bear this construction that Gen. Ansell charges, I ask, as a favor, that this committee make an affirmative finding upon the question whether the bill is even susceptible of the construction that has been given.

It has been charged that my interest in this bill was not such as to produce subsequent effort to secure the enactment of this legislation.

I spoke in my testimony at the last hearing, I think—if not in my first hearing—of the fact that we were all convinced of the necessity of appellate power, and that we got an appellate review under General Order No. 7 as quickly as possible, and transmitted this legislation as quickly as possible in order to get the action of Congress upon it. Now, it is stated that we abandoned that legislation after

we submitted it, and made no effort to urge upon Congress its adoption. I offer in disproof of that statement the following:

(1) I appeared before the House Military Committee on February 5, 1918, and argued as strongly as I could for the enactment of this legislation. About this time I was made legislative liaison officer between the department and the House Military Committee to endeavor, if possible, to expedite the enactment of the necessary war legislation which had been asked of Congress. It must be within the knowledge of the members of that committee that I frequently appeared before the committee urging legislation.

As proof of the unusual efforts that I was making at that time to get something done, I prepared what had not been, I believe, prepared before in the history of the committees, a calendar which would show the progress of enactment of all the war legislation pending before the two committees. There was a House section of that calendar and a Senate section of that calendar. I did that in order that members of the committees to whom I talked could see instantly the status of any particular bill.

The two committees were pleased with the efforts made to advance legislation, and had this calendar which I now place before you printed, and thereafter it constituted the calendar to mark the progress of the bills through the two Houses.

This bill we are discussing was on that calendar and was called to the attention of the committees. The Senate committee never chose to hold a hearing upon it. The House committee did hold a hearing upon it at which I testified, and it was not reported favorably. I do not think they took any action upon it at all.

Meantime General Order No. 7 was working to secure this appellate review. It was reasonably effective to do nearly everything, perhaps, that could have been done under the bill with reference to death, dismissal, and dishonorable discharge cases, and I suppose that the view prevailed that it was no longer as urgent as some other of the war legislation that was taxing the time of Congress. I want to get that thoroughly impressed upon the committee that there was no neglect upon my part, and there never was any foundation for saying that I launched this in bad faith; that I had no confidence in it, and that I abandoned it before Congress.

Senator WARREN. General, Senator Lenroot has to go on the floor and I have to report now for a conference. [Turning to Senator Lenroot:] Are you going to be detained on the floor the balance of the day?

Senator LENROOT. Until Senator Cummins comes back.

Senator WARREN. I think we shall probably have to discontinue now. Shall we go on to-morrow?

(After further informal discussion the subcommittee adjourned until to-morrow, Wednesday, October 29, 1919, at 10 o'clock a. m.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, OCTOBER 29, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman) and Lenroot.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER—Resumed.

Gen. CROWDER. Yesterday I was referring to a charge that my attitude toward the bill to amend section 1199 of the Revised Statutes so as to confer appellate power upon the President respecting findings and sentences of courts-martial, was one of practical abandonment of that legislation. I referred to my efforts to secure that legislation and to my appointment as liaison officer between the department and the committees of Congress to expedite the war legislation, and said that in the course of that work I had prepared a calendar of unfinished business pending before the two Committees on Military Affairs. At the moment I could not lay my hands upon it. I knew that I had brought the document here. It was a document that was printed by Congress, and was used by the committees, and I would like to direct your attention to it. I have the original here. You see in this first part all of the House bills that the War Department was interested in, with these columns showing the progress of each bill toward enactment.

Senator LENROOT. I see.

Gen. CROWDER. Here end the House bills, and the Senate bills are in this part of it, and you will find the progress of each bill in the Senate noted in detail. Here is what appears with respect to the amendment of section 1199, Revised Statutes, "Increasing the revisory powers of the Judge Advocate General and the President." This is simply evidence on the question of whether or not my attitude was one of abandonment of this legislation.

Yesterday Senator Lenroot made some inquiries respecting the effect of the disapproval of findings and sentences of courts-martial by the reviewing authority, and I answered that the effect of disapproval was an acquittal. In order to put the matter beyond any question, I examined the records of the office, with this result:

1. Disapproval of a sentence of a court-martial by the reviewing authority is equivalent to an acquittal of the accused by the court. The following authorities are cited in support of this proposition:

Held, that disapproval of a finding of guilty has the effect of an acquittal. (C 2195, Apr. 4, 1896; 12168, Mar. 10, 1902; 12375, Apr. 23, 1902. Dig. Ops. J. A. G., 1912 Discp. XIV E 9 b (1) (a), p. 564.)

A disapproval of the proceedings of a court-martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act putting an end to such proceedings in the particular case and rendering them entirely nugatory and inoperative: * * *.

The effect of the entire disapproval of a conviction or sentence is not merely to annul the same as such, but also to prevent the accruing of any disability, forfeiture, etc., which would have been incidental upon an approval. (Davis, Treatise on the Mil. Law of the U. S., pp. 201, 202.)

Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory: * * *. Upon such a disapproval also the accused is restored *ex vi* to his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which he may have been subjected, and to be returned to the duties and rights of his rank and office: his legal rights and privileges remaining no more affected than if the trial has resulted in an acquittal. (Winthrop, Mil. Law and Prec., 2d ed., Vol. I, p. 690.)

The uniform practice of the Government seems to have been to regard such action (disapproval of a sentence) by the reviewing officer as tantamount to an acquittal by the court itself, and it can not be doubted that such is the effect of the order of the reviewing authority in this case. (13 Ops. Atty. Gen., 459, 460.)

I thought I would like to introduce that.

Senator LENROOT. Yes, we are very glad to have that.

Gen. CROWDER. I think this is an appropriate time to state the view of the committee of the American Bar Association upon this question of a military court of appeals, and first I would like to state how that committee came to be appointed.

On January 4, 1919, there appeared in the Associated Press dispatches, published widely, a statement by Judge Page, the president of the American Bar Association, following a meeting of the executive committee of that association, that the present military code was archaic, unworthy of the name of law, and Judge Page announced his intention to investigate through a committee appointed by himself. I brought that matter to the attention of the Secretary of War, and told him that I was under an engagement to proceed to Chicago, and address the selective-service boards of that city and of northern Illinois, and also to address the Chicago Bar Association on the following day at luncheon; that probably I would meet Judge Page, and that I wanted his authority to say to Judge Page that the department would welcome the appointment of such a committee, not that I felt very much assured by the circumstance that Judge Page had pronounced a verdict before he had investigated, but because I knew that any committee appointed by him would have to report back to the full bar association; and I had confidence in the judgment of the American Bar Association upon every question that was vital to the issues that had been raised.

I proceeded to Chicago, but I did not meet Judge Page. Later, my recollection is, the Secretary of War addressed to him a letter and asked him to proceed with his investigation, and that in pursuance of that letter Judge Page came to Washington. It is certain that he visited Washington, and called at my office, and we had some discussion about the work that would devolve upon the committee. I did venture to suggest to him the composition of an investigating committee, to this extent, and to this extent only: I said to him in effect that we have six living ex-Secretaries of War, all of them distinguished members of the American Bar Association: three of them Republicans, Mr. Root, Mr. Taft, and Mr. Stimson, and three of them Democrats, Mr. Wright, Mr. Dickinson, and Mr. Garrison: that all of them had an intimate knowledge of the Articles of War, derived from executing the military code in the graver cases that come before

the President for his confirming action, and that it seemed to me that one of the six might well be appointed upon the committee, probably as chairman. He made no reply to my suggestion, and afterwards when the committee was appointed, I was a little surprised that this suggestion had not met with favor. I happened to be in New York City when the announcement was made of the personnel of the investigating committee, and I met a gentleman whose name I do not now recall, but who lives in Albany and who has for a long time been secretary of the New York State Bar Association. He told me that he had cooperated with Judge Page in the selection of the committee. I expressed to him my disappointment that one of the ex-Secretaries of War had not been named on the committee, and I shall always remember his reply. It was, in effect, that "We did not want any one of them;" that they were all tarred with the same stick as Army officers.

Beyond that suggestion I took no interest in the personnel of that committee, and I do not know of any other suggestion that was ever made to Judge Page about who should serve on that committee. I was a little surprised when the committee was announced to find out that Judge Page had gone to the State of North Carolina, from whence Gen. Ansell comes, to select one of the members. I certainly should have been embarrassed if he had gone to the State of Missouri, my native State, and selected a member of the bar of that State to act upon that committee.

Senator WARREN. Do you think the Secretary of War suggested any of the names?

Gen. CROWDER. I have talked to the Secretary of War many times on the subject, and I have no reason to believe that he ever made a suggestion as to the personnel of that committee.

Now, I think we must all be coming to the conclusion that the great question which is to be settled here, the question as to which all others are subordinate, is the question of appellate review, and where that appellate power shall be vested. I have studied carefully the report of the bar committee. Referring to Gen. Ansell's brief of November 10, 1917, deducing appellate power in the Judge Advocate General from section 1199, Revised Statutes, and my opposing brief of November 27, 1917, the committee unanimously reported:

> It may hardly be necessary for the committee to express an opinion upon this question; yet we are inclined to think, in view of the custom of the Judge Advocate General for many years and the only Federal decision on the subject, the case of Mason in the Circuit Court of the Northern Division of New York, decided by Judges Wallace and Cox, that it would be rather difficult to establish as a matter of law that the use of the word "revise" in section 1199, conferred such an extensive authority as is now asserted by some. (P. 20, A. B. A. Rept.)

In other words, the committee unanimously reported their nonconcurrence with Gen. Ansell's contention.

Passing to the consideration of the legislation that should be had to secure adequate appellate review, the following views are expressed:

1. Views of the majority (Bruce, Hinkley, Conboy). The majority quotes with approval the following recommendation of Judge Advocate General Crowder in his letter of March 10, 1919, to the Secretary of War:

> Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War, January 19, 1918, which covers the ground more completely and more flexibly

than the now pending bills—referring to the bill introduced by Senator Chamberlain last winter (S. 5320), among others—and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar, February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact." This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters—the Judge Advocate General.

The majority add the following explanatory comments:

We believe that the reviews provided for should be appeals in every sense of the word on the facts and on the law and that the same general provisions and constitutional limitations should apply in such cases as in appeals from the civil courts. Argument, however, might be limited to the submission of a brief.

On the whole we are of the opinion that the functions of the Judge Advocate General's Department should be advisory rather than judicial, and that sentences should be approved or disapproved and new trials ordered or disallowed by military orders rather than by judicial decrees. (P. 46.)

2. Views of the minority (Gregory, Bynum). It would seem that the minority also contemplate reposing the revisory power in the President.

Mr. Gregory says:

The methods now established in the office of the new Judge Advocate General, although administrative, seem to be admirably adapted in most respects to secure an adequate review—

He is referring to General Order No. 7—

and if, in addition the President were given revisory power to be exercised within a reasonable period of time over judgments in general courts-martial, decisions of medical retiring and efficiency boards involving dismissals or discharges from service, and other similar bodies, I would think that this was adequate. (Pp. 91–92.)

In another recommendation the minority say that in case of the adoption of their suggested amendments for securing adequate trials and the President's revisory power, they would not favor any court of review beyond what they contemplate in the Judge Advocate General's office.

That if the amendments herein suggested, for the purpose of securing adequate trial in a general court, and the President's revisory power shall be adopted, with provisions for appeal when the judgment is against the accused, such appeal not ordinarily suspending execution of sentence, then, in my judgment, it would hardly be necessary to provide by law for automatic review in the Judge Advocate General's office of every case and that it should be binding, leaving that to the discretion of the President as Commander in Chief of the Army; nor to constitute further than is here contemplated a court of review as provided for in section 52 in the pending bill. (P. 95.)

I admit that it is difficult to reconcile these quoted views of the minority with the following language which I find in the minority report:

That the defendant should have a right of appeal, where the judgment was against him, to some board of review or similar tribunal, constituted in the Judge Advocate General's department, which board of appeal or board of review should have the right to modify, affirm, or reverse the judgment of the court, and also to grant a new trial; that this should be independent of and in addition to the so-called automatic review of judgments of courts-martial now carried on in the department of the Judge Advocate General, but that so far as practicable where an appeal was taken these functions should be exercised concurrently and by the same board. (P. 95.)

But by reading this last language in connection with the language quoted from pages 91 and 96, supra, I reached the conclusion that what is meant in recommending a board of appeal or board of review

is not that this board of appeal or review should be invested by statute with independent power, but that such board should be administratively established in the Judge Advocate General's department as an advisory agency to the President.

So understanding the minority recommendations, it would seem that, however they may differ in other respects and in lesser details—differences quite to be expected from independent minds—the members of the committee do not differ on the subject of appellate review. This very able and distinguished committee, representative of the bar of the country, after examination and study of the subject, appear to be unanimous in opinion upon the essentials, namely, that the law has not clothed the Judge Advocate General with appellate power; that revisory control of courts-martial should not be divorced from military authority; that legislation should provide additional appellate and revisory power; and that all such power should be lodged within the Army itself, to be exercised, in one form or another, by the President, as Commander in Chief, upon the advice of the Judge Advocate General and his office. Between that message from the committee of the Bar Association and my own expressed views there is no disagreement.

Senator WARREN. General, I think I have seen in this evidence the opinion of at least one witness, or the accusation, that this committee was a committee hand picked by the War Department.

Gen. CROWDER. Yes.

Senator WARREN. Are we to assume from your testimony that you do not agree with that?

Gen. CROWDER. I have stated all the "hand picking" that there was, so far as I was concerned. It was my single suggestion that one out of six of the living ex-Secretaries of War, because of their experience in applying the code, should be named upon the committee.

Senator WARREN. But that suggestion was not taken?

Gen. CROWDER. That suggestion was not taken; and that is the only suggestion that I ever made; and to that extent, and to that extent only, am I guilty of the charge of helping to hand pick the committee.

Senator LENROOT. And the attitude of Judge Page was rather adverse to your view?

Gen. CROWDER. Yes. Senator Lenroot, in the course of my examination, asked me if I was going to speak of the four death cases in France, and I said yes, at a later period I intended to refer to them. In respect of these four death cases I have to answer the charge of Gen. Ansell that—

> The whole military hierarchy, capped by your Chief of Staff and the Judge Advocate General of the Army, who is not independent of the Chief of Staff, clamored and entered into an agreement that these men should die. (P. 149.)

Who the rest of the military hierarchy were, with whom the Chief of Staff and myself were in agreement, is not expressly stated. Presumably it is another of those frequent exaggerations which we find throughout Gen. Ansell's testimony.

I have also to reply to the following allegation appearing in the Congressional Record of January 27, 1919, page 4639:

> What can be said of a Judge Advocate General, the highest judicial officer in the system itself, who pleads for a united front upon the part of all interested in the maintenance of discipline that innocent men may be sent to their doom as sacrifices to discipline?

On pages 134 and 135 Gen. Ansell gives a description of the four death cases from France—two for sleeping on post and two for disobedience of an order to get their equipment and to drill. All four cases came up from the division commanded by Lieut. Gen. Bullard.

In all four cases there was a finding of guilty and the imposition of the death sentence; likewise a letter of Gen. Pershing that accompanied the records and a copy of which will be found on page 141 of the record of these hearings. Gen. Pershing's letter was directed to me and urged upon me the view that there was a military necessity for the execution of these sentences, saying that he regarded the two soldiers who willfully disobeyed orders without excuse or extenuation as more deserving of the extreme penalty than the two who slept on post. He concluded his letter by saying: "I recommend the execution of the sentences in these cases in the belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future."

I had anticipated that the world war would not proceed very far until we had to deal with the execution of the death sentence coming up from the theater of war and I thought I knew the temper of the American people well enough to anticipate that only in case of the most urgent necessity would public opinion sustain the execution of the death sentence. I also appreciated the grave responsibility which would be assumed if, here in the War Department, we undertook to dictate as to the discipline of the Army in the theater of war.

We knew the lenient policy that Lincoln pursued. Speaking from the experience of that war, it was easily to be seen that there was the greatest responsibility incurred by the Secretary of War and the President in disagreeing with the commanding general of a field army and the commanding general of the American Expeditionary Forces, as to what was necessary in the enforcement of discipline in its command, especially during the period of fighting battles.

When the four death cases from France reached the office, I sent them to the best criminal lawyer we had in the office, Maj.—later Col.—Rand, whose position at the New York bar is well known to each member of this committee. He was the assistant of Mr. Jerome in the trial of a great many criminal cases.

He reported that the record was legally sufficient and recommended the execution of the death sentences.

They were sent back to him for rewriting, as it was thought that he had dealt with them too summarily. The records were sent to a number of other officers for report. I do not remember their names. I would not undertake to say how many were called in conference on these cases, but the facts have been given to this committee by Col. Davis and Col. Clark in their testimony at the February hearings. I can speak only as to my own state of mind. I never knew that my attitude, which was for clemency from the beginning, was questioned by anyone, until Sunday, January 19, 1919, when I read an article published in that day's edition of the New York World entitled "The thing we call military justice," a copy of which I can hand the committee, and in which it was reported, in effect, that my attitude in this case was in favor of the execution of this penalty.

I read that article on Sunday. On Monday morning I sent for Gen. Ansell and asked him if he had read the article. He said that he had glanced at it. I invited his attention to the fact that I was

accused in that article of entering into an agreement with other officers to secure an approval of these sentences, and asked him if he could state from recollection what my attitude was. He replied that in substance he could; that he remembered distinctly my coming to his room, very much worried about these cases, and expressing that worry to him and asking him if he would not take the cases and write a review of them. I did not pursue the matter further, except to say, in substance, "Thank you. I am glad your recollection accords with my own," and I was greatly surprised later, in an issue of the Congressional Record, which I think was that of February 19, to find it inferentially stated there to the public by Gen. Ansell that he had been compelled to resort to a communication to the White House through a distinguished member of the House Judiciary Committee to get the attention of the President in these cases in order to stop a concerted action in the War Department, of which I was a part, to take the lives of these men.

Now, in the course of his testimony before this committee Gen. Ansell, using quotation marks, attributes to me the following language, which he says I used in a note, or two notes, to the Chief of Staff. First, he represents me as saying:

> I have got the four death cases from France. They are cases in which the commanding general in France is very much interested and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing. (P. 137.)

Again:

> We ought to agree to uphold the hands of the commanding general, regardless of the merits. (P. 137.)

Then again:

> We ought to agree to support the hands of Gen. Pershing in these cases. (P. 137.)

And again:

> I recommend that these men die. (P. 137.)

Again:

> I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but understand, when I submit this memorandum to you, I do it with no desire to reopen this case. (P. 138.)

And again:

> While these facts suggest clemency, nevertheless I do not recommend it. Gen Pershing, of course, would feel that we had not supported him, and I sympathize with his view. (P. 138.)

Later, Senator Chamberlain and Senator Lenroot asked that these notes that I had written the Chief of Staff be put in the record. They were put in the record. Now, gentlemen, the language that I have read to you, that Gen. Ansell attributes to me, is not to be found in the notes. I ask for an examination of them.

Senator WARREN. These notes as they appear in the record (pp. 141, 145–147), are correct?

Gen. CROWDER. These notes, as they appear in the record, to the Chief of Staff. But this language that I have read to you here, all except just a phrase here and there that has no significance in representing my attitude toward the case, does not appear in the notes. It is his own deduction.

Senator WARREN. You allude to what appears in the testimony?

Gen. CROWDER. I have right here what appears in the testimony before this committee, and then I have in a parallel column the notes I actually sent. Now, his statement passed unchallenged before this committee, that I said what he attributes to me.

I want to state to the committee what actually happened.

Senator LENROOT. You are going into the notes?

Gen. CROWDER. Yes.

Senator LENROOT. Very well; I will not ask the question I was going to ask.

Gen. CROWDER. My first note to Gen. March was sent before I submitted any review on the case at all, and I asked for an interview, and in that very first note I suggested clemency for these men; but I was of the opinion that Gen. March, fresh from the battle fields of Europe, would have a better judgment about the situation than I would have, and I did say to him that it would be unfortunate if we had a divided opinion upon this subject, contemplating always that Gen. March might come to my view. I went up to Gen. March with the cases in my hand, but without a recommendation, and he said in effect that he did have knowledge of battle-field conditions over there, and likewise, I think he said, some knowledge of these specific cases—that he had heard them discussed; and he went on to give me the reasons why he thought Gen. Pershing's recommendation should be sustained, and that there should be an approval.

Backed as I was at that time with the opinion of several officers that the record was legally sufficient to sustain the findings, and also with Gen. Pershing's very unusual and emphatic recommendation that the sentences should be carried into execution, and with Gen. March's pronounced view that they should be carried into execution, I went back to the office and completed the review with this remark:

> I recommend that the sentence be confirmed and carried into execution. With this in view there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an executive order designed to carry this recommendation into effect, should such action meet with your approval.

And so the cases were submitted in that form. I found that my mind was not at rest on the subject, and I sought an interview with the Secretary of War.

Senator LENROOT. About what date was that recommendation? There does not seem to be any date in the record.

Gen. CROWDER. April 5, 1918, was the date that I wrote my first letter to Gen. March, in which I used this language. That was before I had submitted the cases. I asked for an interview, and I said, "There is a very large question in my mind as to whether clemency should be extended." That was my first attitude, before I had consulted with Gen. March. Then I went up and had this interview, and later on I appended to the review, after my interview with Gen. March, what I have just read to you, by way of final action on the cases.

Senator LENROOT. On the same day?

Gen. CROWDER. I do not remember, but probably, yes.

Then I went to see the Secretary of War about the cases, and I told him about my interview with Gen. March, and that my mind was not at rest on the subject, and that I did feel that we ought to have the kind of conference that would relieve the President from the necessity

of dealing with a divided recommendation. The Secretary of War was receptive, from the start, to clemency in these cases.

I followed up that interview with the Secretary of War with two other interviews direct upon this question of clemency. My whole purpose was to get the War Department to act as a unit on these cases, and believing all the time that we would have to do the rather unusual thing of overruling Gen. Pershing in this matter.

The attitude of the Secretary of War toward these two cases continually strengthened in the direction of clemency, and I recall with some definiteness, when I was talking with him about the embarrassment that would come from overruling the commanding general in the field, that he replied in effect "That is a responsibility I am prepared to take in a proper case."

There never was any necessity for anybody to go direct to the President to stop a concerted action upon the part of officials of the War Department to secure the approval of the death sentences in these cases, and I know of no subject connected with this controversy concerning which there has been so much misrepresentation of the attitude of individuals as there has been in this particular matter.

I wish to put into the evidence, if I may, these parallel columns, which show what I am charged with saying, and show exactly what I did say, in order that anybody by glancing at the parallel columns may find out whether there was any justification for the statement before this committee that I used this extreme language, or that my attitude is correctly stated when they say that I entered into an agreement with the Chief of Staff to secure the execution of the death sentences in these cases.

Inaccuracies of statement are nowhere better illustrated than in what Gen. Ansell says about these four death cases from France.

GEN. ANSELL'S TESTIMONY.	GEN. CROWDER'S MEMORANDUM OF APRIL 5, 1918, TO CHIEF OF STAFF.
I have got the four death cases from France. They are cases in which the commanding general in France is very much interested and is insisting upon the execution of the death penalty. I think it would be very unfortunate, indeed, if the War Department did not have one mind about these cases and agree to uphold the hands of Gen. Pershing. (P. 137.)	APRIL 5, 1918. MY DEAR GEN. MARCH: Here are the four cases from France involving the death sentence—two for sleeping on post and two for disobedience of orders. I regret that the reviews have been so long delayed, but I have had to go outside of the records for relevant facts. The first paper that will encounter your attention is a brief memorandum prepared by the officer charged with the study of these cases, which will give you a survey of all four cases and will prepare you for a quick reading and understanding of the review prepared by this office in each case.
We ought to agree to uphold the hands of the commanding general, regardless of of the merits. (P. 137.)	You will notice that I have not finished the review by embodying a definite recommendation.
We ought to agree to support the hands of Gen. Pershing in these cases. (P. 137.)	It would be unfortunate, indeed, if the War Department did not have one mind about these cases. There is no question that the records are legally sufficient to sustain the findings and sentence. There is a very large question in my mind as to

whether clemency should be extended. Undoubtedly Gen. Pershing will think, if we extend clemency, that we have not sustained him in a matter in which he has made a very explicit recommendation.

May we have a conference at any early date?

E. H. CROWDER,
Judge Advocate General.

Maj. Gen. PEYTON C. MARCH,
Chief of Staff.

CONCLUSION, GEN. CROWDER'S REVIEW OF CASES.

I recommend that these men die. (P. 137.)

The court was lawfully constituted. The proceedings were regular. The record discloses no errors. The findings and sentence are supported by the record and are authorized by law.

I recommend that the sentence be confirmed and carried into execution. With this in view, there is herewith inclosed for your signature a letter transmitting the record to the President for his action thereon, together with an Executive order designed to carry this recommendation into effect, should such action meet with your approval.

E. H. CROWDER,
Judge Advocate General.

GEN. CROWDER'S MEMORANDUM OF APRIL 16, 1918, TO CHIEF OF STAFF.

I think you ought to be acquainted with these additional facts which I have discovered subsequently to my first interview; but, understand, when I submit this memorandum to you, I do it with no desire to reopen this case. (P. 138.)

1. Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should have been invited.

* * * * *

While these facts suggest clemency, nevertheless I do not recommend it. Gen. Pershing, of course, would feel that we had not supported him, and I sympathize with his view. (P. 138.)

4. Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we are called upon to act were not well tried. The composition of the court in Ledoyen's case consisted of one colonel, one major, and four first lieutenants. The four first lieutenants could have had but little experience. The same court that tried Ledoyen tried Fishback. The court that tried Cook was composed of the same members, except a captain (doubtless of considerable experience), and a first lieutenant (presumably of little experience); and the same court that tried Cook tried Sebastian.

We have discussed the fact that each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made any fight for

his life. Each of the four men was defended by a second lieutenant, who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty and require the Government to maintain its case at every point.

It will not have escaped your notice that Gen. Pershing has no office of review in these cases. He seems to have required that these cases be sent to him for the purpose of putting on the record an expression of his view that all four men should be placed before a firing squad. I do not make this statement for the purpose of criticizing his action. Indeed, I sympathize with it. But it is fair, in the consideration of the action to be taken here, to bear in mind the fact that Gen. Pershing was not functioning as a reviewing officer with any official relation to the prosecution, but as commanding general anxious to maintain the discipline of his command.

E. H. CROWDER,
Judge Advocate General.

Senator LENROOT. If you are through with that, I would like to ask you a few questions on the notes.

Gen. CROWDER. Yes.

Senator LENROOT. With reference to the first note, where you say, "There is a very large question in my mind as to whether clemency should be extended," you wish the committee to understand that what you had in mind there was a suggestion of clemency? Is that it?

Gen. CROWDER. That is exactly what I want you to understand.

Senator LENROOT. Of course, the ordinary construction would be rather the contrary, would it not?

Gen. CROWDER. No, I do not think so; but I will admit that it is not as clear a phraseology as I could have employed.

Senator LENROOT. To be perfectly frank with you, it struck me upon reading it, death sentences being the exception rather than the rule, that the suggestion there, in that language, "There is a very large question in my mind as to whether clemency should be extended," did not imply, merely from the reading of the language, a suggestion of clemency.

Gen. CROWDER. Of course, I could have chosen clearer language, had I thought that my attitude as to clemency in this case would ever have been assailed. But, Senator, how could there have been any misunderstanding when you consider my note along with the Pershing letter recommending that the sentences be executed, and the recommendation of Gen. Bullard that the sentences be executed. They favored executing the death penalty. I was raising this new question of clemency, and certainly I was not raising it for the purpose of agreeing with them. So that I do not think that my note, in connection with what it was transmitting for the attention of the Secretary of War, could have been in the least open to this most obvious misconstruction.

Senator LENROOT. Then, at the time of the making of the recommendation itself, what review had been had, or what study had been had, of the facts in these cases?

Gen. CROWDER. First, by Col. Rand, whose qualifications to make the study I have referred to.

Senator LENROOT. Do you know what this study consisted of? Was it more than an examination of the record itself?

Gen. CROWDER. It could not have been any more than that, because it was all the opportunity he had to acquaint himself with the facts.

Senator LENROOT. Then how did the additional facts come to you? That is really what I am leading up to.

Gen. CROWDER. I went back to the office and asked an officer to go up to The Adjutant General's office and ascertain for me the ages of these boys. That was not in the record. I wanted to know how old they were and how long they had served, and what opportunities they had had to learn their duties as sentinels and as soldiers generally; and, aliunde of the record, I got that information.

Then I directed another officer to examine all the cases that had come in from France to see if there were other instances of trial for disobedience of orders and for sleeping on post, and what the sentences had been, and I got that information; and on the basis of that information I became more and more aggressive in claiming clemency for these men, because I found that there were two of them, I think, under 19, and the other two were under 20 years of age, and that all of them had had less than a year's service, and all of them were volunteers.

Senator LENROOT. Then you found some other facts with reference to acquittals of some other charge of a like offense?

Gen. CROWDER. Not acquittals, as I remember it, but very minor sentences, and some instances where the same offense had been tried by special court.

Senator LENROOT. Was there one case where one of the boys involved in the very same transaction was acquitted? As I remember, there was in your review of the facts.

Gen. CROWDER. May I ask you to restate that?

Senator LENROOT. Was there one case where one of the boys——

Senator WARREN. One of the four?

Senator LENROOT. No; not one of the four, but involved at the same time—was acquitted?

Gen. CROWDER. I do not recall that.

Senator LENROOT. Perhaps my recollection is wrong, but I thought I remembered where, in your review of April 10, you cited one case where there was a man named Hindman. Do you recollect?

Gen. CROWDER. No; I do not recollect.

Senator LENROOT. Oh, yes; here it is. On page 144 of this record; William Hindman. The record says:

> This soldier was accused of sleeping on post in the front trenches on the night of November 5–6. This is the same night that Pvt. Cook, who was convicted, is alleged to have committed a like offense.

Neither one of those two is one of the four, is that correct?

Gen. CROWDER. May I glance at that page?

Senator LENROOT. Here it is.

Gen. CROWDER (after examining page 144 of the record). No.

Senator LENROOT. That has nothing to do with any of these four in these cases?

Gen. CROWDER. No; I do not think so.

Senator LENROOT. Then, what have you to say as to the reviewing officer or the court itself, in extreme sentences of this kind, not supplying for the record these very pertinent facts that you afterwards discovered?

Gen. CROWDER. The failure to do so has got to be charged up, it seems to me, to the exigencies of the battle field and of the zone of active operations. I do not like to think that it is possible that a death sentence should come up here for review upon a record which failed to show many things which were necessary to be shown of record to form the judgment of the confirming authority respecting the action finally to be taken. I had a little less severe condemnation of that after reading a corresponding record which has been placed in evidence before this committee, in the British service. It is, if anything, more meager than the records in these four cases, and the man who was tried and convicted was not allowed to live more than 48 hours, when he was executed. There are two such cases in the record before you, of corresponding trials by the field court-martial of the British Army, placed in evidence by Col. Rigby. I supposed that a man like Rand and a man like Wigmore, who also made a study of these sentences, would comment on the very point that you have brought out, but they appeared to be willing to concede something to the exigencies of the battle field, and to the judgment of men on the ground, and it always entered into my head in passing judgment upon that phase of the situation that as good a soldier as Gen. Bullard and as good a judge advocate as Col. Winship, who was upon his staff, appeared to be satisfied with the evidence in the case.

Senator LENROOT. Nevertheless, General, would you not say that it was a most unfortunate condition of affairs where a death sentence inflicted for the purpose of discipline—because that was the primary purpose of the extreme sentence—should be inflicted without the record containing full facts in connection with it?

Gen. CROWDER. I hope we will have very few such cases to deal with in the future.

Senator LENROOT. Did it occur to you and the other reviewing authorities that for a death sentence there had been no adequate and proper defense here of these boys?

Gen. CROWDER. I think we all regretted, and I expressed that regret in my note, that the cases had not been more adequately presented. The only pause that I had in the matter, Senator, was the positive recommendation of such soldiers as Gen. Bullard and Gen. Pershing.

Senator LENROOT. Well, are we to understand from that, General, that for the sake of enforcing discipline you were willing to rather give less weight to the rights of an accused than you otherwise would?

Gen. CROWDER. No; I could not have entertained that view but for the judgment of these distinguished lawyers from civil life, with which I ultimately concurred, that the record was in itself legally sufficient to sustain the findings and sentences. Here we were sitting, 3,000 miles away from the field of action, matching our judgments against the men with as high or higher responsibility, who were in close contact with all the facts, and the situation that had to be dealt

with. Here was the judgment of two distinguished lawyers, at least, from civil life, that the record was sufficient; and now you have before you those two records of the field general courts-martial of England, which show that they also had to execute men upon that kind of a record.

Senator LENROOT. Of course it will be conceded by everyone that legally the record was sufficient, I suppose; and yet the very meagerness of the record, and what did appear upon the record, while from a legal standpoint it was sufficient, might have suggested to anyone, it seems to me, that these men ought not to be executed without further ascertainment of facts.

Gen. CROWDER. My position was this, and let me be held responsible for it, that I would make this fight before the Chief of Staff, and that I would make it before the Secretary of War, but that I would not go against their judgment and complicate the matter before the President of the United States. That was my position. I made the fight before the Chief of Staff; I made the fight before the Secretary of War, in behalf of these men; but it was not necessary to go before the President with a divided opinion except in so far as Gen. March differed from the Secretary of War and myself on those cases.

Senator LENROOT. Now, one further question. This note of yours, following the conference, did contain the unqualified recommendation that the sentence be carried out?

Gen. CROWDER. Please remember that when I wrote that note I had not the facts aliunde of the record.

Senator LENROOT. Yes; you got these additional facts outside of the record?

Gen. CROWDER. Yes.

Senator LENROOT. And on April 16 you wrote Gen. March another letter?

Gen. CROWDER. Yes.

Senator LENROOT. Containing all of these facts?

Gen. CROWDER. Yes.

Senator LENROOT. But there was no suggestion in this letter of a change in recommendation, upon your part, was there?

Gen. CROWDER. No explicit change of recommendation; but the whole effect of the letter was to suggest to him a lack of finality in the first recommendation.

Senator LENROOT. The language is:

> Since our interview on the four cases from France involving the death sentence, at which interview we agreed that we would submit the cases with a recommendation that the sentences be carried into execution, my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think yonr attention should have been invited.

Gen. CROWDER. Yes.

Senator LENROOT. Then you go on with the facts. But is there any suggestion in your letter that so far as your final recommendation is concerned, you desired to change it?

Gen. CROWDER. Not unless you can read that into the letter. I did not use——

Senator LENROOT. From the submission of the facts, yes?

Gen. CROWDER. I had some motive for doing it.

Senator LENROOT. Oh, yes; certainly.

Gen. CROWDER. I know my own state of mind. I know the embarrassment to a President, of divided opinion in a grave matter, and all my effort was to get one view of this case so as to simplify the President's problem in passing upon the case; I conferred with the Secretary of War and the Chief of Staff and consulted officers in my own department, always with the idea that the clemency view would prevail, and saving to myself a position in the case where I would not bring about this state of divided opinion before the President.

Senator LENROOT. Now, this was dated April 16, 1918. What next occurred, so far as you are concerned with it?

Gen. CROWDER. Nothing further occurred except some interviews with the Secretary of War, three in all, the dates of which I can not remember well enough to put them into the record. Whether they followed this letter or not I would not like to say positively, but I am sure that until the Secretary of War finally acted I kept up my conferences with him for the purpose of seeing that he had assumed 100 per cent responsibility for final action upon the case.

Senator LENROOT. Upon what point, as you remember, or as nearly as you remember, did you explicitly change your view with reference to carrying out the sentence, in conversations with the Secretary of War?

Gen. CROWDER. I never had to change my views. I had only to deal with this statement that I have made here in the record; first, of recommending clemency or suggesting clemency; second, submitting the case for execution, after a conference with the Chief of Staff; and then, third, bringing these additional facts to his attention, my mind being always in one attitude toward the case, but always subordinating an expression of that view to what was the ultimate and combined judgment of the War Department as to the necessities of the situation as interpreted by the commanding general of the American Expeditionary Forces in France.

Senator LENROOT. But, General, must there not have been at some point a changed attitude upon your part? Because after this conference, you did formally make the recommendation that the sentence be executed.

Gen. CROWDER. Yes; after the first conference.

Senator LENROOT. Now, after that——

Gen. CROWDER. The next day.

Senator LENROOT. Yes; and after that, you must, to the Secretary of War, it seems to me, have expressed a reversal of your formal recommendation.

Gen. CROWDER. In every one of these three interviews I expressed to him this view that I had, which I would have carried out if it were not for the necessity of coordinating action of the War Department in these grave matters. It was not a question of law upon which I was expected to speak an independent word. It was a question of clemency. If it had been a question of law, it would have been a different matter; I should not have consulted with the Chief of Staff or any military man respecting the legal view. But this was purely a question of clemency, a question that the Secretary of War and the Chief of Staff have as much to do with as the Judge Advocate General.

Senator LENROOT. Then, do I understand that so far as clemency itself was concerned, you took no part in it, or assumed no responsibility for it, except the bringing of the additional facts, subsequent to your formal recommendation, to the attention of the Chief of Staff and the Secretary of War?

Gen. CROWDER. In both written and oral interviews.

Senator LENROOT. Yes.

Gen. CROWDER. That is true, and I do not know how I could have——

Senator LENROOT. But you at no time changed your view as to the carrying out or execution of the sentence? In other words, you are willing to stand upon your formal recommendation as originally made?

Gen. CROWDER. I never withdrew that recommendation.

Senator LENROOT. That is what I am getting at.

Gen. CROWDER. I never withdrew it, but the Secretary of War has had my personal view as to my personal desire to see him overrule the recommendation.

Senator WARREN. Let me ask a question a little aside from this line, if I may interrupt.

Senator LENROOT. Certainly.

Senator WARREN. As to this question of capital punishment, a question that is very much discussed and differently administered—that is, the sentences for capital punishment—many believing that there should be no such thing as capital punishment: Do you recommend that the final punishment of death for certain offenses in the Army should be done away with entirely—capital punishment entirely abandoned and eliminated from the Articles of War?

Gen. CROWDER. I know of no offense denounced and punished by death in the military code as it exists to-day where the death penalty can be properly abrogated. We cut it down somewhat in the revision of 1916.

Senator WARREN. But you believe that finally there should be a specific law providing that certain cases should proceed to that end?

Gen. CROWDER. Do I believe what?

Senator WARREN. That there should be, in the finality, certain crimes—if I may allude to them as crimes—some offenses, for which the death penalty should be pronounced and executed? You do not believe in abrogating capital punishment in the Army?

Gen. CROWDER. Oh, no; it is impossible.

Senator WARREN. When I think of the Army, I am reminded of the times when I used to stand guard myself as a private soldier, where we were likely to be picked off by the enemy, any time; and I know how hard it is for a boy 16 or 17 years old to keep awake, unless there is something that scares the very life out of him, to keep him interested.

Senator LENROOT. If I understand your attitude, it is that so far as you were personally concerned, you were from the beginning in favor of clemency, but that you desired united action upon the part of all those who were responsible, and that you made this formal recommendation for the carrying out of the sentence, but you would have been glad if Gen. March would have been willing, and the Secretary of War had been willing, to recommend clemency. But if they were unwilling to do that, you were willing to assume your share of the responsibility, leaving the original notes to stand?

Gen. CROWDER. That is correct; but if you will allow me to put in there, that the duties of the Judge Advocate General in a case of that kind are two-fold. One is to pass upon the legality and regularity of the record; its freedom from prejudicial error or reversible error or jurisdictional error. In that field he has an undivided responsibility in which it would be rarely justifiable for him to consult with any military authority.

The second is the duty in regard to clemency, where there was a necessity of coordinating action and of establishing a policy which would govern during the period of the war. It was on that side and that side alone that I sought conferences with superior authority, and the motive that I had in every conference conducted was to bring about clemency, if we could without detriment to the efficiency of our fighting forces, in a matter where Gen. Bullard and Gen. Pershing had placed themselves on record in favor of a specific action. Now, if it be a crime for the Judge Advocate General on that side of his duties, where coordination is necessary, to consult with a superior authority, I am that criminal. I never consulted with them on the ground of the sufficiency of the record. I did consult with them on the ground of the degree of clemency that should be extended in this case, and I never had but one attitude of mind toward it, that I was not willing to make the President's duty more difficult because of any view that I had on the subject that arrayed itself against the view of the Secretary of War, the Chief of Staff, Gen. Pershing, and Gen. Bullard. Now, I hope I have made my position thoroughly clear there, so that hereafter nobody will be able to misunderstand my position. It is very important, if I understand it, to keep in mind that on one side of my duties I had an undivided responsibility which I could not share with anybody, while on the other side I had a divided responsibility.

Senator LENROOT. Did Gen. March make a recommendation similar to your formal recommendation?

Gen. CROWDER. Yes.

Senator LENROOT. What other recommendations were there—aside from Gen. Pershing's, I mean; I mean here in the department?

Gen. CROWDER. The cases went before the President and the Secretary of War with my recommendation and Gen. March's recommendation, and of course with the recommendations which had been made of record, of Gen. Bullard and Gen. Pershing.

Senator LENROOT. Yes.

Gen. CROWDER. Then, as the result of this further study that I made, simply because my mind was not at rest upon this question of clemency, there was a further report submitted by me in which I had used very largely the reports submitted by Gen. Ansell, Col. Clark, and perhaps Col. Davis also, who cooperated, getting up these additional facts.

Senator LENROOT. But, in the first place, the formal recommendations, so far as those in the department here were concerned, were those of Gen. March and yourself to the Secretary of War?

Gen. CROWDER. Yes.

Senator LENROOT. And if Gen. March had looked upon it as you did, instead of your making the recommendation for carrying out the recommendation of the sentence, it would have been just the reverse?

Gen. CROWDER. Yes; if I had secured agreement.

Senator LENROOT. So that, did you rather yield in that respect to Gen. March's judgment in order to secure agreement?

Gen. CROWDER. I yielded to the judgment of a man fresh from the battlefields.

Senator LENROOT. Yes; but I am referring to the fact.

Gen. CROWDER. On the question of clemency only.

Senator LENROOT. Yes, I understand.

Gen. CROWDER. Not on any duty that devolved on me as the Judge Advocate General. But on the question of clemency I went to him, because he was but recently from there; and I found out that he had discussed these cases before he left France.

Senator LENROOT. That is all.

Gen. CROWDER. There is one other matter, before I proceed with the discussion of the pending bill. I represented to you yesterday that the English war department had sought by admonition to regulate punishments and to control sentences of courts-martial. I have this morning to bring to your attention their standing regulation on the subject, which is paragraph 583, subheading XI, of their King's Regulations, corresponding roughly to our Army Regulations. [Reading:]

The following general instructions are issued for the guidance of courts-martial, but nothing contained in them must be construed as limiting the discretion of the court to pass any legal sentence, whether in accordance with these instructions or not, if in their opinion there is good reason for doing so.

And then follows a list of punishments that they think appropriate. That was before the war came on.

In 1917 I find that they issued the following order to the British armies in France. This order was issued by Field Marshal Haig, January 1, 1917. [Reading:]

[Extracts from general route orders issued to the British armies in France by Field Marshal Haig, Jan. 1, 1917.]

COURTS-MARTIAL—GENERAL INSTRUCTIONS.

The commander in chief has had under consideration certain sentences recently awarded by courts-martial. It would be improper for him to interfere in any way with the discretion of a court-martial as to the sentence to be awarded, but, at the same time, he is of opinion that the unequal sentences awarded by courts-martial for similar crimes show that many officers do not sufficiently appreciate the precise quality of the offenses with which they have to deal.

He wishes to point out that certain offenses which in peace time are adequately met by a small sentence, assume, on active service, a gravity which wholly alters their character.

This principle is fully recognized in military law; for instance, in the case of desertion, the army act in time of peace permits a maximum sentence of two years' duration only, whereas on active service a court is allowed to award a sentence of death for the same offense. Similar considerations apply to cases of looting and to other offenses specified in sections 4 and 6, army act.

The commander in chief wishes to impress upon all officers serving upon courts-martial that it is their duty to give weight to considerations of good character, inexperience, and all other extenuating circumstances, but that, at the same time, they are seriously to consider the effect which the offense in question may have upon the discipline of the Army, upon which its safety and success depend, and if they come to the conclusion that a sentence, however severe, is necessary in the interests of discipline, no feeling of commiseration for the individual must deter them from carrying out their duty.

Upon my return to the office of the Judge Advocate General last January, I got out the following instruction. This was after the armistice. [Reading:]

GENERAL ORDER JANUARY 22, 1919—MAXIMUM PUNISHMENTS.

In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of courts-martial as established by Executive order of December 15, 1916, is obvious. Where in exceptional cases a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record. Trial by general court-martial within the territorial limits stated will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the 104th article of war would be under all circumstances of the case clearly inadequate.

Now, I told you that I got a part of the verbiage of that order from an order that had been prepared by the chief of the military justice division of my office in the summer of 1918, and submitted to Gen. Ansell in September of that year, which had been sent back for further revision and study, and was not published. Of course at that time no reference could have been made to the cessation of hostilities, but a reference could have been made to conditions here in the United States approximating those of peace, where the severer punishments, including the death penalty, were not necessary, and in that way an admonition could have gone to the Army which, I think, as I said yesterday, would have been productive of greater uniformity of sentence, and would have defeated many of the excessive sentences that were adjudged in this country.

Senator LENROOT. Was that an order signed by the President?

Gen. CROWDER. It was issued by his authority. Those statements cover all the matter necessary to connect up with the testimony heretofore offered, and I am ready now to take up the discussion of the pending bill and its application to a hypothetical case.

APPLICATION OF SENATE BILL 64 TO A HYPOTHETICAL CASE.

I think we may best reach an understanding of those sections of the proposed bill which have to do with actual trials before courts-martial by giving those sections a hypothetical application to a specific case; and, because I know that this committee would not report, nor would Congress enact, a bill which would not meet the requirements in the trial of purely military offenses—which I have stated to you constitute about 86 per cent of the cases tried during the war—I shall discuss the application of those sections to such a case, namely—alleged disobedience of a colonel commanding a line regiment, of competent orders to put his regiment into battle—a case where the evidence is primarily tactical or strategical, and wholly military. When I have finished with this typical military offense I shall try to explain the application of the pending bill to the trial of a common-law or statutory felony, which I have told you make up from 8 to 12 per cent of the cases. Let us see what would happen under the proposed bill at the successive stages of the trial of the assumed case of purely military offense, commencing with the preferring of the charge.

PREFERRING OF THE CHARGE.

Under the pending bill the charge would be preferred in the first instance by "a person subject to military law who can make oath that he has actual personal knowledge of the matters set forth in the charge." It will rarely be the case that one such person has all this knowledge. The proposed law takes care of this situation. If such person has not the actual knowledge, or is lacking in knowledge in part, he must personally investigate and make oath on information or belief (art. 18). The charges are duly prepared and forwarded to the brigade commander.

The brigade commander's duties are set forth in article 19. He makes, or causes to be made, a thorough investigation as to the truth of the matters set forth in such charge. The accused is heard in his own behalf and by available witnesses he may offer. In forwarding the charge, the brigade commander must accompany it with statements of the substance of the testimony taken on both sides and all other evidence, including the statement of the accused.

Down to this point, with the exception of the requirements that the signer of the charge must be a "person subject to military law," and, therefore, an officer, enlisted man, or retainer to the camp, who must make oath on actual knowledge, or on information and belief as the result of an investigation made by him, the new procedure is substantially the existing procedure under sections 75 and 76, M. C. M., as modified by C. M. C. M. No. 5, July 14, 1919, and no great embarrassment would result from the enactment of that part of the pending bill.

I shall not object at any stage to the requirement that the man who prefers charges against another shall himself make oath to those charges, either of personal knowledge or upon information and belief. I am not certain that it will serve any useful purpose, I am not certain that it will curtail the number of charges that are preferred, but I am willing to do anything that will give the public confidence in the manner in which trials by court-martial are conducted, and will give them confidence in the fairness of the manner in which officers who are conducting courts-martial are discharging their duties in that connection. Therefore, you need expect no opposition from me to that provision in the bill.

REFERRING THE CHARGE.

The next step is the forwarding by the brigade commander of the charge, with all accompanying papers, to the next higher authority having general court-martial jurisdiction, namely, the division commander, upon whose staff there is, under existing tables of organization, an officer of the Judge Advocate General's department with the rank of major or lieutenant colonel and hereinafter designated the division judge advocate. The division commander is under the mandatory requirement to refer the case to the division judge advocate who must be an officer of the Judge Advocate General's department; who, in the usual case, is a man with little or no military education or training.

Certainly nobody can object to that, and down to that point this is exactly the existing practice. I do not believe there has ever

general court charge referred for trial, during the World War, a long time past, by any convening authority that was not ed by an examination and report of the judge advocate on ıff, and I have no objection; if you put it in the law, it will ange matters at all. But he has this other duty——

ıtor LENROOT. Would that apply all the way down to the nartial of an enlisted man?

. CROWDER. It would not apply to a special court, but to a l court.

ıtor LENROOT. Yes, I understand; but of a general court-l?

. CROWDER. I do not believe there is a case on record where a ment commander referred a case for trial until he had a report judge advocate upon the legal pleadings in the case.

ıtor LENROOT. Of course, if the convening authority was of rank than the commanding officer——

. CROWDER. I do not care how low he is; he may be a colonel, ıow, commanding a territorial department, but he has got his advocate, and in all his actions he is governed by this same ıd procedure and practice.

ıtor LENROOT. I was thinking more of the qualification of an lual.

. CROWDER. The judge advocate is the same, irrespective of ık of the commander of the organization or territory or depart-

ıtor LENROOT. What would you say if the convening authority colonel of a regiment?

. CROWDER. Yes; a colonel may fall into command of a terri-department; but the department staff remains.

ıtor WARREN. Yes; of course.

. CROWDER. But the judge advocate has this other duty. vested under the pending bill with the exclusive power to (a) not only whether an offense punishable by the Articles ır is charged with legal sufficiency, but also (b) that there na facie proof that the accused colonel is guilty. It must ne in mind that the assumed case is a disciplinary one where ridence is primarily strategical or tactical and wholly mili- The exclusive power of determining the sufficiency of this gical, tactical and wholly military evidence is vested in an who, as I have said, in the usual case is without military ng or experience. Both the brigade commander and the on commander may see, in the facts of the case the failure t his regiment into action—a grave military offense affecting r the fighting efficiency of the division and threatening the ıg efficiency of the Army, but the final decision of this question sufficiency of evidence is vested by law in the division judge ate. Unless he will indorse on the charges, using the actual age of this proposed new law—"that it has been made to appear n that there is prima facie proof that the accused is guilty of the e charged" there is an end of the matter. In such a contingency ıme article 20 provides that the charge shall not "be referred to ed by a general court."

m told that this parallel print of the bill is rather inaccurate.

ıator WARREN. I think there was one copy of it here that had hanges made in it.

Gen. CROWDER. In other words, if this subordinate law officer, who is ordinarily without military training and experience, is not convinced that there exists a prima facie case, there is an end of the proceedings and the accused colonel escapes trial.

Senator LENROOT. Now, I want to get this clear in my mind. In the hypothetical case the charge is of a refusal to obey an order?

Gen. CROWDER. Refusal to put his regiment into action.

Senator LENROOT. Not through refusal of an order, but failure to perform a duty?

Gen. CROWDER. No, to obey an order which he receives in action at a particular time and refuses to obey. And it may be remembered that the same awkward situation may arise when the evidence is not strategical or tactical, but still military.

In the accused's statement, or in the statement of his witnesses which accompanies the charges, there may be found evidence showing that he did not attack because of the tired condition of his men; that his regiment had been imposed upon by being kept in the line longer than other regiments; or that he had an unusual number of sick; or that his rations were short or his supplies insufficient; or that to attack meant the annihilation of his regiment. This kind of evidence presents military questions to be decided; but under the new law it is not the division commander aided by his military staff, all with extensive training and experience, who will decide this question—it is a judge advocate with little or no military experience or training. I regard this veto power of the division judge advocate over the division commander as one of the grave defects of the pending bill.

Senator LENROOT. Right there, I do not know that I have it, but in the print I have before me it is not the investigation that the judge advocate would pass upon, but only the legal sufficiency of the charge.

Gen. CROWDER. Oh, no; he takes the evidence that accompanies the charges, and he must determine that there is a prima facie case against the accused.

Senator LENROOT. I see; that is right. He must determine that there is a prima facie case?

Gen. CROWDER. Yes.

Senator LENROOT. If we stop with the charge itself—with the legal sufficiency of the charge—the criticism would not apply?

Gen. CROWDER. No.

Senator LENROOT. I see. You are speaking of the bill before you—S. 64?

Gen. CROWDER. Yes. Now, I am going to assume that the judge advocate entertains correct views or that he defers to the views of military men on such questions and finds that a prima facie case exists, thus permitting the division commander to refer the charges for trial, in order that we may consider and discuss the next stage of the trial, which is the appointing of the court.

APPOINTING OF THE COURT.

It is provided in article 8 of the pending bill that the division commander may appoint a general court-martial, but it seems that he can do no such thing. His appointing authority is completely exhausted when he has performed the following three acts:

(*a*) When he designates, under article 10, a panel (strength not stated) "consisting of those who are by him deemed fair and impartial and competent to try the cases to be brought before them" (whether he is to constitute a large panel to be drawn from whenever courts-martial are to be convened in his command, or a special panel for each case, is not clear);

(*b*) When, under article 12, he appoints a court judge advocate—"an officer of the Judge Advocate General's Department, if such an officer is available, and whenever such officer is not available the appointing authority shall select that available officer of his command whom he deems best qualified therefor by reason of legal learning or aptitude, or judicial temperament;" and

(*c*) When, under article 21, he appoints a prosecutor—"an officer of the Judge Advocate General's Department, and if such an officer be not available the prosecutor shall, whenever practicable, be an officer or enlisted man deemed by the appointing authority specially qualified for the duty by reason of learning in or aptitude for the law; and one or more assistant prosecutors, when necessary, each of whom shall be competent to perform all the duties of the prosecutor."

The court judge advocate actually appoints the court; that is, he selects from the division commander's panel the eight members who are to constitute the court (art. 10 and art. 12a). Though, of course, not intended by those who drafted the pending bill, it is possible that the eight members of the court for the trial of this accused colonel may all be enlisted men (arts. 4, 5, and 17).

Of course, Senator Chamberlain did not intend that, and Gen. Ansell did not intend it. I take it that they did not intend it because there is in article 5 a provision in regard to the mimimum number of enlisted men that must be upon a court in certain cases, but not stating any maximum; but it is a defect in the bill which I pass without laying stress upon it, because I know that if they were present they would say it was not intended.

Thus it appears that when the division commander appoints a court judge advocate, furnishes him with a panel, and appoints the prosecutor, he is through. All other affirmative acts necessary to be performed in appointing the court for the trial of the accused colonel must be performed by the court judge advocate. Let us assume that the court of eight members consisting of general officers and of colonels, superior in rank to the accused colonel, has been appointed and that we are at liberty to consider the next step, which is the organization of the court.

THE ORGANIZATION OF THE COURT.

The eight members selected by the court judge advocate from the panel, and the accused, with military counsel of his own selection and also with civilian counsel of the accused's selection employed by the court judge advocate and paid by the Government in case of acquittal (art. 22), meet on the date and at the place designated by the court judge advocate. We have first to consider the affidavits of prejudice which counsel for the accused may file. These are of three kinds:

First. Affidavits of prejudice, accompanied by certificates of good faith by the accused's counsel, against the division commander, alleging bias or prejudice on his part (art. 23):

Second. Affidavits of prejudice, accompanied by certificates of good faith by the accused's counsel, against the court alleging that by reason of any matter touching its constitution or composition it can not do justice (art. 23).

These two kinds of affidavits of prejudice are to b passed upon by the court judge advocate who sits in judgment on the division commander who appointed him to determine his bias or prejudice in making such appointment, also in designating the panel from which he selected the court, also in his decision to refer the charges, and also in his appointment of prosecutors, which are the only affirmative acts which devolve upon the division commander in respect of the trial. The court judge advocate also sits in judgment, in ruling upon the second class of affidavits of prejudice, on his own action in drawing the eight members of the court from that panel. If the court judge advocate holds that the division commander has shown bias or prejudice in any or all of his affirmative acts relating to the appointment of the court, or if he holds that the court that he himself has constituted may not proceed with "absolute impartiality," then the further organization of the court is stopped and the court judge advocate reports to the division commander. Article 23 continues: "Thereupon the next superior authority may appoint a court for the trial of the case," a clause of doubtful construction but which would probably be held to mean that the next superior authority—that is the corps commander—may designate a panel and appoint another court judge advocate, and the procedure above outlined would be reenacted with the hope, though not the certainty, of obtaining a different result.

Third. Affidavits of prejudice, accompanied by certificates of good faith, against the court judge advocate. No one passes upon this affidavit. With the filing of it the court judge advocate automatically ceases to function and the law requires a new court judge advocate to be appointed.

Of course this procedure of filing affidavits of prejudice against the court judge advocate may go on indefinitely, without further restriction than that the affidavits of prejudice must be certified by the counsel for the accused that they are made in good faith.

But let us assume that none of these three kinds of affidavits of prejudice have operated to block the trial; that the court judge advocate has not himself been challenged and has properly ruled on all other affidavits; that he has properly ruled on all challenges for cause which, under article 12 (b), he is given exclusive authority to pass upon; and that we have a duly organized court of eight general officers and colonels, superior in rank to the accused, with the prosecutor, court judge advocate, and counsel, all appointed or selected and ready to proceed further with the case; in order that we may discuss the next stage, namely, incidents of the trial.

INCIDENTS OF THE TRIAL.

The pending bill makes the court judge advocate in a very real sense the arbiter of the trial, as the following statement shows:

(*a*) He sits with the court (except when it is in closed session), though not a member of it. (Art. 12.)

(*b*) As we have seen, he passes upon all challenges, including affidavits of prejudice directed against the division commander and the court. (Art. 12 (b).)

(c) He advises the court and the division commander of any legal defects in the constitution and composition of the court or in the charge before it for trial. (Art. 12.)

(d) He grants continuances upon the request of either prosecutor or accused's counsel. (Art. 25.)

(e) He rules upon the admissibility of evidence (art. 12b) applying the "rules of evidence which are generally recognized in the trial of criminal cases in the District Courts of the United States" (art. 41) and, because of this requirement of article 41, denying recognition of those exceptions to such rules as are recognized by such eminent authority as Greenleaf, viz: "Those which are of necessity created by the nature of the service and by the constitution of the court and its course of proceeding" (Greenleaf on Evidence, Vol. III, 16th ed., p. 49), denying also the applicability of the doctrine laid down by Winthrop, who says (vol. 1, p. 473):

"That in the absence, therefore, of statutory direction, they (courts-martial) can scarcely be held bound to the same direct adherence to common-law rules (of evidence) as are the true courts of the United States, and upon trial they may properly be allowed to pursue a more liberal course in regard to the admission of testimony and the examination of witnesses than do, habitually, the civil tribunals. (Grant *v.* Gould, 2 H. Black., 104; Kennedy, 120; Tullock, 13; Bombay, R. 19; Pratt, 198.) Their purpose is to do justice; and if the effect of a technical rule is found to be to exclude material facts or otherwise obstruct a full investigation, the rule may and should be departed from. Proper occasions, however, for such departures will be exceptional and unfrequent."

(f) He also rules upon pleas and motions. (Art. 12 (b).)

(g) At the conclusion of the case he sums up the evidence and discusses the law applicable to it, unless both he and the court consider it unnecessary. (Art. 12 (d).)

(h) "His rulings and advice given in the performance of his duty and made of record shall govern the court-martial." (Art. 12.)

It thus appears that in respect of every military incident the court judge advocate is, in a very real sense, the arbiter of the trial as fully as is the trial judge in the civil court; and he has even wider and more extensive power than the civil judge in the respects next to be noted, that is, with reference to the findings and sentence of the court.

FINDINGS AND SENTENCE.

The case has followed the routine of trial as outlined above. The court judge advocate has passed upon affidavits of prejudice against both the division commander and the court: upon challenges, peremptory and for cause; upon pleas to the jurisdiction and special pleas in bar, such as, of the statute of limitations, former trial, pardon or amnesty, constructive pardon, etc.; upon motions to quash or for continuances; has ruled on all questions of admissibility of this strategical, tactical, and wholly military evidence, and on all other questions arising in the procedure of the court on the trial; has "advised" the court with binding authority, and the convening authority, as to defects in the charges. He has also summed up the evidence in the case and discussed the law applicable to it; and the court has gone into closed session for the purpose of deliberating upon its findings. It may be that the question involved under the evidence as presented is not whether the colonel did obey his orders, but whether he ought to have obeyed them. The court-martial has reached its findings, which are announced in open court by the court judge advocate. Let us assume for the purpose of continuing the discussion that the finding is guilty as charged. What is the further procedure?

The court judge advocate has the following duties respecting the findings of the court:

1. He may approve the findings when, as a matter of law, the evidence of record requires such action. When as a matter of law the

evidence of record requires such action he may withhold approval of the findings or disapprove the findings. If he adopts either course and then stops, what is the result? Is it an acquittal? This, I think, must be the result, for the law charges him with the duty of approving the finding, and it must, I think, be held that his action on the findings is necessary to their validity and that his power to approve includes the power to withhold the approval or to disapprove, and in either event to acquit. This conclusion seems to be justified when we consider his next duty in respect of the findings.

2. He may approve only so much of the finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense, when, as a matter of law, the evidence of record requires such action. Of course, if he withholds full approval of the finding of guilty and approves only the finding of guilty of a lesser and included offense, this, under well-established doctrine, is a finding of not guilty of the major offense charged. It would seem, therefore, that we must hold, as noted under subhead 1, that the withholding of approval, or the disapproval of the finding of guilty, amounts to a finding of not guilty or acquittal. Viewed in this light the finding of guilty by the court of eight brigadier generals and superior-rank colonels has no validity in and of itself, when as a matter of law, in the opinion of the court judge advocate, the evidence of record requires withholding of approval, or disapproval, or a finding of guilty of a lesser included offense. It is also plain that the court judge advocate weighs the evidence under the doctrine of reasonable doubt and himself makes the determination of the degree of guilt or of innocence of the accused.

Now, as to the sentence and the exclusive power of the court judge advocate to impose it: With the imposition of sentence necessary to meet the needs of discipline in this assumed case of disobedience of orders to put a regiment into action, neither the court of eight brigadier generals or superior-rank colonels, nor the division commander, nor any other military man, up to the President of the United States, has anything to say. It is wholly the responsibility and duty of the major or lieutenant colonel, judge advocate, drawn, in the usual case, from civil life, of limited or no military training or experience, but a man "specially qualified by legal learning and experience" (art. 12). The accused colonel's sentence should depend, of course, largely upon the needs of discipline in the command but the measure of his punishment and its character lie in the discretion of a subordinate law officer.

To sum up the requirements of the pending bill as to findings and sentence, we have to note:

1. That the court judge advocate, in disagreement with the court as to the credibility of witnesses or weight of testimony, may, by withholding approval or by disapproval, convert a finding of guilty of disobedience of the order to fight into a finding of not guilty or an acquittal; or into a finding of not guilty of willful disobedience but guilty of the lesser and included offense of failure to obey, or simple neglect of duty with a minor degree of criminality; or attaching to the facts proved no criminality. And in respect of the action of the court judge advocate upon the findings, the law is careful to provide that "such action shall be held to be the action of the court." (Art. 12f.)

2. That the court judge advocate may, in disregard of the judgment of all military men, impose, not a dismissal with imprisonment,

imple reprimand, or no punishment at all, in case he finds under idence such justifying circumstances that he can not attach ality to the facts proved.

hat the court judge advocate may suspend, in whole or in part, ntence short of death or dismissal.

ne can follow the course of the trial as I have outlined it and appreciate the fundamental changes, which are as follows:

he division commander is deprived of his present authority to harges for trial; except as permitted by the division judge .te.

he division commander is deprived of his authority to appoint mbers of a court-martial, his only duty being the furnishing nel from which the court judge advocate selects.

he court once selected and organized sit only as triers of fact the same as petit juries sit. All questions arising during the s of the trial (except possibly adjournment), including con- es, are decided by the court judge advocate.

he finality of the court's findings is taken away. In practical he court simply recommends findings which the court judge te may approve or disapprove; or modify to express a finding y of a lesser included offense.

he court loses entirely its power to impose a sentence; the e of punishment to meet the disciplinary needs of the Army rmined by the subordinate law officer—the court judge te.

onvening authorities (ordinarily division commanders) and ing authorities (the President, and commanding generals of lose their authority to review for jurisdictional or invalidat- or, and that power is vested in a court of military appeals, ing of three civilian judges; and also their authority over the e except by way of mitigation of punishment after the fact. ther words, officers of the combatant army are stripped of ally all their power of enforcing discipline through the agency ral courts-martial.

us assume that the court judge advocate has, in agreement e court, imposed a sentence of dismissal and imprisonment xed term, as he is authorized to do under proposed article 62 pending bill; that the accused colonel is not content with the e and therefore does not waive in open court and of record a review of the case, as he may do under article 52 of the pend- . Under these assumptions the record of the trial is completed warded to the division commander.

division commander neither approves nor disapproves the s and sentence, nor does he comment upon the proceedings in y. His sole duty, upon the receipt of the record, is to for- he record without delay to the Judge Advocate General of the (Art. 38.) The sole function of the Judge Advocate General Army is to "immediately transmit to the court of military the record of all proceedings which carry sentences involving dismissal, or dishonorable discharge, or confinement for a of more than six months." (Art. 51.) And it may be re- d, incidentally, that the whole duty of the Judge Advocate l with respect to all other general court-martial cases is to e and file" the record of them. (Art. 51.)

COURT OF MILITARY APPEALS.

The court of military appeals consists of three civilian judges sitting in Washington. They are entirely outside of and unconnected with the Army. They are citizens "learned in the law," appointed by the President, by and with the advice and consent of the Senate, holding office during good behavior, with pay and emoluments, including the privilege of retirement upon full pay, of a circuit judge of the United States. (Art. 52.) They are as supreme in the colonel's case, upon appeal, as the court judge advocate was upon its trial. With respect of the findings and sentence, they exercise the following powers:

(*a*) They can disapprove a finding of guilty because of errors of law evidenced by the record and injuriously affecting the substantial rights of the accused, without regard to whether such errors were made the subject of objections or exceptions at the trial;

(*b*) For the same reasons they can approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(*c*) They may, for the same reasons disapprove the whole or any part of the sentence; and

(*d*) In case of findings and sentence being disapproved, as above provided, they may advise the division commander (or other convening authority) that he may lawfully order a new trial by another court.

(*e*) They may recommend clemency.

In the colonel's case we will assume that the principal questions presented to these civilian judges are "whether the evidence justified the conviction of willfull disobedience," or whether only "failure to obey orders" should be substituted as a finding. And, having this power to modify findings when, to use the language of Gen. Ansell, "the evidence is not reasonably sufficient to sustain the finding of guilty of the major offense," it must be held, I think, that they may weigh the evidence and apply the doctrine of "reasonable doubt" to the solution of all questions of fact. I would not necessarily reach this conclusion were I discussing the authority of any civil appellate court of this country to determine "errors of law" injuriously affecting the substantial rights of the accused. For no civil appellate court in this country has the extraordinary power to disapprove a finding of guilty or to substitute a finding of a lesser included offense.

I think that the phrase "errors of law," the existence of which call into exercise these extraordinary powers to disapprove and modify findings, must be construed in the light of these extraordinary powers; that it must be held to be an "error of law" when there has been error in weighing the evidence or in the application of the doctrine of the reasonable sufficiency of the evidence to sustain a charge; otherwise the authority to substitute a lesser and included offense in the finding would find such limited application as to make this authority of little value to the service.

Now, I have tried to state the application of the pending bill to the trial of a purely military offense, and I think it sufficiently appears that its effect is largely to take away from military men the discipline of the Army and transfer it to civilians. That offends my

sense of what is right much more than it would if the proposition were to turn over to civilian control common-law and statutory felonies committed by persons within the Military Establishment.

In considering common law or statutory offenses, like manslaughter, robbery, embezzlement, and larceny, we get a different picture. The advisability of leaving questions of law, including the determination of weight of evidence and of the measure of punishment, to a subordinate law officer—the court judge advocate—rather than to a court composed of military officers is more apparent. These offenses are committed either against other members of the armed forces or against civilians. In both cases, as I understand it, the practice in England, in time of peace, is to turn over all such cases to the civil courts for trial. The practice in our country, in time of peace, is generally to turn over only the second class of cases to our civil courts for trial, and our code expressly provides for this. I mean where the person offended against is a civilian. It is more convenient in England than in our country, because of the scattered condition of our Army and the sparseness of our population relative to theirs. When the common law or statutory offense is committed by a soldier against another soldier it affects discipline of the command in a very direct way and, I think, the discipline of our Army would suffer to a very great degree if we adopted the policy of turning over all such cases to the civil courts for trial. As these cases do affect the discipline of the Army we should have to consider, as in a strictly military case, the disadvantages which would result from turning over to a subordinate law officer, usually without military training or experience, and to a court of military appeals consisting of civilian judges, the question of the measure of punishment. It is a subject to which I have given much thought without being able to devise any way of treating these two classes of cases separately; and, of course, they can not be separated in time of war.

I fear that it is an absolute necessity that the military jurisprudence should carry the burden of adjudicating and determining all of these offenses of a common law and statutory character.

I have not touched upon the anomaly that would result if, under this pending bill, the President were the convening authority. Assume that he has convened a court-martial for the trial of some high ranking officer in the Army. His duties would be limited to furnishing a panel and appointing a court judge advocate and a prosecutor, and so forth. The trial would proceed along the lines indicated, and when the case came in, a court of military appeals would determine for the President all the questions presented by the record. These questions might arise out of the participation of a division or a field army in a battle.

The idea of a civil court of military appeals is wholly untenable from my point of view. And so, too, is the idea of an exclusively military court of appeals functioning independently of the President in a case of the kind I have mentioned. I think it would affect in the most detrimental way the fighting efficiency of our forces. That seems to be the view taken by the Kernan-O'Ryan-Ogden Board. That board injects the question of the constitutionality of such legislation, which I have not mentioned because I am not prone to raise constitutional objections. I would prefer to see this question of appellate power settled on the ground of what is best for the

service and the fighting efficiency of our armies. I have in this review invited the attention of the committee to all articles in the pending bill which have to do with trials. By consideration of them you get a picture of the military jurisprudence that would be set up if the pending bill were enacted into law.

Senator LENROOT. If you have finished your review of the law, I will ask you some questions.

Gen. CROWDER. I have finished with that part of my statement.

Senator LENROOT. I want to ask you some questions, not at all in opposition to your construction of the bill, because I am inclined to agree with the construction you have given; but I do want to ask you some questions along this line; I am not going into the question of how the court of appeals, if one should be created, should be constituted now. If the jurisdiction of this court was limited to passing upon prejudicial errors and jurisdiction, but was in no sense permitted to substitute their judgment for that of the court upon the facts, to what extent would your objection still apply—not, now, going to the constitution of the court?

Gen. CROWDER. My objections would still exist, and for this reason: There is no jurisprudence that needs, so much as the military, an appellate review on both the law and the facts. I should hate to see an appellate review limited to jurisdictional and prejudicial errors alone, or what is sought to be designated in the bill as "errors of law." The original trial before a court-martial is necessarily summary, erroneous findings of fact are more probable and excusable than in plenary trials before petit juries in the calmness of county seats. I hope, sincerely hope, that it will not be the final judgment to create an appellate jurisdiction for the review of errors of law alone. I can not emphasize too greatly this view. Now in this other field of common law and statutory felony it may well be that a civil court of appeals would function more efficiently. Civilians would be better qualified to try such cases, not more than 14 per cent of the total, just as military men are better qualified to try the remaining 86 per cent of military cases.

Senator LENROOT. Yes.

Gen. CROWDER. I do not think, however, that a divided appellate power would be either practicable or wise. I do not think that anybody would be justified in asking for that separation of the powers unless he could prove that the machinery set up under General Order No. 7 had made errors. We have to-day a unified appellate jurisdiction under General Order No. 7, and nobody has appeared before you and asserted since that order went into effect there has been any injustice done except in the failure to handle questions of clemency. If the experiment has been successful in having the appellate jurisdiction consolidated that way, I can not help but say, "Why change?" In other words, I will always be able to command in my office qualifications of the highest character to constitute the board of review; always be able to deal with records that set forth every bit of evidence that is taken by the trial court; always be able to present to the Secretary of War, and through him to the President, whom we propose to vest with full appellate power, all the error there is, jurisdictional or prejudicial of law or fact. And if the system has worked during this war, I ask "Why change?" Let it be a question of fact. Has the machinery worked under General Order No. 7?

And if it has, if it does not appear that there is any complaint to make against the system, and it seems to have won the commendation of the American Bar Association after examining a large number of cases, then I say, "Why change?"

Senator LENROOT. As a matter of fact, General, under the prevailing system, while your office in practical effect is exercising this supervisory power, you have no jurisdiction to do so?

Gen. CROWDER. No, but we propose to create it in the present legislation.

Senator LENROOT. You propose to create it still in only an advisory capacity?

Gen. CROWDER. But to give the President the full power.

Senator LENROOT. Well——

Gen. CROWDER. Then again I come to this point. If there was any failure upon the part of the reviewing authorities and the President to respect the advice that we have given, it might be necessary to consider an appellate jurisdiction independent of the President and the reviewing authority; but has your attention been called to any? Four cases to the reviewing authorities below. Six cases where the Secretary of War, a civilian lawyer, has assumed to determine in the office above.

Senator LENROOT. You are proposing to grant to the President a reviewing authority not only upon the facts, not only general powers, but upon questions of law which you never expect him to exercise independently, and presumably he might not be qualified to exercise independently.

Gen. CROWDER. Neither is the President qualified to exercise command independently. He acts on advice of experts in matters of command. And I assume that the Judge Advocate General and the Secretary of War, his legal experts, will advise him in the exercise of this appellate authority.

Senator LENROOT. Yes.

Gen. CROWDER. And that he will follow their advice.

Senator LENROOT. That is the whole point. You are creating an appellate tribunal in name that you do not expect will independently exercise the powers that are given him.

Gen. CROWDER. No; I expect the President to exercise it upon a legal review prepared in the office of the Judge Advocate General. I have no objection to the way you state it, and I believe it will be 100 per cent effective.

Senator LENROOT. It may be, but I am stating the terms of the law itself.

Gen. CROWDER. Yes.

Senator LENROOT. In so far as prejudicial errors are concerned, I take it from your statement that you see in itself no objection to a properly constituted court. I am not speaking now of how the court should be constituted, but of a properly constituted court, of that power being vested that would not interfere with discipline.

Gen. CROWDER. Yes, although I am frank to say that I think it would interfere with discipline if such a court is superior to the President and able to overrule or conclude the President.

Senator LENROOT. Now, going one step further, as to the constitution of that court, supposing a court of appeals were created, a majority of whom should be military men, but a permanent court. What would you say?

Gen. CROWDER. First, and of minor importance, let me say that you would have to choose between such a court and the continuance of the office of the Judge Advocate General. Of course, with a court vested with that power, the Judge Advocate General of the Army would have little or nothing to do with military justice. Of course, there would remain his duty to render opinions connected with the civil administration of the War Department.

Senator LENROOT. He would have a great deal to do with military justice. He would have a large force under him.

Gen. CROWDER. The military justice would depend upon the court of appeals and not upon him at all.

Senator LENROOT. Would it not be very proper to have the judge advocate present them to the court?

Gen. CROWDER. Present the case?

Senator LENROOT. To represent the Government, so to speak.

Gen. CROWDER. Before that court?

Senator LENROOT. Before that court.

Gen. CROWDER. Well, that would mitigate the evil somewhat. But if you will permit me one other suggestion, I think you and I will have a complete meeting of minds. I can conceive of this appellate jurisdiction as you have outlined it, but it gives me some pause when I reflect upon the fact that what you propose is a completely new experiment which no great nation has heretofore ever attempted—and probably no great nation ever will attempt—except Russia. They have tried out your proposition in France. Their court of revision is composed wholly of army officers in time of war and in the theater of war, and of a majority of army officers under other conditions, but the President is authorized to suspend its functions in time of war, or in time of peace in a besieged area he can suspend this appellate jurisdiction. They have also given their President the right to create emergency war courts from which there is no appeal. Now, if the most advanced nation that has dealt with this appellate review has placed such qualifications upon a military appellate body like that, would it not be invading the field of untried experiment if we, by rigid statute law, operative at all times and under all conditions, either peace or war, should create an appellate court with absolute power to conclude the President and all commanding generals under him?

Senator LENROOT. That would go to the extent of whether our review would be given such a construction as in this bill, or a very limited power such as I have suggested. I am asking these questions to get your ideas upon it.

Gen. CROWDER. I am trying to speak moderately upon this whole experiment. I hope that it will not be the final judgment of Congress to set up a tribunal limited to a review of errors of law only. I hope that we will always have an appellate review on both law and fact. It would be a great mistake, it seems to me, to limit the appellate review, as it is limited in the pending bill, to questions of law; and I must admit that I can not define what is a question of law under the terms of this bill. It is something less broad, of course, than questions of law and fact. Something is excluded. Now, here we are with a jurisprudence that is older than the civil jurisprudence, with records of trials that contain every word that is uttered from the time the accused enters the court room until he leaves it—I hope

that it will not be the judgment of this committee to set up a limited review. We have got the whole review. The convening authority below can weigh both questions of law and fact when he comes to act, and so, too, should the President have this power.

Senator LENROOT. The reviewing authority, I quite agree with you, has full power to measure questions of fact; but again, the convening authority must rely upon a judge advocate when it comes to questions of law, and not exercise his own judgment.

Gen. CROWDER. Yes, he should.

Senator LENROOT. That is the difficulty for me.

Gen. CROWDER. But it has not proved a practical difficulty. In judging of the personnel of your proposed court of appeals, it is important to bear in mind that about 90 per cent of the cases coming before that court are military cases. It is unreasonable to assume that any but military men could judge of the weight or relevancy of the evidence in determining the conduct of a man upon the field of battle, where the evidence is strategical or tactical and wholly military. The issues are those which only a military man who has been trained in those matters can understand. How could a civilian understand and judge of the conditions of battle in the Argonne so as to fix responsibility for failure of a division or Army commander, or even a colonel of a line regiment?

Senator LENROOT. I am not speaking of a civilian tribunal. I put my final proposition, of a tribunal the majority of whom should be military men.

Gen. CROWDER. Even in that case the objection that I have previously advanced remains, that when we shut the President off from a final say in such matters, we impair his responsibility, as the constitutional commander in chief, for winning the war; and I feel very certain, if you pass a bill of this kind, that ultimately its constitutionality will go before the Supreme Court.

Senator LENROOT. On this question raised by the Kernan report?

Gen. CROWDER. I am very much afraid, if you undertake to shut the President off from his relations to the discipline of the Army, and shut off commanding generals under him from their relations to the discipline of the Army, by creating a court of appeal with power to conclude them all, that the constitutional question raised by the Kernan-O'Ryan-Ogden Board will ultimately come before the Supreme Court for settlement, and in a case which will be very embarrassing, because the case will be identified with some great national crisis. I have just that to say about the constitutional question.

Senator LENROOT. I have not heretofore expressed any opinion, but I must say that if the view of the Kernan report is correct, I think the sooner it is found out the better. If there is any such autocratic power vested in the President of the United States as commander-in-chief of the Army, beyond the control of Congress, we ought to know it. That is my view of it.

Gen. CROWDER. Well, I have not based my opposition on constitutional grounds.

Senator LENROOT. I know that you have not, at all.

Gen. CROWDER. I preferred to rest the whole question upon what is best for the Army.

Senator LENROOT. Yes, I understand.

Gen. CROWDER. And I am willing to assume the constitutionality of legislation of that character.

Senator LENROOT. Yes.

Gen. CROWDER. And my only purpose there was to say that I have no doubt in time of some great crisis, the constitutional question will arise.

Take the question of the President convening the court. I did not emphasize that in my application of the law. Suppose that he, instead of a subordinate commander, is the convening authority, and then consider the President submitting to a court judge advocate below, and to a military court of appeals here, the question of whether some field commander or some division commander or corps commander in the battle of the Argonne has failed to do his part.

Senator LENROOT. Well, that all goes to two questions. One involves, of course, the question of whether the Constitution applies at all, which you discussed somewhat, and, secondly, whether the President is governed not only by law but by common principles of justice—whether there are any limitations upon him. If there be such, I see no more reason why, upon questions of law, he should not be governed by a military tribunal as Commander in Chief; he certainly is, just as a civil officer is, by the very men that he appoints to the bench, and they control his action and find his action invalid in a given case.

Gen. CROWDER. Of course, everybody sees that point instantly upon its being mentioned; but what would be the effect in the end, I am asking, what would be the effect upon efficiency if the man he appointed would have the right to control and nullify his action as Commander in Chief?

Senator LENROOT. If he did not obey the law, if he violated the law, I do not know why he should not be subject, as Commander in Chief, to nullification of any action in violation of law.

Gen. CROWDER. I am afraid this question of military relations is sui generis and that it does not aid you much to invoke the analogies of our civil jurisprudence.

Senator LENROOT. Well, take this case: Under existing law, take th case of the President convening a court, as you suggest. Supposing that the President should undertake to convene a court in violation of the Articles of War. Do you not think habeas corpus would lie to a civil court?

Gen. CROWDER. Unquestionably; and when the privilege of this writ is not suspended it would be effective.

Senator LENROOT. Do you not think that the civil courts therefore, to that extent, would have the control of the action of the President, even though he is Commander in Chief?

Gen. CROWDER. Oh, of course.

Senator LENROOT. So that to that extent now the courts may control the action of the President as Commander in Chief.

Gen. CROWDER. Yes; controlled by habeas corpus, but as to jurisdiction only.

Before I conclude my testimony I wish to call the attention of this subcommittee to a matter and see what my responsibility is. If I stop here I shall leave many matters uncovered which this committee has admitted as in some way relevant, and most of them the accusa-

of a single witness, Gen. Ansell. Illustrative of the intem-
general character of these accusations, I cite the following as
les:

gainst generals of the Army:

The weakest grade in the Army of the United States" (p. 121), which is the
m which are drawn convening and reviewing authorities of courts-martial;
Many of them, jokes to everybody else in the world except ourselves and
es" (p. 121);
acking in experience" (p. 121), citing Gens. Pershing and Wood as examples,
ng:
That heterogeneous collection of troops on the Mexican border" "which Gen.
commanded"; "no professional soldier would ever call that a division" (p.
d "the command in the Philippines was not the kind of command that re-
eneral leadership" (p. 122); and again,
have had a hundred times their court-martial experience" (p. 121).

gainst the Inspector General:

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d reactionary" (p. 173); "whose views savor of professional absolutism" (p.

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ation of Gen. Ansell's part in the present controversy; in trying to compel
sell to make a statement against his will by threatening that "this thing is
ess, and my report will go to Congress, and, Ansell, when it gets to Congress,
e very detrimental to you" (p. 209).
ith habitually using the power of his office in connection with investigations
el accused persons and others to make statements against their will and to
ate themselves by menaces, threats, and intimidation (p. 209).
ith allowing officers in his department in camp and division to compel testi-
om suspected or accused soldiers, and then use it against them (p. 209).
ith having taken part with the Secretary of War and the Acting Judge Advo-
neral (Gen. Kreger) in frequent conferences with the court-martial committee
merican Bar Association under such circumstances that "I, for one, as long
, will not express any respect for any such committee, no matter how high it
or whatever association it may be a part of" (p. 214).

Against Gen. Biddle, former Assistant Chief of Staff:

Thoroughly reactionary" (p. 116);
haring with the Inspector General in views that "savor of professional abso-
" (p. 123).

Against Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col.
—the members of the Kernan-O'Ryan-Ogden Board—and
Col. Barrows, the recorder of that board:

The most reactionary set of men in the United States" (p. 215).
o prejudiced, and known to be so prejudiced, that many officers of high
olding liberal views refused to express their views on military justice to that
p. 215).

Against former President Taft—not admitted to the record,
lustrating the intemperate and irresponsible character of these
ations:

Perverting "his power to the furtherance of a plan * * * to maintain the
g vicious system of military justice, and to do me great personal injury" (state-
of Gen. Ansell, New York World, Sept. 16, 1919);
Abusing "the confidence and trust of the American people" and "misleading
" (ibid.); and
Debasing "his exalted position as ex-President of the Republic to become an
nt and bitter partisan in behalf of his friend," Gen. Crowder (ibid.).

ere is also a formidable list of accusations against the court-
ial committee of the American Bar Association, but particularly
st the Secretary of War and myself. The list is a long one.
ain of these accusations carry their own refutation.

Then there follows a long list of accusations against the Chief of Staff and against the chiefs of bureaus, and others.

Now, the question is how much responsibility do I incur by leaving unanswered charges that have been admitted by this committee to their record as in some way relevant?

It will protract the sessions of this committee a week if I answer fully all those charges.

Senator WARREN. Are you putting that as a question?

Gen. CROWDER. I am asking the question. I do not like to leave those things unanswered if the inference by Members of Congress is going to be that such a course admits the truth of any of them.

Senator WARREN. You enter a general denial?

Gen. CROWDER. Sometimes a little truth is interwoven with a lot of misleading, inaccurate statements, and made to serve all the purposes thereby of positive misstatement. The explanation to be made is rendered very difficult.

Senator LENROOT. I would suggest that Gen. Crowder place in the record anything he desires upon that general subject. Of course that is not the issue anyway before this committee. The only thing I assume is that the committee is charged with such recommendations to the full committee, as to legislation upon this subject, if there are any changes to be made. I think that in view of what has been said if you desire, the committee should hear you and give you the fullest opportunity; but certainly you should be given full liberty to place in the record anything you desire to.

Gen. CROWDER. Then I can put in these matters in the form of appendices. I will scan again the principal of those charges. Where I think they do not carry their own refutation, I will answer them. That was where I wanted your instructions. I could talk here for a week in regard to issues of fact that have been raised, and probably talk of what is relevant to those issues, but not at all relevant to the real issues before this committee.

Senator WARREN. I agree entirely with the Senator from Wisconsin, that there was no occasion for a great deal of that to go into the record; we have nothing to do with very much of that kind of evidence. All we have to do is just what the Senator says, to consider what is necessary—what changes are necessary, if any, in the present laws—and whether this bill or some other should be reported from this committee to the full committee and from them to the Senate. So that all of this other matter should have, in our consideration, nothing to do with the question before us of the necessity of reforming the law. But, on the other hand, I think you should have freedom to insert in the record anything respecting the issues that you consider relevant, because I know that you will not transgress.

Gen. CROWDER. I will avail myself of that permission and will insert such memoranda, as appendices, with a list or table of contents so as to direct the attention of the committee to any particular subject where there may be any question in their minds as to what the facts may be.

Senator WARREN. You will be able to conclude your testimony to-day, will you?

Gen. CROWDER. I have finished all that I care to talk about to-day. I will insert as an appendix the five or six different suggestions that have been made to you of courts of appeal. There are several bills pending. I will do that in order that you may have in the briefest

possible compass these alternative schemes, if that will be helpful; and I may add a few explanatory notes. There are two or three bills in the House and two or three in the Senate.

Senator WARREN. I think that is a point about which we can not have too much information.

Gen. CROWDER. If I can be of any further assistance to the committee on these points, or if there is anything I have not covered, I shall be very glad to do so now. This matter is one about which I am deeply interested.

The propositions before the committee, except those submitted by myself, Senator McKellar, and by the Kernan-O'Ryan-Ogden Board, carry appellate power further than it has ever been carried in the history of armies by any leading nation, and if you adopt them, you are a pioneer in that field.

Senator WARREN. Inasmuch as we have parallels before us from individuals, one from the Kernan Board, and a not quite complete parallel from the American Bar Association, would it be too much to ask the general to take his suggested amendments and put them in the form of a bill and submit them in parallel columns in the same share as this print which we already have?

Senator LENROOT. I would be glad to have it.

Gen. CROWDER. May we have that made of record, that you desire me to put in the record my suggestions of amendments, just as a formal bill?

Senator WARREN. Yes. It could be gotten up in the form of an ordinary bill, or you could print it in parallel columns for comparison with the present Articles of War.

Senator LENROOT. If it could be done in that way, in parallel columns, it would be very much easier for us to use.

I wish, also, Mr. Chairman, that we might have a print of the Kernan report.

Senator WARREN. They printed it in the department, you know.

Senator LENROOT. We could have that Kernan report taken and put in this form of parallel columns with the present Articles of War.

Senator WARREN. Very well.

Gen. CROWDER. I brought to your attention the first day that I was testifying a quotation of Gen. Ansell, purporting to be from the language of the Supreme Court of the United States in the Grafton case, which language we have been unable to find in that case, and you called for the citation, Senator Lenroot. I ought, in justice to Gen. Ansell, to spread upon the record an explanation if anybody has been able to find that language which he attributes to the Supreme Court in the Grafton case.

Senator LENROOT. I do not want it. I was interested in giving the reference to the volume and page of the Supreme Court reports.

Gen. CROWDER. I do not like to leave the inference on the record that any man would attribute language to the Supreme Court which the Supreme Court had not used, if anybody is able to find that language; for, I am frank to say, if the Supreme Court ever used that language, I am out of court on that issue.

In concluding my statement before this subcommittee, I wish to make some additional comment upon the pending bill. In its fundamentals that bill is built upon a distrust of or lack of confidence in nearly every existing military authority, including the President of the United States, the Secretary of War, and also commanding

generals under them who are classified in testimony before this committee as "jokes;" it implies distrust of the many thousands of officers of the great Army we raised to fight this World's War, who participated in the administration of military justice by general, special, and summary courts. In this bill you are asked to brush aside the traditions of the American Army and build anew a jurisprudence bearing faithful analogies to the civil jurisprudence, notwithstanding the fact that, even in the decisions of the Supreme Court of the United States, it is recognized that the Army and Navy of the United States are emergency forces and require other and swifter methods of administering justice than prevail in civil jurisprudence, where normal conditions usually obtain and where, if normal conditions are disturbed, resort is had to the more expeditious military method.

The arguments by which this proposed new system has been supported are those of sensationalism—sensational appeals to American homes based upon alleged individual miscarriages of justice, and attributing to the officers who fought this war, and who were drawn from the same American homes as were the soldiers in the ranks, a tyranny which I, for one, do not believe characterized their attitude toward the men in the ranks.

Because I do not believe that Mr. Taft, of prolonged judicial experience, who lived his official life in the Philippines in such close contact with the Army and Navy, and who, as Secretary of War and President of the United States, had such direct relations to the administration of military justice in the graver cases, is a man to "debase his exalted position as an ex-President of the Republic to become an ignorant and bitter partisan" on this issue; because I do not believe that most of our general officers, who have acted as convening and reviewing authorities during the period of this world's war, are "jokes;" because I do believe that the sense of justice of the American people is fairly reflected in the lives and judgments of the officers of this great world army who have been drawn from American homes, and that they are not men thirsting for the lives and liberties and blood of the men in the ranks, I think that the pending bill, whose fundamentals are built upon this general view, should be rejected as a basis of legislation, and that we should proceed by way of amendment of the existing code to enact all of the reforms which our war experience has shown to be necessary.

I believe in safeguarding the administration of justice and I believe it can be done in a way consistent with winning battles and wars, which, I presume, it will be conceded is the primary purpose of maintaining armies. To this end I would strengthen the safeguards in the actual trials of men below; and above, would secure an adequate legal review of cases, on both the law and fact, and not on errors of law alone as is provided in the pending bill; but never in establishing such a review would I favor divesting the President of his present relations to the discipline of the Army, as is proposed in the pending bill, any more than I would favor divesting him of the command of the Army. Normally his control in both cases is exercised through subordinate officers; but under our system the authority is reserved to him in the graver crises of our National life to make his own control effective.

(At 1 o'clock p. m., the subcommittee adjourned subject to the call of the chairman.)

APPENDICES.

I. Senator Chamberlain's Charges Against Gen. Crowder.

(*a*) That the selective-service law, as originally drawn by Gen. Crowder and transmitted to Congress by the War Department, was of "Prussian character."
(*b*) That the War Department project of the selective-service law "evidences the hand of the military autocrat." That Gen. Crowder is at heart a military autocrat.
(*c*) That Col. Warren, and not Gen. Crowder, was responsible for the civilian composition of the selective-service boards.
(*d*) The Army and Navy Club incident: Gen. Crowder's refusal to acknowledge an introduction to Senator Chamberlain.

II. Gen. Ansell's Charges Against Gen. Crowder.

(*a*) Gen. Ansell's charge that he was relieved from all duties and responsibilities in connection with the administration of military justice after November, 1917.
(*b*) Gen. Ansell's charge that he was again relieved from all connection with the administration of military justice after the armistice.
(*c*) Gen. Ansell's charge against the administration of the Judge Advocate General's office.
(*d*) The alleged "propaganda bureau."
(*e*) Gen. Ansell's charge that Gen. Crowder failed to forward to the Secretary of War Gen. Ansell's report of his European trip.
(*f*) Gen. Ansell's charge that Gen. Crowder opposed granting counsel to accused, and giving accused legal protection at the trial.
(*g*) Gen. Ansell's charge that Gen. Crowder entertains and has expressed illiberal views as to appellate procedure.
(*h*) Gen. Ansell's charge that Gen. Crowder entertains and has expressed illiberal views as to accused's rights of challenge.

III. Attacks upon the Present System of Administering Military Justice and upon the Articles of War and the Revision of 1916.

(*a*) Alleged archaism of the Articles of War.
(*b*) Same subject: Alleged "archaism" of the present Articles of War.
(*c*) Court of military appeals: Gen. Ansell's statement that Gen. Sherman and Gen. James B. Fry, former provost marshal general, advocated such a court.
(*d*) Condemnation of the ninety-sixth article of war, the so-called "general article."
(*e*) Charge that General Order No. 7, War Department, January 17, 1918, prevented or hindered recommendations of clemency by the Judge Advocate General.

IV. Gen. Ansell's Inaccurate Statements.

(*a*) Concerning review of records of trial in the Judge Advocate General's office.
(*b*) That forfeiture of citizenship is entailed upon conviction by court-martial.
(*c*) Concerning the Camp Grant rape cases.
(*d*) Concerning the proportion of charges preferred, referred for trial, convictions, acquittals.
(*e*) Concerning statistics of court-martial trials for the year preceding the armistice.
(*f*) Concerning the special clemency board organized in the office of the Judge Advocate General.
(*g*) Concerning the same subject: Clemency board.
(*h*) Concerning the same subject: Organization of the clemency board.
(*i*) Concerning the effects of conviction by court-martial.
(*j*) Concerning the investigation of Gen. Ansell's accusations by the Inspector General

V. APPELLATE POWER: VARIOUS IDEAS SUBMITTED TO CONGRESS.

(a) Opinion of Attorney General Wirt, September 14, 1818.
(b) S. 3692 and H. R. 9164 (bill drafted by Gen. Crowder and submitted by Secretary of War, January, 1918).
(c) Proposed joint resolution prepared for Senator McKellar, February 20, 1919
(d) Gen. Crowder's recommendation in his letter of March 10, 1919, to the Secretary of War.
(e) Kernan board report, July 17, 1919.
(f) S. 5320 (Chamberlain, January, 1919), H. R. 14883 (Siegel, Jan. 22, 1919), H. R. 15945 (Johnson, February, 1919), and H. R. 431 (Siegel, May 19, 1919).
(g) Senate joint resolution 18 (McKellar, May 20, 1919).
(h) S. 64 (Chamberlain, May 20, 1919) and H. R. 367 (Johnson, May 19, 1919).
(i) H. R. 9156 (Dallinger, Sept. 9, 1919).

VI. TABULAR STATEMENT OF THE ORGANIZATION OF BRITISH AND FRENCH MILITARY TRIBUNALS.

(a) Organization of British military tribunals, including the functioning of the British judge advocate general's office.
(b) Organization of French military tribunals, including French courts of revision.

VII. GEN. ANSELL'S ACCUSATIONS AGAINST OTHERS BESIDES GEN. CROWDER.

(a) Against the generals of the Army.
(b) Against the Inspector General.
(c) Against Gen. Biddle, formerly Assistant Chief of Staff.
(d) Against Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col. Ogden, the members of the Kernan-O'Ryan-Ogden board, and against Lieut. Col. Barrows, the recorder of that board.
(e) Against Brig. Gen. E. A. Kreger, Acting Judge Advocate General of the Army.
(f) Against former President Taft.
(g) Against the Chief of Staff.
(h) Against the court-martial committee of the American Bar Association.
(i) Against the Secretary of War.
(k) Against Prof. John H. Wigmore, dean of the law school of Northwestern University, former colonel in the Judge Advocate General's Department.

VIII. SUMMARY OF INSPECTOR GENERAL'S FINDINGS.

(a) Specific findings and detailed report to Secretary of War.

IX. GEN. CROWDER'S ATTITUDE TOWARD RETURN OF ACQUITTAL FOR RECONSIDERATION.

(a) Charge of Gen. Ansell respecting the return to court of acquittals.
(b) Same subject: Gen. Crowder's attitude.
(c) Same subject: Recognition and approval of the power.

X. COURTS-MARTIAL IN GEN. ANSELL'S COMMAND WHILE HE WAS A COMPANY COMMANDER.

(a) Summary courts-martial.
(b) General courts-martial.

I. SENATOR CHAMBERLAIN'S CHARGES AGAINST GEN. CROWDER.

(A.) CHARGE—PRUSSIAN CHARACTER OF THE SELECTIVE-SERVICE LAW AS DRAWN BY ME AND TRANSMITTED TO CONGRESS BY THE WAR DEPARTMENT.

Senator Chamberlain injected this wholly irrelevant issue into the discussion of the subject of "Military justice" in his speech of August 18, 1919, withheld by him for revision and published in its revised form in the Congressional Record of August 20, 1919 (p. 4338, et seq.). He recurs to this subject in his speech of October 6–7, 1919, withheld by him for revision and published in its revised form in the Congressional Record of October 11, 1919 (p. 7150, et

seq.). He pretends in this latter speech to be speaking from record proof and quotes from the selective-service law, as introduced in the House of Representatives on the 19th of April, 1917, the following paragraph:

That the President is authorized and empowered to constitute and establish throughout the United States tribunals for the purpose of enforcing and carrying into effect the terms and provisions of this act, together with such regulations as he shall prescribe and determine necessary for its administration. A majority of the members of each tribunal shall be citizens of the United States not connected with the Military Establishment: *Provided further*, That upon the complaint of any person who feels himself aggrieved by his enrollment or draft as is herein provided, any court of record, State or Federal, having general jurisdiction in matters pertaining to the writ of habeas corpus, according to local laws or by act of Congress, shall have jurisdiction, by proceedings in the nature of the writ of habeas corpus, to hear summarily and determine the rights of such person.

He leaves one to infer that the chairman of the House Military Committee (Mr. Dent) introduced the bill in the form in which the War Department had submitted it and then proceeds to criticize it by saying that it left to the Judge Advocate General the power to appoint the men who were to pass upon the qualifications of registrants, and adds the observation that if there were to be any appeal at all it was to be to the courts rather than to tribunals in the locality from which the registrants came.

Answer.—It is a sufficient answer to this attack of Senator Chamberlain to point to the fact that the provision against which he hurls his criticism is not to be found in the War Department project of the selective-service law, but is a provision formulated by the House Military Committee. I had no more to do with the preparation of this provision than did Senator Chamberlain himself. His quarrel —if he has one, which I do not concede—is, therefore, with the House Military Affairs Committee and not with me. I have verified the fact in conference with the Hon. S. Hubert Dent, jr., the then chairman of the House Military Committee.

(B.) CHARGE—WAR DEPARTMENT PROJECT OF THE SELECTIVE-SERVICE LAW: IT EVIDENCES THE HAND OF THE MILITARY AUTOCRAT. HE (GEN. CROWDER) IS AT HEART A MILITARY AUTOCRAT. (CONG. REC., AUG. 20, 1919, P. 4338.)

Answer.—Although it is impossible to perceive the relevancy of this issue to the subject of "Military justice," Senator Chamberlain has injected the issue into that controversy and made it the subject of a personal attack. If Senator Chamberlain had consulted his own files, he would have known how far afield he had been carried, and also that the War Department project was silent on the subject of how selective-service boards should be constituted, except in so far as section 5 of that project, authorizing the President to utilize the services of any or all departments, or any or all officers or agents of the several States, Territories, and the District of Columbia, in the execution of that act, foreshadowed the plan of the War Department to constitute local boards consisting of local officials to execute the law.

But while the War Department project was silent on that subject, except as above indicated, the War Department plan of execution was not. That plan was completed prior to April 10, 1917, of which fact there is to be found proof in an official record which had been made nearly two years before this charge of Senator Chamberlain was made.

I refer here to a statement in the report of the Provost Marshal General of December 20, 1917, page 9, where it is stated that the specific task of working out the details of the general plan of execution of the selective-service law was formulated and approved on April 10, 1917. To show conclusively and by the same kind of record proof that I contemplated decentralized local administration by local boards prior to any expression from Congress on the subject, I have only to quote from a letter confidentially communicated to the governors of the several States on April 23, 1917, and formulated some days prior to that date, the following paragraph:

> While the class from which soldiers are to come is to be segregated by draft, the law is careful to provide for avoiding the misery that war brings to dependents at home and for a choice of those whose military service the Nation most needs and whose civil and domestic service can best be spared. The important duty of making the selection from the drafted class can best be performed by a permanent board in each county composed of citizens who can be relied upon to execute this solemn function with even justice and with apprehension of its gravity. This board should control the process of selection from its earliest steps, and therefore it must supervise the registration. For the sake of uniformity, for the elimination of expense, and for further and self-evident consideration, it would be prescribed that this board be composed of the sheriff, who would act as its executive officer; the county clerk, who would be custodian of its records; and the county physician, who would serve as surgeon and pass upon the physical fitness of those who are selected for service.
> (See Report of Provost Marshal General, Dec. 20, 1917, p. 8.)

This would seem to be unimpeachable evidence that the War Department, not later than April 10 and before Congress had much opportunity to consider this legislation, had formulated that very plan of supervised decentralization which would place the execution of the law in close touch with the civil population. Undoubtedly Members of Congress entertained the same view. The fact that members of the House Military Committee entertained these views is amply attested in a series of hearings conducted by that committee upon the typewritten War Department project between April 7 and April 17. (Hearings on selective-service act before House Committee on Military Affairs, pp. 63–64, 93–95, 105, 120, 131–132, 156, 285, 301, 307.) In many places in these hearings apprehension is expressed by members of the committee against a Federalized draft, but I can speak positively only as to my own state of mind. I had never contemplated other than a decentralized draft executed by the people themselves. I have no doubt but that many Members of Congress entertained the same view. I did not borrow my idea from them, and neither did they borrow their ideas from me.

(c.) CHARGE—THAT COL. WARREN AND NOT GEN. CROWDER, WAS RESPONSIBLE FOR THE CIVILIAN COMPOSITION OF THE SELECTIVE-SERVICE BOARDS.

Senator Chamberlain says: Did Gen. Crowder come before the conferees to assist them? Not at all. It was recognized by some of the members of that committee, at least, that Gen. Crowder was not the man to undertake to popularize that measure. The man who was called into consultation was Mr. Charles Warren. * * * I am suggesting the fact that the man who was sent before the committee for the purpose of assisting in perfecting this bill and bringing the local communities into touch with the Military Establishment was a civilian lawyer of distinction from Detroit, Mich., as I have before stated; and I want to pay him the compliment of saying here and now that there never was a man who appeared before the committee who tried harder

that it will not be the judgment of this committee to set up a limited review. We have got the whole review. The convening authority below can weigh both questions of law and fact when he comes to act, and so, too, should the President have this power.

Senator LENROOT. The reviewing authority, I quite agree with you, has full power to measure questions of fact; but again, the convening authority must rely upon a judge advocate when it comes to questions of law, and not exercise his own judgment.

Gen. CROWDER. Yes, he should.

Senator LENROOT. That is the difficulty for me.

Gen. CROWDER. But it has not proved a practical difficulty. In judging of the personnel of your proposed court of appeals, it is important to bear in mind that about 90 per cent of the cases coming before that court are military cases. It is unreasonable to assume that any but military men could judge of the weight or relevancy of the evidence in determining the conduct of a man upon the field of battle, where the evidence is strategical or tactical and wholly military. The issues are those which only a military man who has been trained in those matters can understand. How could a civilian understand and judge of the conditions of battle in the Argonne so as to fix responsibility for failure of a division or Army commander, or even a colonel of a line regiment?

Senator LENROOT. I am not speaking of a civilian tribunal. I put my final proposition, of a tribunal the majority of whom should be military men.

Gen. CROWDER. Even in that case the objection that I have previously advanced remains, that when we shut the President off from a final say in such matters, we impair his responsibility, as the constitutional commander in chief, for winning the war: and I feel very certain, if you pass a bill of this kind, that ultimately its constitutionality will go before the Supreme Court.

Senator LENROOT. On this question raised by the Kernan report?

Gen. CROWDER. I am very much afraid, if you undertake to shut the President off from his relations to the discipline of the Army, and shut off commanding generals under him from their relations to the discipline of the Army, by creating a court of appeal with power to conclude them all, that the constitutional question raised by the Kernan-O'Ryan-Ogden Board will ultimately come before the Supreme Court for settlement, and in a case which will be very embarrassing, because the case will be identified with some great national crisis. I have just that to say about the constitutional question.

Senator LENROOT. I have not heretofore expressed any opinion, but I must say that if the view of the Kernan report is correct, I think the sooner it is found out the better. If there is any such autocratic power vested in the President of the United States as commander-in-chief of the Army, beyond the control of Congress, we ought to know it. That is my view of it.

Gen. CROWDER. Well, I have not based my opposition on constitutional grounds.

Senator LENROOT. I know that you have not, at all.

Gen. CROWDER. I preferred to rest the whole question upon what is best for the Army.

Senator LENROOT. Yes, I understand.

Gen. CROWDER. And I am willing to assume the constitutionality of legislation of that character.

Senator LENROOT. Yes.

Gen. CROWDER. And my only purpose there was to say that I have no doubt in time of some great crisis, the constitutional question will arise.

Take the question of the President convening the court. I did not emphasize that in my application of the law. Suppose that he, instead of a subordinate commander, is the convening authority, and then consider the President submitting to a court judge advocate below, and to a military court of appeals here, the question of whether some field commander or some division commander or corps commander in the battle of the Argonne has failed to do his part.

Senator LENROOT. Well, that all goes to two questions. One involves, of course, the question of whether the Constitution applies at all, which you discussed somewhat, and, secondly, whether the President is governed not only by law but by common principles of justice—whether there are any limitations upon him. If there be such, I see no more reason why, upon questions of law, he should not be governed by a military tribunal as Commander in Chief; he certainly is, just as a civil officer is, by the very men that he appoints to the bench, and they control his action and find his action invalid in a given case.

Gen. CROWDER. Of course, everybody sees that point instantly upon its being mentioned; but what would be the effect in the end, I am asking, what would be the effect upon efficiency if the man he appointed would have the right to control and nullify his action as Commander in Chief?

Senator LENROOT. If he did not obey the law, if he violated the law, I do not know why he should not be subject, as Commander in Chief, to nullification of any action in violation of law.

Gen. CROWDER. I am afraid this question of military relations is sui generis and that it does not aid you much to invoke the analogies of our civil jurisprudence.

Senator LENROOT. Well, take this case: Under existing law, take th case of the President convening a court, as you suggest. Supposing that the President should undertake to convene a court in violation of the Articles of War. Do you not think habeas corpus would lie to a civil court?

Gen. CROWDER. Unquestionably; and when the privilege of this writ is not suspended it would be effective.

Senator LENROOT. Do you not think that the civil courts therefore, to that extent, would have the control of the action of the President, even though he is Commander in Chief?

Gen. CROWDER. Oh, of course.

Senator LENROOT. So that to that extent now the courts may control the action of the President as Commander in Chief.

Gen. CROWDER. Yes; controlled by habeas corpus, but as to jurisdiction only.

Before I conclude my testimony I wish to call the attention of this subcommittee to a matter and see what my responsibility is. If I stop here I shall leave many matters uncovered which this committee has admitted as in some way relevant, and most of them the accusa-

tions of a single witness, Gen. Ansell. Illustrative of the intemperate general character of these accusations, I cite the following as examples:

1. Against generals of the Army:

(a) "The weakest grade in the Army of the United States" (p. 121), which is the grade from which are drawn convening and reviewing authorities of courts-martial;
(b) "Many of them, jokes to everybody else in the world except ourselves and themselves" (p. 121);
(c) "Lacking in experience" (p. 121), citing Gens. Pershing and Wood as examples, and saying:
(d) "That heterogeneous collection of troops on the Mexican border" "which Gen. Pershing commanded"; "no professional soldier would ever call that a division" (p. 122); and "the command in the Philippines was not the kind of command that required general leadership" (p. 122); and again,
(e) "I have had a hundred times their court-martial experience" (p. 121).

2. Against the Inspector General:

(a) "Thoroughly reactionary" (p. 116); "the most reactionary of men"; "prejudiced and reactionary" (p. 173); "whose views savor of professional absolutism" (p. 123).
(b) With trying to browbeat and intimidate Gen. Ansell in connection with the investigation of Gen. Ansell's part in the present controversy; in trying to compel Gen. Ansell to make a statement against his will by threatening that "this thing is in Congress, and my report will go to Congress, and, Ansell, when it gets to Congress, it will be very detrimental to you" (p. 209).
(c) With habitually using the power of his office in connection with investigations to compel accused persons and others to make statements against their will and to incriminate themselves by menaces, threats, and intimidation (p. 209).
(d) With allowing officers in his department in camp and division to compel testimony from suspected or accused soldiers, and then use it against them (p. 209).
(e) With having taken part with the Secretary of War and the Acting Judge Advocate General (Gen. Kreger) in frequent conferences with the court-martial committee of the American Bar Association under such circumstances that "I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

3. Against Gen. Biddle, former Assistant Chief of Staff:

(a) "Thoroughly reactionary" (p. 116);
(b) Sharing with the Inspector General in views that "savor of professional absolutism" (p. 123).

4. Against Maj. Gen. Kernan, Maj. Gen. O'Ryan, and Lieut. Col. Ogden—the members of the Kernan-O'Ryan-Ogden Board—and Lieut. Col. Barrows, the recorder of that board:

(a) "The most reactionary set of men in the United States" (p. 215).
(b) So prejudiced, and known to be so prejudiced, that many officers of high rank holding liberal views refused to express their views on military justice to that board (p. 215).

5. Against former President Taft—not admitted to the record, but illustrating the intemperate and irresponsible character of these accusations:

(a) Perverting "his power to the furtherance of a plan * * * to maintain the existing vicious system of military justice, and to do me great personal injury" (statement of Gen. Ansell, New York World, Sept. 16, 1919);
(b) Abusing "the confidence and trust of the American people" and "misleading them" (ibid.); and
(c) Debasing "his exalted position as ex-President of the Republic to become an ignorant and bitter partisan in behalf of his friend," Gen. Crowder (ibid.).

There is also a formidable list of accusations against the court-martial committee of the American Bar Association, but particularly against the Secretary of War and myself. The list is a long one. Certain of these accusations carry their own refutation.

to note in this letter of February 12, 1919, in the discussion of a single court-martial case, the fact that the original finding of the court had been "not guilty," but that on revision the court had changed this finding of "not guilty" to a finding of "guilty."

It is true that the first draft of my letter of February 12, sent to Senator Chamberlain, omitted any mention of the changed finding of the court from "not guilty" to "guilty," but it is likewise true that this was noted the next day by me and a corrected copy sent to the War Department for transmission to Senator Chamberlain.

It is also true that eight days before Senator Chamberlain gave out this denunciatory interview, namely, on February 26, 1919, I specifically called his attention to the correction in my letter of February 12, 1919. (Hearings before Senate Military Affairs Committee on S. 5320, 65th Cong., 3d sess., p. 282.)

It is also true that on March 4, 1919, two days before the appearance of this denunciatory interview, my said letter of February 12 was published in the Congressional Record in its corrected form. (Cong. Rec., Mar. 4, 1919; pp. 5257–5265.)

The unquestionable fact is, therefore, that on March 6, 1919, Senator Chamberlain gave out this denunciatory interview branding the statements in my letter of February 12 as "erroneous and false;" and that on that date he referred to this omission above set forth as an example of "wholly incorrect" statement, although he had three prior notices, two of them personal notices, that this "wholly incorrect" statement, had been admitted by me and promptly corrected.

The other criticism that he made of my letter of February 12 was that I had there stated that the judge advocate on the camp commander's staff (Lieut. Col. William Taylor) who had passed on this same case was a civilian lawyer, fresh from civil practice. As a matter of fact this judge advocate had entered the Army from civil practice during the Spanish-American War. In the rush of preparing the data for my letter of February 12, Lieut. Col. Taylor had been confused with Maj. Orville Taylor, a Reserve Corps judge advocate, who had just entered the service from civil life. This error was noted by me the very next day (February 13) and corrected in the revised letter of that date. And on February 21 the Secretary of War, at my request, notified Senator Chamberlain by letter of this error and called attention to the correction. Indeed, it is doubtful whether Senator Chamberlain would ever have noticed this error at all had it not been for my open admission and voluntary correction of it. This erroneous statement did not appear in the letter of February 12 as published in the Congressional Record of March 4. Yet in spite of the fact that, apparently, Senator Chamberlain did not discover this error until the Secretary of War called his attention to it, at my request, and in spite of the fact that he knew the correction had been made at least 13 days before his statement appeared in the press on March 6, he described my letter as containing "so many misstatements of fact" that he did not make it public because he did not care to "embarrass the Secretary by having him stand sponsor and be responsible for such erroneous and false statements."

Senator Chamberlain, at the time of his speech in the Senate, August 18, had had in his possession my letter of February 12 for a period of over six months. He has entered the general allegation of "erroneous and false statements," but he has never, so far as I know, particularized but two, and those two are fully explained above.

II. Gen. Ansell's Charges Against Gen. Crowder.

(A.) GEN. ANSELL'S CHARGE THAT HE WAS RELIEVED OF ALL DUTIES AND RESPONSIBILITIES IN CONNECTION WITH THE ADMINISTRATION OF MILITARY JUSTICE AFTER NOVEMBER, 1917.

Gen. Ansell's letter to Congressman Burnett, February 17, 1919, (Cong. Rec., Feb. 19, 1919, p. 3982.) · Gen. Ansell's testimony on the hearings on S. 64 (p. 173).

Gen. Ansell wrote to Congressman Burnett:

Thereupon (upon filing the brief as to the meaning of the word revise as used in R. S., sec. 1199) I was relieved of my duties in connection with the administration of military justice, and these were taken over by the Judge Advocate General in person. Consequently, from the middle of November, 1917, to the middle of July, 1918, I was not charged with any duty or responsibility in connection with the administration of military justice, nor was I consulted either by the Secretary of War or the Judge Advocate General upon matters affecting military justice.

He testified before this subcommittee:

After I had filed my opinion insisting upon subjecting courts-martial to legal regulation, in November, 1917, the Judge Advocate General of the Army came back, took charge, relieved me from all connection with military justice, except, of course, when he was away for any period some one had to act, and I acted; but I mean to say that I was relieved of all authority to act while he was there. (P. 173.)

Answer.—The truth is to the contrary, that Gen. Ansell continued his duties in connection with military justice after November, 1917, and until his departure for Europe in April, 1918, as senior assistant in the office, in the same way and with the same responsibility as prior to November, 1917.

Col. E. G. Davis, during that time chief of the military justice division of the office, testified on the hearings on S. 5320 before the Senate Military Affairs Committee on February 26, 1919 (p. 204):

That statement (Gen. Ansell's statement in his letter to Congressman Burnett, above quoted) "is not correct, for the reason that all these cases continued to pass through his hands. He signed many of them himself, as acting Judge Advocate General, and actually exercised the discretion of deciding what, if any, of the cases went on to Gen. Crowder for his action. Gen. Ansell exercised final authority on such cases during November, December, January, February, and March, except where he did not want to take the responsibility of determining a particular case himself.

The Inspector General of the Army, after examining officers connected with the military justice division of my office during the period in question and the reviews of the courts-martial cases prepared during the period from November, 1917, to Gen. Ansell's departure for France in April, 1918 (finding over twice as many signed during that period by Gen. Ansell as by Gen. Crowder), said in his report to the Secretary of War, May 8, 1919 (p. 26):

From the records and from all obtainable evidence it appears that Gen. Ansell's statement that from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts.

An examination of the records in my office shows Gen. Ansell's signature appended to 105 written reviews of general courts-martial cases, dated between November 16, 1917, and April 9, 1918, as against 36 signed by Gen. Crowder. The balance, 436 in number, cases of less importance, bear the signature of Col. Davis or his assistant Lieut. Col. Clark.

(B.) GEN. ANSELL'S CHARGE THAT HE WAS AGAIN RELIEVED FROM ALL CONNECTION WITH THE ADMINISTRATION OF MILITARY JUSTICE AFTER THE ARMISTICE.

Gen. Ansell's testimony before this subcommittee (Hearings on S. 64, p. 183).

Gen. Ansell said:

After the armistice the Judge Advocate General returned to the office and more largely assumed the reins, and the first thing that the Judge Advocate General of the Army did again was to relieve me from all contact with and supervision over military justice. The truth of the matter is, of course, that he and the department did not like my liberal views. They will not say it, but their conduct speaks far louder than any words.

Answer.—The truth of the matter is quite to the contrary. On resuming charge of the office obviously a division of the work between Gen. Ansell and myself became necessary in the interest of expedition of business and a proper division of the burden. In order to get quickly in touch with the much assailed department of military justice, I gave directions that court-martial records be routed direct to my desk and other matters direct to Gen. Ansell's desk; but I never failed to send to him important records for his opinion. In addition (1) Gen. Ansell was made president of the clemency board, a matter of the very first importance in which he was greatly interested and which necessarily absorbed his time; (2) Gen. Ansell remained senior assistant in the office, upon whom devolved the duty and responsibility for all matters relating to military justice, as well as to other matters in the office whenever Gen. Crowder was not personally present, and, even when Gen. Crowder was personally present, Gen. Ansell remained in charge of more important disciplinary matters; (3) this relation continued undisturbed until after Gen. Ansell by his unwarranted personal attacks in his letter to Congressman Burnett, published February 19, 1919, had created an impossible situation; (4) Gen. Ansell himself said of this matter while it was fresh in his mind, in his testimony, February 15, 1919, before the Senate Military Affairs Committee, in the hearings on S. 5320 (p. 146):

An order was published routing all matters affecting military justice through other channels * * * maybe 10 days ago, I imagine. But I think it ought to be said that there is always a question as to what work is going to come to me or through me, and it was well within the province of the Judge Advocate General to decide such a matter, without any desire whatever to prevent my supervision of the administration of military justice. I do not believe that the publication of the order by the Judge Advocate General was designed to prevent my supervision of the administration of military justice, but rather done in the due course of administration and the division of work.

As to Gen. Ansell's statement that "he and the department did not like my liberal views," (1) Gen. Ansell held many views with which I did not concur; I did, however, appreciate his ability and energy. Although his views were well known to me, I retained him as my senior assistant in charge of the office in my absence; (2) my high opinion of his ability and my liberal attitude toward his differing views were testified in the order issued a few days later (G. O. No. 18, War Department, Jan. 27, 1919), upon my recommendation, awarding Gen. Ansell the distinguished service medal, which, condensing the substance of my letter of recommendation, awards him the medal "for especially meritorious and conspicuous service as Acting Judge Advocate General of the Army, whose broad and constructive interpretations of law and regulations have greatly facilitated the conduct of the war and military administration."

(C.) GEN. ANSELL'S CHARGES AGAINST THE ADMINISTRATION OF THE JUDGE ADVOCATE GENERAL'S OFFICE.

Gen. Ansell says:

If there was ever one institution in the world that really ought to be thoroughly investigated, in my judgment, it is the Office of the Judge Advocate General of the Army. (P. 162.)

Injustice reigns supreme in the bureau of military justice itself. (P. 162.)

The Judge Advocate General's department is no longer a place of certain and assured justice. All too frequently it is a department given over to base wrong and tyranny, and the oppression of the men and officers who serve in it, and of the Army at large.

I am going far enough into this question of administration to show, I think, that justice is jockeyed around in that department, and it has been degraded to serve the personal purposes of an imperious master, the Judge Advocate General himself. (P. 172.)

Answer.—This language contrasts strangely with the gratuitous statement made by Gen. Ansell as late as July 8, 1918, and contained in the report of his trip abroad, as follows:

In passing, I should like to say and considering the nature of this report I think that with entire propriety I may say, that as a result of my observations and study here I have been surprisingly struck with the prevision with which the Office of the Judge Advocate General of our Army has been administered for the past several years, including the period of this war. Without particular opportunities for so doing, and without the advantage of actual war experiences had here, it has anticipated necessities of administration which as a rule only experience develops; and, more remarkable still, there is a surprising consonance between the principles of administration which our office had recommended to be adopted and which doubtless in the end will be adopted in the department and those principles which are found to be an approved basic part of the military administration of the allied nations.

As to this matter the Inspector General found (Inspector General's report of May 8, 1919, to the Secretary of War, p. 57):

It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose.

I should welcome an investigation of my office. I think I may confidently rest upon the record it has made.

(D) CHARGE.—THE ALLEGED "PROPAGANDA BUREAU."

Charge.—The following excerpts appear in Gen. Ansell's testimony before the Senate committee.

Mr. ANSELL. They met, these three men, and they decided upon a plan of campaign to maintain and defend the existing system at all costs and discredit the complaints and destroy the complainants. (P. 166.)

Senator CHAMBERLAIN. Who were the men? You mentioned them a while ago. (P. 166.)

Mr. ANSELL. They were Mr. Baker, Gen. Crowder, and Prof. Wigmore. The first thing done publicly was a statement for the press, devoted largely to discrediting me. * * * Now, they got together and published this document accusing me of wanting to succeed, and wanting to succeed by surreptitious methods, and gave it to the papers—the Associated Press and all of them—all timed for the usual Monday morning fulmination. It had been held there two or three days and sent out everywhere, with great headlines, about me. All of this was done by the Secretary of War, who invited it by writing a letter to Gen. Crowder as a vehicle upon which this letter to Gen. Crowder could travel. He said, "Please make the statement immediately." And the statement was made immediately that the system was splendid; that it had virtues that few human institutions have; and then it devoted itself largely to destroying me for bringing to the public, as I have had to do, the situation. And then, not content with what they gave to the press, but in accordance with the plan, they published this 70-page document here, which was an elaboration of the statement that was given to the press, in itself a long one, written by Prof. Wigmore. (Pp. 166–167–168.)

This conference between the Secretary, Gen. Crowder, and Prof. Wigmore that I told you about, established a propaganda bureau, in which Prof. Wigmore was the chief. There were several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries. (P. 168.)

The bureau got out this very elaborate statement, which is devoted to encomiums upon the system, and then concludes, as the other did, by calling the attention of the public to my surreptitious conduct, adding here another gross example of "surreptition" (p. 168).

That lengthy pamphlet was gotten out. There were 90,000 copies of this pamphlet published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this system and to discredit those who would attack it. I wish to say to you, Mr. Chairman, that the records of the cases cited will prove that the Secretary of War and the Judge Advocate General of the Army have resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation (pp. 168–169).

Answer.—These several quoted statements, in so far as they charge me with any part in this propaganda work, are wholly untrue. I had no more to do with it than did Gen. Ansell and Senator Chamberlain, both of whom have accused me of a leading part in it. More than that, in a conference with the Secretary of War, held between March 10 and March 14, when we had this so-called Wigmore letter before us, it was expressly agreed that the letter should be placed upon the files of the War Department as a complete refutation of charges made, and to limit publication to what is found in my letter of March 8, published in Official Bulletin of March 10, and I left for Cuba on or about the latter date with that firm understanding. It was not until April 4 that I learned of the large publication and distrbution of this letter. I was then at Habana, Cuba; and perhaps the best proof that I can give of my attitude toward this whole matter is by inserting here a letter which I wrote of that date to Gen. Kreger, who was representing me in the office.

FIFTH FLOOR, ROBINS BUILDING,
Habana, Cuba, April 4, 1919.

Personal and confidential.

MY DEAR KREGER: I am in receipt of a personal letter from Maj. Miller this morning dated March 29, inclosing copy of a public document issued out of the Government Printing Office, same being a reprint of my letter of March 10, 1919.

The matter of publishing this letter came up before I left Washington when I learned that a copy of it was in the hands of the Secretary of War before I had read it, being left with him by Col. Wigmore. As you know, the letter was prepared by Wigmore and Rigby, but largely by the former. Wigmore and I had a rather unpleasant conversation about his action in going direct to the Secretary of War with this communication. I think I remember the facts correctly. Wigmore told me that he had won the assent of the Secretary of War to its publication and distribution. I told him that such a step would be such a departure in military administration that it was not to be thought of, and that the expenditure of public funds for such a purpose could not in my judgment be defended. I expressed a doubt as to whether the auditor would pass the voucher for the publication of the letter for such distribution. Wigmore acknowledged the irregularity of his action in going over my head to the Secretary but expressed the view that he could not sit by and see the case fail for lack of presentation to the public. I would not yield my assent to publication and left Washington with the facts just as I have stated. I hope I am not dim in my recollection of the occurrences I have attempted to narrate.

In view of what I have stated, you will understand my surprise to receive this pamphlet and a statement by Miller that a hundred thousand copies were being mailed by the Provost Marshal General's Office; where they got their mailing list I do not know.

Had I been present in Washington I should have strenuously opposed the publication, if for no other reason than the events which have occurred since I left Washington furnish; namely, the refusal by the Secretary of War to give Gen. Ansell's letter of reply to my letter of March 8, published in the Official Bulletin March 10, any publicity. Now comes along this publication, which involves some reiteration of what

I said in the other letter and is certain to aggravate the situation both within the department and before Congress and the country. It insures, in my judgment, a turmoil for the next six months or a year.

Had I been compelled to yield my assent, I should have asked for the elimination of the part commencing "As to the second point," on page 53, and ending on page 62 with the second paragraph of that page, with, of course, those modifications in the remaining part of the text necessary to conform that part to this elision. Published in that way it would have been a straight explanation of the system of military justice, with recommendations as to what improvements ought to be made, and nothing more. The inclusion of the 10 pages, the elision of which I would have made, presents the personal issues and impairs the primary use of the document.

I thought I would like to have this explanation in your hands for your own guidance in answering any questions that may be directed to you. I hope I have stated the facts in all fairness to Wigmore.

Very truly, yours,

E. H. CROWDER.

Brig. Gen. E. A. KREGER,
Room 606, Mills Building, Washington, D. C.

E) GEN. ANSELL'S CHARGE THAT GEN. CROWDER FAILED TO FORWARD TO THE SECRETARY OF WAR GEN. ANSELL'S REPORT OF HIS EUROPEAN TRIP.

Charge.—Gen. Ansell said in his letter February 17, 1919, to Congressman Burnett (Cong. Rec. Feb. 19, 1919, p. 3983):

Returning from Europe in the middle of July, whither I had gone the April before for the purpose of studying the military administration of our Allies, I filed with the Judge Advocate General a report, which, among other things, treated especially of the administration of military justice in France, Italy, and England, and which indicated those elements of their systems which I believed to be better than our own, and suggested our own weaknesses. This report never reached the Secretary of War.

Gen. Ansell repeated this charge before this subcommittee (p. 174).

Answer.—In truth Gen. Ansell's orders to proceed abroad did not contemplate any examination of the administration of military justice. He himself wrote every order that he received. The convincing answer, therefore, may come from the official record he himself has made. His first letter on the subject of his trip was written as early as July 25, 1917. Certainly his orders gave me no information that his report was any broader than the instructions he had written for himself, and which I had approved, and therefore no information that it had any relevancy to the administration of military justice. This information came to me when I was accused of the suppression of that report. I then sent for the report, which I had never seen. After some delay a carbon copy was brought to me. I asked for the original. This was, after even greater delay, brought to me with the statement that it was found on Gen. Ansell's desk.

I submit herewith all I can find on the files respecting this trip abroad of Gen. Ansell, in order that the committee may form an independent judgment as to the extent to which I was apprised that it dealt at all with the subject of military justice:

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, July 25, 1917.

Personal memorandum for the Secretary of War.

Especially at this time—and I am sure you will agree—it is the plain duty of a subordinate to make to you such suggestions based upon his daily experience and observation as will help in the better administration of the department and to a more efficient Military Establishment.

In the performance of my daily duties in this office during this war I have met with certain deficiencies which doubtless have considerable effect upon general mili-

tary administration and which, if I do not exaggerate them, we must, as we can, readily remedy. I shall summarize the several and rather unrelated subjects thus:

1. The failure of this office primarily, the War Department, and the entire Government to inform itself and act advisedly in the light of the war law and administration of Great Britain, Canada, and France.

2. The failure of the War Department to appreciate the legal relation of this bureau to all military administration as the same is established and required to be recognized by law.

3. The unfair and injurious attitude of the department to the personnel of this bureau.

I. Long before we entered this war I took up with the head of this office the necessity of our keeping in touch with the war legislation and administration of Great Britain and Canada especially, and of France as well. At that time we contented ourselves with a rather perfunctory and unstimulated effort. I gathered some things through the State Department, and spent several half days down in the Library of Congress, and, through friends in the large universities, got in touch with university current library literature upon this subject. Since that time, in a perfunctory sort of way, I have kept up, through British law notes and like journals, with the general commentaries upon such law and administration. We are now in the war, and doubtless will have to consider, if not adopt, a course of law and administration parallel to that of our English allies, and should give thorough consideration to the much more scientific and effective effort of the French. If it were important for us to keep in touch with such national activities before we entered the war, it is imperative that we do so now. Doubtless the war law and administration of certain of the allied countries—particularly Great Britain, and to a lesser degree France—can be found in the Congressional Library and other sources of information in this country, and with considerable labor be gathered together and some estimate made of the whole. This gathering of the material, however, would be uncertain and unsatisfactory, and would give us no information of the effects of the legislation. Much of what has been done has been tried, tested, and found wanting, and much practice and experience have proved good. Assuming that we can produce the various parts of the legislation, of its effects there is as yet no literature which is authoritative, complete, or assuredly impartial. We ought to know this law and administration, the necessity back of it, its purposes and objects, and, above all, its results.

Now our Government must necessarily embark on many similar projects, or must at least consider them, and it should do so advisedly. I feel that the entire country is deficient in this knowledge, and that this great war-making department is almost inexcusably so. This department in this regard is not performing the functions that it ought to perform and will have to perform before this country participates effectively in this war. The chief fault is that as a nation and as a department we are proceeding along the old established lines that wars are to be fought by hosts specially trained therefor, and involve only indirectly and remotely the Nation and society at large. This was once so, but is so no longer. One or two or more millions of men can not be put into the field without profoundly disturbing social, economic, and industrial conditions, and this general disturbance is as much a matter of concern to this department as is the conduct of technical military affairs themselves.

A thousand and one questions ought to be considered, and this department should be ready with helpful views and advice. Indeed, we hardly know what the subjects are. We can summon to our minds a few of them which are likely soon to become subjects of consideration in this country—such as moratoriums for those engaged in the military service; separation allowances; government care of dependents; a scheme of insurance to supplant the unscientific American pension system; military requisitions of all kinds; control of telegraphs and telephones; suspension of freight and passenger traffic; control of resident aliens; press control; control of infectious diseases; the support of nonemployed; food conservation; judicial process as affecting those in the military service; trading with the enemy and suspension of private commerce with them; litigation and adjustment of judicial work to the situation of war; and a thousand and one phases of the problem of adjusting ordinary civil rights to the law and military exigency.

I say this department is not at all familiar with the conduct and experience of the other belligerents in these matters. We ought to be. This office particularly ought to be. I feel the need of such information every day. Though we are in the war, in some respects we are as far removed from it as Mars. We are not abreast of war activities; we lack current knowledge and information which is easily obtainable; we have not the facts which can serve as the basis of views that are worth while. We can not rely upon past experience; this war is sui generis, and must be understood as such.

I believe that the quickest and best way of getting these facts is to send several trained officers and investigators to London, Paris, and Ottawa, who should acquaint themselves with what has been done and get the opinions as to the merits of the various legal and administrative steps taken. In this way local color, atmosphere and public opinion will all register their effects. Such a commission should stay, I should say, a month in London, living in and with the administration that is there taking place, and perhaps a lesser time in Paris and Ottawa. They should then come back here prepared to state the facts with respect to the law and administration taken by the allied countries to our own Government, and to express informative and valuable views upon them.

I have talked over this subject with Maj. Wigmore, of this department, and as well with the Judge Advocate General himself. I think both agree with my views. Maj. Wigmore took the matter up with the Librarian of Congress, and has a letter from that authority, which I here quote:

"MY DEAR MAJOR: I was interested in your inquiry this morning, but impressed anew by the situation and the need which it reveals. What your office wants is, first, of course, the war legislation enacted in foreign countries, but also, secondly, the effects of this legislation.

"Now, as to certain of the countries, particularly Great Britain, and to a lesser degree France, we can produce the legislation, but of its effects, there is, as yet, no literature in our possession which is authoritative, complete, or assuredly impartial. An occasional article in a periodical, to be sure, on some particular phase; but with what bias composed can only be guessed.

"Now our Government is necessarily to embark on many similar projects of legislation or, at all events, to discuss them, and Congress will undoubtedly demand information not merely as to the legislation actually enacted abroad, but as to its effects, and it will not be content with a mere characterization of these as 'good' or 'bad.'

"Later on, studies and conclusions will doubtless appear in print, which will be adequate for the historian, but our legislators can not wait for their appearance. I believe that the one sound and practical method is to send a commission abroad to make some first-hand studies (see note [1]) and direct inquiries. An attempt to secure the data through our embassies or consulates, especially if based upon careful questionnaire, might yield some useful return, but any attempt at long distance and by correspondence merely, which rested solely upon the regular staff at these already overpressed offices, is not likely to yield adequate results. The inquirers themselves should be men with special training. Only such men have sufficient familiarity with the literature, the way of using it, and the method of formulating the inquiry. Only they could get at the essentials in the short time available, and could avoid being clouded by the nonessentials.

"There must be many such men available from the universities, at least between now and October 1, who are only too anxious to do some war service. They could readily be drafted in for it.

"I have been induced to note the above because, though your inquiry this morning is the actual occasion, we have already, during the months past and from various angles, had ample proof of the need.

"In determining the field to be covered, however, and the qualifications desirable in the investigator, there should not be overlooked any projects underway in other Government establishments—for instance, the Department of Commerce, the Department of Agriculture, the Tariff Board, etc.—whose object may be the acquisition of data within the section of the field with which their activities are concerned.

"Faithfully, yours,

"HERBERT PUTNAM, *Librarian.*"

I also quote one to me from Maj. Wigmore, as follows:

"I visited the Congressional Library this morning. Here is the book (my own copy) of which I spoke to you. The Congressional Library contains the same, with Volumes II and III also to 1916. Also the Library has a different series covering the same ground to 1917, in 14 small volumes. Also it has the English Manual of Emergency Legislation in serial parts to 1916, followed by a new series, of which one volume is now on hand, entitled 'Defense of the Realm Act and Regulations Thereunder.'

"Neither for France nor for England are there any treatises or reports on the effect of such legislation.

"I consulted my old friend, Herbert Putnam, Librarian; and he stated that he has for some time been convinced that such a mission as you propose should be sent. He is writing me a memorandum about it to hand to you.

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[1] NOTE.—Not necessarily elaborate first-hand studies in the field, but studies of data which might be secured by direct contact with the operating bureaus of the Government.

"Also I lunched with Ambassador Spring-Rice at the Cosmos Club, and asked him whether he knew of any reports on the effect of the British legislation. He did not. His opinion was that the only way to learn the facts would be to send an agent to inquire, first, however, equipping him with a definite series of questions on which it was desired to ascertain the conclusions of English experience."

With my present information I can only see the task in vague outline, but I am absolutely assured of the advisability, even necessity, of undertaking it. I am also convinced that it is too big a task for one man, and that, as suggested by Mr. Putnam, trained investigators and skilled legalists should be called to our assistance.

In proceeding to the work, first the grounds here at home should be covered. That will enable one to get a comprehension of the task and to gather points to which he will direct his inquiries. Then the commission should take to the field, by which I mean should take up its investigation in London, Paris, and Ottawa.

If it will make my suggestion appear as disinterested as it is, permit me to say that I am not an applicant for a position on this commission should it be appointed.

II. This bureau and its official personnel are the legal advisers to the Secretary of War, to all bureaus and officers of the department, and to the Army itself. Such is the relation established by law. The function of this bureau ought not to be, and safely can not be, ignored or minimized. There is no need or reason for ignoring or in any degree denying its functions or seeking to establish it extra legally elsewhere. And yet this is what is being done. Since this war began I have seen grow up in many of the bureaus of this department unofficial and extra legal law officers—lawyers who are commissioned, for instance, as reserve officers of the particular bureau, having no qualification for the work of that bureau and commissioned therein only to perform for it work which belongs to this bureau. It is an abuse of the appointing power so to use the Reserve Corps. If any bureau needs legal advice, the law requires that it be sought here; and this bureau can and will supply it reliably and expeditiously. The Judge Advocate General's Department has a reserve section to which the best legal talent of the country can gain admission. Such a system of supplying legal aid has given rise, as naturally it must, to uncoordinated legal direction and embarrassment, the extent of which is best known to this office, but the effect of which throughout the field of administration can not be lost. Congress has established one law bureau in this department. It certainly has not been found wanting; indeed, surely, it has proved helpful and has put every ounce of its effort behind correct departmental administration. There can be no reason, in fact, for attempting to disintegrate its functions. While I assume that such is not the desire of the department, such is inevitably the result of the present tendency of each bureau to furnish its own law officers. There is but one Judge Advocate General's Department; it is unlawful, unwise, and unsafe to attempt to create and rely upon others.

III. (*a*) The staff rank of the officers of this department has been placed on a grade below that of other staff officers. This has wrought a great injustice to the worthy officers of this department and is bound to have an injurious effect upon the legal administration of the Army. I know this discrimination has been made through the ignorance of line officers of the General Staff who can have no accurate comprehension of the importance of a judge advocate's work. The action, initially, was taken hastily and ill-advisedly. The merits of the proposition were not considered properly, if at all. No officer of this department was heard or consulted, yet this office has never been able to get a reconsideration of a matter which is vital to this department and must result detrimentally to the Army.

(*b*) This is in line with the recent ruling of the department to exclude all permanent staff officers from eligibility for appointment in the National Army. That rule is unlawful. The statute renders us eligible to command, and it is not within the lawful power of this department to render us ineligible. We can be rendered ineligible only by an arbitrariness that is unjustifiable in law, does an injustice to all whom it affects, has its entire basis in prejudice, and can result only detrimentally to the Army. Not only is it unlawful, it is even more unwise.

S. T. A.

MARCH 20, 1918.

Gen. CROWDER (personal):

1. I am now ready to start at any time on the proposed journey for the study of the Allies war laws and administration. I think my departure should be hastened.

2. More time will be required than I first reckoned. A rough estimate is: One week at Ottawa; 3 or four weeks at London; 3 or 4 weeks at Paris; 2 weeks in conference with our own authorities, military and civil. About 20 days will be consumed in ocean travel going and returning. I could leave for Ottawa almost immediately.

3. I have from time to time had conferences with members of the various foreign missions here, whereby I am satisfied I better know what is needed, and how to get it. Maj. Innes, of the British Embassy, has been the soul of courtesy, very interested, and very helpful. With great kindness he has offered to place his chambers at the Inns at my disposal.

4. My information is that the volume and the character of the work, together with the difficulty of getting the services of a stenographer abroad, will absolutely necessitate my taking along a stenographer from this office. The volume of dictation, copying, and note-taking will make the continuous services of a stenographer indispensable.

5. I am sure I do not exaggerate the benefits that will result from such a tour. There have been missions for everything else, but nothing has been done to acquaint us, especially, with the war laws and administration of the Allies. Indeed, it would be difficult to exaggerate the benefits. I am quite sure that the results of such a tour and study will be helpful to the Government, to the department, and to you, and that it will be especially beneficial and I hope creditable to you, to me, and to this office. I feel that this office, thus prepared, will thereby be enabled to exert greater influence in the department and outside of it.

ANSELL.

MARCH 30, 1918.

Memorandum for The Adjutant General.

Will you please issue travel orders immediately, in letter form, substantially as follows:

Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, accompanied by Mr. Earle L. Brown, civilian clerk, office of the Judge Advocate General, will proceed not later than April 1, 1918. to Ottawa, Canada, for the purpose of observing the Canadian forces under confidential instructions of the Secretary of War. Upon the completion of this duty both will return to their proper station. The travel, as directed, is necessary in the military service. Mr. Brown will be paid $4 per day in lieu of actual expenses, and the Quartermaster's Department will furnish him the necessary transportation.

S. T. ANSELL,
Brigadier General, National Army.

MARCH 30, 1918.

From: The Adjutant General of the Army.
To: Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department, Washington, D. C.
Subject: Travel orders.

The Secretary of War directs as necessary in the military service that, accompanied by Mr. Earle L. Brown, civilian clerk, you will proceed not later than April 1, 1918, to Ottawa, Canada, for the purpose of observing the Canadian forces, under confidential instructions of the Secretary of War, and upon completion of this duty you and Mr. Brown, will return to your proper station.

Mr. Brown will be paid $4 per day in lieu of actual expenses, and the Quartermaster Department will furnish him the necessary transportation.

A. G. LOTT, *Adjutant General.*

WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, April 16, 1918.

Confidential.
Memorandum for The Adjutant General (through the Judge Advocate General).
Subject: Travel orders for Brig. Gen. S. T. Ansell, National Army, Judge Advocate General's Department.

I request that orders issue directing that I proceed not later than the 20th instant to the port of embarkation at New York, and thence to France and such other of the allied countries in Europe as may be found to be necessary, for the purpose of observing the allied forces and studying their operations and studying and observing the principles and practice of the war laws and administration of the allied governments, in accordance with directions previously given the Judge Advocate General by the Secretary of War, and that upon completion of this duty I return to my proper station, reporting my observations in writing to the Judge Advocate General of the Army.

S. T. ANSELL,
Brigadier General, National Army.

[First Indorsement.]

To THE ADJUTANT GENERAL:

APRIL 16, 1918.

Recommending that orders issue in accordance with the above request.

E. H. CROWDER,
Judge Advocate General.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF STAFF,
Washington, April 17, 1918.

Confidential
Memorandum for The Adjutant General.

The Secretary of War directs that an order in letter form be issued to Gen S. T. Ansell, directing him to proceed not later than the 20th instant to the port of embarkation at New York and thence to France and such other of the allied countries in Europe as may be found necessary for the purpose of observing the principles and practice of the war laws and administration of the allied countries, in accordance with directions previously given the Judge Advocate General. Upon completion of this duty Gen Ansell will be directed to return to his proper station

Report of his observations will be made in writing to the Judge Advocate General of the Army.

WM. S. GRAVES,
Brigadier General, National Army,
Assistant to Acting Chief of Staff.

(F) GEN ANSELL'S CHARGE THAT GEN CROWDER OPPOSED GRANTING COUNSEL TO ACCUSED, AND GIVING ACCUSED LEGAL PROTECTION AT THE TRIAL.

Charge.—In Gen. Ansell's testimony before the Senate Committee on Military Affairs (p. 257), he charges that Gen. Crowder, in his testimony before the Committees of Congress on the Revision of 1916, stated:

> I must warn you to be careful about injecting into this system these civil principles that give you counsel and protection at every stage of the proceeding, because it will disturb discipline.

Gen. Ansell further says that Gen. Crowder "said that (referring to above quotation) on pages 18, 20, 29, 30, 44, and 48 of the hearings, and repeated it time and time again."

Answer.—Gen. Ansell's statement is not in accord with the facts.

A careful examination of those hearings discloses that neither the statement quoted by Gen. Ansell, nor any statement of similar import, appears either on pages 18, 20, 29, 30 or 44 of the hearings. On page 48 of the hearings, Gen. Crowder, in discussing before the committee a proposition as to whether or not there should be a unanimous verdict by the court in a sentence imposing death, stated—

> To require a unanimous vote for the infliction of the death penalty in time of war would be going a long way, I think, toward impairing the success of the field operations of an army. If this were a proposition to regulate the trial of capital crimes in time of peace, the argument presented by Mr. Kahn would have greater force. As to a few military crimes, the death sentence is authorized in time of peace, but I have not been able to find any instance where a death sentence has been adjudged by a court-martial in time of peace Over and above the court to act upon such a sentence is the convening authority, and over and above both the court and the convening authority stands the President of the United States, whose sanction is necessary in peace before a death sentence can be executed. I request that the committee consider very carefully the question of introducing into our military jurisprudence the principle of the civil law, which requires, in addition to these safeguards, a unanimous verdict.

Gen. Ansell's quotation is a plain misstatement of facts, and is an attempt to convey the impression that Gen. Crowder entertained opposition to surrounding an accused upon trial before general court-martial with any of the safeguards guaranteed by law to an accused in civil cases.

(G) APPELLATE PROCEDURE—GEN. ANSELL'S CHARGE THAT GEN. CROWDER ENTERTAINS AND HAS EXPRESSED ILLIBERAL VIEWS AS TO APPELLATE PROCEDURE.

Charge.—Gen. Ansell, before this committee, in discussing revision of the Military Code of 1916, charges Gen. Crowder with expressing illiberal views as to appellate procedure, to committees of Congress which considered and reported the revision of 1916. Gen. Ansell (p. 257) quotes Gen. Crowder as saying on this subject:

If there is one thing we must not have in the Military Establishment it is an appellate tribunal. (P. 257.)

Gen. Ansell further charges Gen. Crowder with the following statements:

In a military code there can be no provision for a court of appeal. Military justice and the purpose which it is expected to subserve will not permit of the vexatious delays incident to the establishment of an appellate procedure. However, we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be, in addition, the confirmation of the President. (P. 257.)

Answer.—A careful examination of the hearings before the committees of Congress which considered the revision of 1916 has been made. The following is the only comment by Gen. Crowder found in the hearings, on the subject of appellate jurisdiction:

I might interject here the remark that the administration of military justice differs from that of civil justice in that every case is appealed. There is always somebody above the trial court authorized to act by way of disapproval (p. 27, 1912 hearings).

Over and above the court to act upon * * * a sentence is the convening authority and over and above the court and the convening authority stands the President of the United States, whose sanction is necessary in peace before a death sentence can be executed. (P. 48 Id.)

A soldier is tried for an offense, the court convicts him, and the proceedings come to headquarters for approval. They are subjected to review by the commanding general. * * * The commanding general and his legal adviser think the proof not sufficient * * *. (P. 50 Id.)

(This statement was made in discussion of reviewing officers' power to approve as to a lesser included offense.)

The statement quoted by Gen. Ansell and the statements which he charges Gen. Crowder with making are not found in the hearings. The statements which Gen. Ansell charges that Gen. Crowder made on this subject are much broader than the actual language of Gen. Crowder, and would indicate opposition by Gen. Crowder to appellate procedure; which is not warranted by Gen. Crowder's testimony on the subject.

(H) GEN. ANSELL'S CHARGE THAT GEN. CHOWDER ENTERTAINS AND HAS EXPRESSED ILLIBERAL VIEWS AS TO ACCUSED'S RIGHT OF CHALLENGE.

Charge.—Gen. Ansell, on page 256 of the hearings, in charging Gen. Crowder with the expression of illiberal views before committees of Congress in hearings on the revision of 1916, quotes Gen. Crowder as follows, in respect of peremptory challenges:

I think it would be very harmful, indeed, for this committee to undertake to modify these Articles of War by injecting into them any of these civil protections.

Answer.—The hearings on this subject disclose Gen. Crowder's actual language to have been—

> It would be an innovation, and I think an unwise one. (P. 31, 1912 hearings.)
> The right of peremptory challenge which is common to our civil courts has never had a place in our military jurisprudence, * * * and I am inclined to think that its introduction would be fraught with grave consequences. (P. 32, Id.)

Gen. Ansell's exact quotation is not found in the hearings. It is not justified by what Gen. Crowder said on this subject. It conveys the impression that Gen. Crowder held opposition to permitting in trials by court-martial any of the safeguards accorded accused in civil courts. This is not justified by Gen. Crowder's language.

III.—Attacks upon the Present System of Administering Military Justice, and upon the Articles of War, and the Revision of 1916.

(A) Alleged archaism of the articles of war.

Charge.—Gen. Ansell charges in his testimony on the pending bill, S. 64, before this subcommittee, that our system is "a vicious anachronism" (pp. 102, 223, 229–230, 241), "medieval" (p. 230), "thoroughly archaic" (p. 102), "a witless adoption" of the British Articles of War of 1774 (p. 103).

He further says (speaking of the alleged archaism of the present military code):

> The Judge Advocate General in an address in the city of Chicago, reported in the press, which he has frequently referred to since, is shown as saying that all that the American Bar Association's president, Mr. Page, and Senator Chamberlain and other people who were going after this system, said, was true, except for the revision of 1916 of which he was the author. (P. 247.)

Answer.—He has reference to an address before the Chicago Bar Association January 13, 1919. I have never seen in print any allusion to the court-martial system made in the course of that address. The stenographic notes of what I said were, however, sent to me for correction, a correction, by the way, which I never made. From these notes I am able to speak positively, and they show that what I did say was this:

> Now, gentlemen, I have this to say, that I do not believe that there is a criminal code of any State of the Union that has embodied so much in the way of essential reforms, that reform organizations have been discussing, as the present Military Code of the United States, under which we have fought this World War.

I was here referring to the principal reforms in civil criminal jurisprudence that had been urged by criminologists in late years, together with the extent to which they had been already incorporated in the present military system, as follows:

1. *Brevity of pleading.*—This is a distinguishing feature of the military system. Sections 61 and 74 of the Court-Martial Manual require the pleading to "set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended."

2. *Presentment instead of indictment.*—This idea is inherent in the military system.

3. *Requiring the accused to testify.*—This idea prevailing under European codes of the civil law has been sometimes advanced as a

reform measure. It was not deemed desirable or compatible with American notions of justice and the code expressly prohibits it by the twenty-fourth article of war.

4. *Abolition of the presumption of innocence.*—This idea, also borrowed from the civil law, has been rejected in the military system. By section 277 of the Court-Martial Manual, the presumption of innocence is asserted as a presumption of law.

5. *Giving judge greater power in summing up.*—This is admitting the judge of the law to participation in the conclusion of fact. This is true of military trials.

6. *Abolition of unanimity of jurors.*—This is provided by the forty-third article of war, which requires a majority of the court for conviction except in death cases, when the concurrence of two-thirds is necessary.

7. *Curtailing the right of appeal.*—This proposition, frequently urged as a reform measure, has not been adopted in the military system where the tendency has been in the other direction.

8. *Curtailing press comment.*—This idea, adopted extensively in England and in some respects in a few States, lies beyond the military system altogether.

9. *Indeterminate sentences and probation.*—The military system has gone as far or farther than any civil jurisdiction in this direction.

10. *Safeguards of mental responsibility.*—Here, too, the military system has adopted advanced scientific theories and has provided by psychiatric examinations and otherwise against the conviction of the mentally irresponsible. Section 219 of the Court-Martial Manual provides for the interruption of trial and scientific examination wherever the existence of mental disease or derangement on the part of the accused is brought in issue.

My estimate of the present military system was not different from that made by the Senate Committee on Military Affairs on February 6, 1914, when they reported to the Senate upon a code substantially the same as the present, adopting the words of the subcommittee as follows:

> Convinced that the revision embodies many essential reforms in our military law, and that it presents an adequate and modern military code, your subcommittee earnestly recommends that the project, as set forth in the amended draft, be recommended for enactment.

(B) SAME SUBJECT.—ALLEGED "ARCHAISM" OF THE PRESENT ARTICLES OF WAR.

1. *Charge.*—Gen. Ansell says:

> In his statement to the Military Committee, the Judge Advocate General on May 14, 1912, said, "As our code existed it was substantially the same as the code of 1806."
>
> The modifications that were deemed necessary were simply such modifications as were necessary to make the articles fit into the mere machinery of our Government and introduce the requisite terminology. Speaking of his so-called revision of 1916, the Judge Advocate General said:
>
> "It is thus accurate to say that during the long interval between 1806 and 1912—106 years—our military code has undergone no change except that which has been accomplished by piecemeal amendment."
>
> The so-called revision of 1916 was only a verbal one and not an organic revision—the proponents themselves so stated. They did not contemplate the making of a single change.

Answer.—It will thus be seen that Gen. Ansell attempts to show out of my own mouth that there were no material changes incorporated into the revision of 1916, but that that revision was merely a rearrangement of the existing Articles of War.

He fails to call attention to the fact that between 1912 and 1916, the date of final enactment, many substantial changes had been secured and that these reforms acquired piecemeal between 1912 and 1916 were supplemented by other material reforms secured in 1916 and the whole then incorporated into the Articles of War and the Code enacted as a single piece of legislation in 1916.

Between 1912 and 1916 the following acts were passed, containing legislation looking toward the reform of the system of military justice:

The act of August 22, 1912 (37 Stat., 356).
The act of March 2, 1913 (37 Stat., 721).
The act of April 24, 1914 (38 Stat., 347).
The act of April 27, 1914 (38 Stat., 354).
The act of March 4, 1915 (38 Stat., 1084).

The act of August 22, 1912 (37 Stat., 356), secured the following reforms:

1. Exempted peace-time deserters from loss of citizenship rights; and
2. Permitted reenlistment of peace-time deserters by permission of the Secretary of War.

The act of March 2, 1913 (37 Stat., 721), secured the following reforms:

1. Enlargement of power to convene general courts-martial.
2. The creation of special courts-martial.
3. Enlargement of powers of summary courts.

The act of April 24, 1914 (38 Stat., 347) secured the following reform:

1. Volunteer forces were made subject to the laws, orders, and regulations governing the Regular Army.

The act of April 27, 1914 (38 Stat., 354), secured the following reforms:

1. Providing that an enlistment period shall not be regarded as complete until the soldier has made good any time lost from service by his own misconduct.
2. Authorizing the reviewing authority to suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement.

The act of March 4, 1915 (38 Stat., 1084), secured the following reforms:

1. United States Prison, Fort Leavenworth, Kans., changed to the United States Disciplinary Barracks.
2. Providing for the confinement in penitentiaries of military offenders convicted of civil felonies alone or of military offenses in connection with civil felonies.
3. Providing that all persons not convicted of civil felonies be confined in disciplinary barracks.
4. Providing for the organization of the disciplinary battalion, looking to the restoration or reenlistment of offenders in confinement in disciplinary barracks.
5. Authorizing the Secretary of War to remit the unexecuted portion of sentences of offenders sent to the United States Disciplinary Barracks for confinement; to order their honorable restoration to duty when not discharged the service, or when discharged from service to authorize their reenlistment upon their written application when their conduct in confinement so justifies.

6. Creation of branches of the United States Disciplinary Barracks.

No effort had been made to arrange in convenient form the amendments secured between 1912 and 1916. The revision of 1916, act of August 29, 1916 (39 Stat., 650), incorporated some of these changes into the Articles of War and in addition introduced many other changes, the more important of which are as follows:

1. Giving concurrent jurisdiction to general courts-martial, military commissions, and other war tribunals in certain cases.
2. Making mandatory that accused be furnished counsel at his request.
3. The inauguration of a system of suspended sentences of fine or confinement.
4. Providing for one or more assistant trial judge advocates for each general court-martial.
5. Authorizing the President to prescribe procedure before courts-martial.
6. Reenactment of the statutes of limitation for military offenses.
7. Granting to persons in the military force the right to remove to Federal courts all suits and prosecutions brought against them in State courts for acts done under the color of their military status.
8. Authorizing reviewing and convening authorities to mitigate a finding of guilty to a finding of guilty of any lesser included offense.
9. Reenactment of the statute concerning taking of depositions.
10. Making necessary the concurrence of two-thirds of the members of the court-martial in finding an accused guilty of an offense for which the death sentence is mandatory.
11. Guaranteeing the same treatment to officers and enlisted men in procedure prior to trial.
12. Establishing in commanding officers power to administer disciplinary punishment without the intervention of a court-martial.
13. Eliminating from the only remaining article of war (A. W. 56, false muster) in which a court-martial might adjudge in time of peace loss of civil rights, the power to deprive an accused upon conviction of such rights.
14. Creation of a comprehensive probate jurisdiction within the Military Establishment.

From the foregoing it will be seen that it is not true that the revision of 1916 was simply a codification and rearrangement of the Code of 1806.

2. *Charge.*—Gen. Ansell says, in substance:

> I say that his (Gen. Crowder's) revision (1916) did not revise and that we still have the British Code of 1774, itself of even more ancient origin—the so-called revision of 1916 was only a verbal one and not an organic revision—they (the revisers) did not contemplate the making of a single change—such revision as was made, made the structure even more firmly upon the principle that courts-martial are absolutely subject to the power of military command.

Answer. It is true that the revision of 1916 preserved the fundamental distinction between civil and military courts which the peculiar needs of each demand. What those peculiar needs are and the manner in which each must be met were discussed in my letter of March 10. I need not repeat them. But Gen. Ansell leaves the impression that theories for the administration of justice can become "modern and enlightened" only by discarding and destroying the fundamentals of systems that centuries of application have shown

to be both necessary and best. He is apparently not willing to admit that a real improvement and true modern enlightenment can be obtained by slow building upon old theories that are essentially sound. He commits himself to the proposition that improvement is possible only through revolution. To the wisdom of such a theory the American people have not yet been converted, although I must admit that current events are placing the issue before them in a very disagreeable way in many phases of their social and political life.

But, as I said in my letter of March 10, the Military Criminal Code of 1916 no more deserves the term "archaic" than the Revised Statutes of the United States, under which the Federal courts since 1878 administered civil justice, and it is nearly 40 years later than the civil Revised Statutes.

But Gen. Ansell would leave the impression that I am contending that the existing code is perfect and that it is capable of few, if any, improvements. This is an impression entirely opposed to what I said in my letter of March 10. I then said that, in the light of the experience of a great war "which subjected the military code to unprecedented test," I readily could admit that certain improvements, limited in number, have been demonstrated to be worth while introducing, and I did suggest in that letter the changes which I thought the experience of the war had disclosed to be necessary.

(C) COURT OF MILITARY APPEALS—GEN. ANSELL'S STATEMENT THAT GEN. SHERMAN AND GEN. JAMES B. FRY, FORMER PROVOST MARSHAL GENERAL, ADVOCATED SUCH A COURT.

Gen. Ansell in his testimony before this subcommittee said (p. 258) that Gen. Sherman said in an address to the graduating class at West Point June 12, 1882:

> I am quite willing to see a court of appeals on courts-martial established. It would settle a great many vexed questions and give a legitimate channel for subsequent operations, instead of those who make the laws being told the findings are all wrong by some fellow working up his own case on ex parte statements.

Gen. Ansell also (pp. 259–261) quotes from an article, "A Military Court of Appeals," found in Gen. Fry's book, entitled "Military Miscellanies," apparently advocating the establishment of such a court.

Answer.—(*a*) In quoting Gen. Fry's article, Gen. Ansell significantly—and, I think, disingenuously—omits the one sentence in Gen. Fry's article which sums up the latter's whole attitude. That sentence, on page 186 of Gen. Fry's article, is:

> But it is the purpose of this paper merely to present the subject for consideration—not to advocate it.

(*b*) A close reading of Gen. Sherman's remarks to the 1882 graduating class at West Point shows that he was talking of some instrumentality for considering matters of clemency—like our present clemency board—rather than a technical court of appeals. Gen. Sherman's remark, quoted by Gen. Ansell, forms part of a very brief talk to the class—not much more than five minutes talk—following an address by Senator Harrison. Senator Harrison had been talking to the class on the subject of sobriety among Army officers and had spoken of "piteous appeals" of fathers and mothers for erring sons. Gen. Sherman's remarks followed somewhat along the

lines of Senator Harrison's address and advocated temperance. In the course of it he threw in the language quoted by Gen. Ansell. No such thing as a technical court of appeals was under discussion. This isolated remark is no proof of a settled conviction of Gen. Sherman on that question.

(D) CONDEMNATION OF THE NINETY-SIXTH ARTICLE OF WAR, THE SO-CALLED "GENERAL ARTICLE."

Charge.—Maj. Runcie says:

That was formerly known as "the devil's article." It was the catchall for everything that nobody had thought of putting specifically among the offenses triable by a court. It makes punishment possible, therefore, for any action which, though not involving any real offense, a commanding officer may choose to regard as prejudicial to good order and military discipline. If he can appoint a court that will accept his view of the matter or that he can coerce into agreeing with him, he can punish a man for almost anything.

This article serves another purpose also. It is available to defeat the ends of justice as well as to perpetrate injustice. If, for instance, an officer has been guilty of acts that would properly be described as "conduct unbecoming an officer and gentleman," the penalty for which is dismissal from the service—I mean that upon conviction under such a charge the sentence of dismissal is mandatory, the court having no discretion in the matter—and if for any reason the commanding officer does not desire to expose the accused officer to the risk of dismissal, he may cause the charge against him to be brought under this ninety-sixth article for "conduct to the prejudice" (p. 37).

Answer.—Here is severe condemnation of an article of war which has been in our code and the British Code for all time and about which the Supreme Court of the United States in an early case expressed a view not at all in harmony with that expressed by Maj. Runcie. Commenting on the corresponding article of the Navy code, that court said:

And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the thirty-second article of the Rules for the Government of the Navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the Navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are and how they are to be punished is well known by practical men in the Navy and Army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognized. (Dynes *v.* Hoover, 61 U. S., 65, 82.)

But a general article of this kind is not peculiar to military and naval articles alone. The criminal codes of many of the States and of the District of Columbia contain provisions similar to the ninety-sixth article of war for the punishment of offenses not specifically enumerated or described. The general article, therefore, seems to be in line with enlightened criminal codes. To illustrate, the Code of the District of Columbia contains the following in addition to provisions enumerating and defining specific offenses:

Punishment for offenses not covered by provisions of code.—Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than five years, or both. (District of Columbia Code, sec. 910.)

As another example, the Wisconsin Statutes contain the following:

Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this State shall be punished only by imprisonment in the county jail for not more than one year or by fine not exceeding $250. (Wisconsin Statutes, sec. 4635.)

In other words, these civil codes say that as to offenses not enumerated therein recourse may be had to the common law; and the military codes say as to offenses not enumerated you may have recourse to the common law, military; and the Supreme Court says as to this article of our military code that "it is not liable to abuse." It is a case of Maj. Runcie differing from the Supreme Court of the United States—that and nothing more.

I insert here a memorandum from Lieut. Col. Dinsmore, chief of the statistical section of the Judge Advocate General's Office, concerning the effect of the revision of 1916, upon charges laid under the "general article" (former sixty-second article of war; present ninety-sixth article).

SEPTEMBER 21, 1919.

Memorandum for Gen. Crowder.

Subject: Effect of the revision of 1916 upon charges laid under the general (old 62d) article of war.

1. During the fiscal year ending June 30, 1916, the total number of offenses of which men were convicted by courts-martial of all classes (general, special, and summary) was 58,957. Of these 33,767, or 57 per cent of the total number, were upon charges laid under the sixty-second article of war.

2. The revision of 1916 went into effect on March 1, 1917. It is therefore necessary to divide the fiscal year ending June 30, 1917, into two periods. Certain offenses were, during the first eight months of that year, charged under the sixty-second article, while, during the last one-third of the year, these same offenses were charged under various specific articles of the new code. As to these offenses I have assumed that two-thirds of the charges were laid under the old general article, and one-third under some specific article of the new code. Upon this assumption the following statement is made:

During the fiscal year ending June 30, 1917, the total number of offenses of which men were convicted by courts-martial of all classes (general, special, and summary) was 105,946, of which about 51,000, or 48 per cent, were upon charges laid under the sixty-second article of war.

3. The records of this office do not show the specific articles of war under which offenses have been charged subsequent to June 30, 1917, nor the offenses of which men have been convicted by special and summary courts-martial. I think it may be assumed that the instruction contained in paragraph 74 (e) Manual for Courts-Martial, viz: That a charge shall be laid under a specific article, whenever possible, has been generally followed. Upon this assumption the following facts are stated:

During the fiscal year ending June 30, 1918, the total number of offenses of which men were convicted by general courts-martial was 17,202. Of these, 13,085 were convictions of offenses which could have been charged under a specific article of war, and 4,117, or about 24 per cent of the total number were upon charges which could properly have been laid under the general (96th) article.

During the fiscal year ending June 30, 1919, the total number of offenses of which men were convicted by general courts-martial was 20,933. Of these, about 15,333 were upon charges which could have been laid under a specific article, while about 5,600, or about 26 per cent of the total number were upon charges which could properly have been laid under the general (96th) article.

JOHN P. DINSMORE,
Lieutenant Colonel, Judge Advocate.

(E) GENERAL ORDERS, NO. 7, WAR DEPARTMENT, JANUARY 17, 1918, AS AFFECTING RECOMMENDATIONS OF CLEMENCY BY THE JUDGE ADVOCATE GENERAL.

Charge.—That General Orders No. 7 prevented or hindered recommendations of clemency by the Judge Advocate General.

Gen. Ansell says:

But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of military justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this

order acted as a limitation to that effect, upon these reviews and studies we made since the time of the publication of General Orders, No. 7, until after I got back * * * (p. 182).

When I got back I took the bull by the horns, because it was nothing less than that, and I reversed what the Acting Judge Advocate General had in my absence very properly, as a matter of law, held to be the limitations placed upon our office to recommend clemency, and instructed the boards to review and recommend clemency in proper cases.

Senator CHAMBERLAIN. To recommend to the President?

Mr. ANSELL. To the President, or to a subordinate commander. I wish to say here that when we began to recommend this clemency to these commanding generals below, it had to be done with a delicacy that does not speak well for justice. They are men of power, supported by the War Department, and they wanted no interference from a mere lawyer, and frequently we got very sharp retorts from them to the effect, "You had better mind your own business; we know what this requires."

Senator CHAMBERLAIN. They were superior in rank to the men who made the recommendations.

Mr. ANSELL. Yes. They are major generals, and at best the head of my office was only a brigadier (p. 182).

Answer.—General Orders No. 7 never hindered recommendations of clemency. The fact is that the practice of the Judge Advocate General's Office in recommending clemency was never interrupted. Recommendations for clemency in appropriate cases have always been made. Nothing was contained in General Orders No. 7 preventing or restricting that practice, nor have I ever heard until now that such an interpretation of the order was ever suggested by anyone. No such view of it was taken by Gen. Ansell. He did not raise that objection in his memorandum in opposition to General Orders, No. 7, nor did he, while acting himself on these cases, entertain such a view. As late as April 17, 1918, two months and a half after General Orders, No. 7, had been in force and just before his departure for France, I find Gen. Ansell himself returning a record to a division commander with advice that the sentence was legal, coupled with a recommendation that it be mitigated. (Case 112666, Clifton Cox, Apr. 17, 1918.) During Gen. Ansell's absence in France, the Acting Judge Advocate General was Col. James J. Mayes, who certainly recommended clemency in one case within General Orders No. 7. (Case 115198, James Cox, June 19, 1918.) Whatever instructions Gen. Ansell gave upon his return, to recommend clemency in proper cases, inaugurated no new practice in this respect. To recommend clemency it was never necessary to do violence to General Orders No. 7.

To the same effect is the testimony of Col. Clark and Col. Davis given before the Senate Military Affairs Committee in February of 1919. Col. Clark said:

Now, I may say that under General Orders No. 7, which was put in operation in January, 1918, the record came direct to the Judge Advocate General, and we built up a practice during the months of January, February, March, April, and May, while I was in that section, of not only calling attention to jurisdictional and legal defects, but also accompanying the record with a recommendation as to the place of confinement, and the quantity of punishment that should be imposed, with a view of securing some uniformity of policy in respect to the amount of punishment imposed for certain classes of offenses. I do not know what became of that practice after I left the section, but understand that there was a change (pp. 186, 187).

Col. Davis said:

I may say to you, sir, that in practically all of those cases the sentence has been scaled down on the recommendation of the Judge Advocate General to what that office thought should be the case.

Since General Orders No. 7 went into effect, there is not a man in the whole service sentenced to be dishonorably discharged and to a long term of confinement whose case has not been passed upon by the Judge Advocate General's Office, by the board of review since that has been constituted, and his case passed upon for the very purpose of determining the amount of punishment which that man should serve. He is in the disciplinary barracks at this time serving, not the punishment which the court awarded him, but the punishment which the Judge Advocate General's Office, after reviewing the case, thinks he ought to bear (p. 221).

And again, Col. Davis said, outlining the progress of a case:

Now, General Orders No. 7 requires them to suspend the execution of a sentence until it is reviewed in the office of the Judge Advocate General. The Judge Advocate General reviews that sentence and advises the commanding officer out there at Camp Meade as to the result of his review. * * *

The sentence of dishonorable discharge would be suspended by the reviewing authority and the man would be sent under that suspended sentence to the disciplinary barracks. The disciplinary barracks for Camp Meade would be Fort Jay, N. Y. He is sentenced to 10 years, and after review the Judge Advocate General's Office recommends that 9 years of the sentence of confinement be remitted. Then the man stands under a sentence of dishonorable discharge which has been suspended until he is released. In other words, Senators, the unexecuted portion of that sentence may be remitted and the man restored to duty without being dishonorably discharged, and he can be put right back in the Army (pp. 222, 223).

Col. Davis further said:

Yes, sir. I might say, that Gen. Ansell, in his letter to Congressman Burnett, says that in 1918, September, 1918, he directed his board of review to suggest to reviewing authorities the very corrective action which had been applied between November, 1917, and April, 1918. It was at that time opposed by him on the ground that it was not correct procedure according to his theory of what the law authorized (p. 225).

Col. Davis, in his testimony, was dealing with the period prior to his own relief from duty in the Military Justice Division of the office, which occurred about the middle of May, 1918 (p. 200).

The Inspector General says in his report of May 8, 1919, upon "Investigation of the controversies pertaining to the office of the Judge Advocate General:"

The provisions of General Orders No. 7 became effective on February 1, 1918. From that date until April 15, 1918, the Judge Advocate General not only recommended to reviewing authorities that corrective action be taken where illegality appeared in the proceedings, but brought to their attention, with a view to mitigation, sentences which were unduly severe. During this period all cases arising under General Orders No. 7, before final action thereon, were handled either independently by Col. Davis, Chief of the Military Justice Division, or by General Crowder upon recommendation from Col. Davis. This was partly because Col. Davis had drafted the orders, and was in sympathy with them, and also because Gen. Ansell, after publication of the orders, was plainly antagonistic.

IV. Gen. Ansell's Inaccurate Statements.

(A) REVIEW OF RECORDS OF TRIAL IN JUDGE ADVOCATE GENERAL'S OFFICE.

Charge.—Gen. Ansell said to this subcommittee, on the hearing on S. 64:

Why, Senator, we did not review. * * *. We revised officers' cases, we revised death cases, and we got little further. There was one man, not always the best man, and with all too much to do, who revised—that is looked over—the other cases (p. 134).

I say that the cases were not properly reviewed. I say that they were not all reviewed; that there were only a few of them that were reviewed, * * * (p. 159).

Answer.—The truth is to the contrary.

The truth is (1) that penitentiary sentences were reviewed during the war and still are, in precisely the same way and with the same

as officers' cases and death sentences; and (2) that all other nces were and are carefully examined by at least two officers— r sentences not carrying dishonorable discharge in the "Retained rvice Section," and disciplinary barracks sentences in the "Dis- ıary Barracks Section" of the office—First, by an officer to whom ase is assigned; and, second, by the chief of the section; and in · of those cases written reviews are prepared and examined by officers in addition. Nor is it true that the officers serving in sections were not among the best men in the office; for example, E. H. Lewis, former assistant attorney general of the State of York, was for a long time chief of the retained in service section, ved by Maj. Walter M. Krimbill, former assistant United States ct attorney at Chicago. Maj. (now Lieut. Col.) J. A. Tyson, ninent lawyer of Mississippi, at present acting as counsel to the l of War Purchase Supplies, was chief of the Disciplinary Bar- Section; succeeded by Maj. Charles Harris, now president pro ore of the Senate of the State of Kentucky, and then by Maj. 'alvin Wells, another well-known Mississippi lawyer, formerly tary of the campaign committee of Senator Harrison.

the penitentiary section also were many of the most capable in the office, including at various times such men as Maj. S. S. et, formerly president of the State Bar Association of Georgia, G. P. Middleton, a leading trial lawyer of Philadelphia, Maj. ; Adams, another eminent Georgia lawyer, Maj. Junius Adams, counsel for the American Liquidation Commission in Europe, others of similar ability and standing. Among the chiefs of section were Maj. Henry W. Runyon, a very capable New Jersey er; followed by Maj. E. F. Noble of Pittsburgh, now secretary of ımerican Liquidation Commission in Europe; and then by Maj. rt Bright, one of the most prominent lawyers of Philadelphia. ten reviews were required from this section of all penitentiary , which afterwards went through the hands of the board of w and of Col. B. A. Read, the chief of the Military Justice ıion of the office, before reaching the head of the office for signa- —in just the same way as the death and dismissal cases. Prior ovember 6, 1918, penitentiary cases went through the same board view as the death and dismissal cases. After the institution of 'second board of review" on November 6, 1918, penitentiary went to that board, which was composed of three of the very t and most experienced lawyers connected with the Judge Advo- General's Department; namely, Lieut. Col. J. Sydney Sanner, resigned his position on the bench of the Supreme Court of the of Montana to enter this department; Lieut. Col. S. Moreland, ıine years a judge of the Supreme Court of the Philippine ıds; and Lieut. Col. W. H. Kirkpatrick, a leading Pennsylvania er with a wide trial experience.

(B) FORFEITURE OF CITIZENSHIP.

ıarge.—Gen. Ansell says:

ere are certain offenses—desertion, for instance—which carry with them inci- l punishments in the way of civil disabilities. A man convicted of desertion is ved. He loses his right to citizenship and his right to hold office, etc. (p. 205).

nswer.—The truth is to the contrary.

No citizen loses his citizenship except by voluntary expatriation. What Gen. Ansell refers to is his citizenship rights and his right to hold public office. The loss of these rights as a penalty is now confined to the single offense of desertion committed in time of war. The forfeiture is not provided by the Articles of War but by special acts of Congress. (Rev. Stat., secs. 1996–1998.) The original act of March 3, 1865, provided that all persons who should desert the military or naval service in time of peace as well as in time of war or should leave the United States to avoid a draft, forfeited their rights of citizenship or to become citizens and should be forever incapable of holding any office of trust or profit under the United States or of exercising any right of citizens thereof. I was particularly active in helping to bring about a modification of this civil war statute, which was effected by the passage of the act of August 22, 1912, amending section 1998, Revised Statutes, so as to remove the penalty from desertion in time of peace.

Up to 1916 there was one other military offense punishable with the disability to hold office, namely, making or signing a false muster. The present Articles of War omit the disqualification as part of the penalty for this offense. This was done in pursuance of my recommendation to Congress as follows:

> The further phrase "and shall thereby be disabled to hold any office or employment in the service of the United States," occurring in existing Articles of War 6 and 14 has been omitted * * * for the reason that punishment by way of disqualification to hold public office, both civil and military, is believed to be a particularly inappropriate one to be awarded by a military tribunal; and there is this further reason * * * that the offenses specified, though grave, are not more so than sundry other military crimes for which less severe penalties are provided. It is the effect of this revision to abolish this form of punishment—disqualification to hold office—in all cases where it is authorized in the existing code (Comparative Print, Articles of War, Gen. Crowder's note to Article 56.)

(C) CAMP GRANT RAPE CASES.

Charge.—Gen. Ansell said before this subcommittee (hearings on S. 64, p. 262):

> That as a result of the first trials in May and June, 1918, 17 men were convicted.

He said further (p. 263):

> All of them were convicted and they would have been hanged by this time.

Answer.—The truth is to the contrary.

(1) On the first trials in May and June, 1918, only 15 of the accused were convicted, 6 of whom were sentenced to hang and the remaining 9 were sentenced to life imprisonment; 1 accused was acquitted as insane, and 5 others were acquitted.

(2) Even if the sentences imposed by the first courts in 1918 had been executed, only 6 of the 15 convicted could have been hanged.

(D) PROPORTION OF CHARGES PREFERRED, REFERRED FOR TRIAL; CONVICTIONS; ACQUITTALS.

Charge.—In his testimony recently given before this subcommittee Gen. Ansell says:

> Out of every 100 sets of charges drafted by an officer against an enlisted man, between 96 and 97 were tried (p. 199).

Answer.—The truth is these statistics relate to charges approved by the commanding officer and forwarded with his recommendation of trial; not to all charges "drafted" by any officer.

Of course, Gen. Ansell means to be understood as saying: Out of every 100 sets of charges "forwarded" and not "drafted." Many charges that are drafted and presented to a commanding officer to be forwarded for trial are dropped on the preliminary examination; or referred for trial to an inferior court. As to the number of these, no statistics are available. Amending, therefore, the statement to read "forwarded" and not "drafted," Gen. Ansell's figures are substantially correct. Examinations of the statistics for 1912, 1913, 1914, and 1915 have been made, and of the total number of sets of charges forwarded to convening authorities 96.36 per cent were ordered by those convening authorities to be tried.

SAME SUBJECT.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

Between 96 and 98 of every 100 charges preferred result in trial and conviction (p. 266).

Answer.—The truth is, again, the statistics relate not to all charges preferred, but only to those approved for trial, both by the commanding officer and by the convening authority. Even so, the truth is to the contrary.

Gen. Ansell undoubtedly means to say "referred" by the convening authority for trial; and not "preferred." The statistics for a single year—that of 1918—have been considered, and of those referred for trial there were acquittals in 12.01 per cent; and, of the convictions by the court, reviewing authorities disapproved an additional 5.05 per cent; so that the total resulting in acquittals, or disapproval, which is the equivalent of acquittal, was 17.06 per cent. So that the statement of Gen. Ansell that between 96 and 98 per cent of the charges preferred resulted in trial and conviction, and between 2 and 4 per cent of such charges resulted in acquittals, is erroneous.

Of course, these statistics take no account of special and summary court charges drafted, preferred, or referred for trial.

(E) STATISTICS OF COURT-MARTIAL TRIALS FOR THE YEAR PRECEDING THE ARMISTICE.

Charge.—Gen. Ansell says, in his testimony before this subcommittee:

For the year immediately preceding the armistice, according to the reports that I have, there were 28,000 general courts-martial out of an army of an average of 2,000,000. We know the size of the army the year before the armistice, and we know the size of the army at the time of the armistice, and I roughly estimate it at 2,000,000 men average.

In the inferior courts during the same period there were between 340,000 and 360,000 cases (pp. 190, 191).

I do not know how the inferior court cases were divided between special courts and summary courts; we have no way of telling that, as those records do not come to us except in unusual cases (p. 191).

Answer.—The truth is to the contrary.

(*a*) The number of men tried by general courts-martial from November 11, 1917, to November 11, 1918, by months, is as follows:

1917.

November (two-thirds of whole number of cases for that month)	482
December	910

1918.

January	1,150
February	1,300
March	1,577
April	1,449
May	1,257
June	1,350
July	1,457
August	1,516
September	1,171
October	1,109
November (one-third of whole number of cases for that month)	440
Total	15,182

(*b*) During the fiscal year ending on June 30, 1918, the total number of trials by summary courts-martial in all commands was 229,839, 202,085 of which resulted in convictions and 9,732 in acquittals (some commands did not report the number of convictions and acquittals). During the same period the total number of trials by special courts-martial was 14,715, of which 13,275 resulted in convictions and 1,440 in acquittals.

Incomplete reports for the fiscal year ending June 30, 1919, show a total number of 200,614 trials by summary courts-martial, of which 189,270 resulted in convictions and 11,344 in acquittals; and 23,634 trials by special courts-martial, of which 20,565 resulted in convictions and 3,069 in acquittals.

(*c*) Taking two-thirds of the total number of trials by special and summary courts-martial during the fiscal year ending June 30, 1918, and one-third of the total number of trials by those courts during the fiscal year ending June 30, 1919, it may be stated that there were, between November 11, 1917, and November 11, 1918, a total of about 218,752 trials by summary courts-martial and about 17,971 trials by special courts-martial, or a total of 236,723 trials by inferior courts.

In order to supply the figures upon trials by inferior courts during the fiscal year ending June 30, 1919, concerning which reports have not yet reached this office, I estimate (liberally) that a total of 35,000 cases ought to be added to the number quoted, to be divided as follows: Summary court trials, 90 per cent; special court trials, 10 per cent.

Adding these figures to those already quoted it may be stated that the total number of trials by summary and special courts-martial from November 11, 1917, to November 11, 1918, was about 271,723; as against 340,000 to 360,000, as stated by Gen. Ansell.

(*d*) The Judge Advocate General's published report for 1918 (p. 15) shows a segregation between special and summary court statistics.

(*e*) Summarizing, therefore, we have, for the year immediately preceding the armistice, about 15,182 trials by general courts-martial, as against 28,000, as stated by Gen. Ansell; and about 272,000 trials by inferior courts, as against 340,000 to 360,000, as stated by Gen. Ansell. We also find that the Judge Advocate General's published report for 1918 (p. 15) shows a segregation between special and summary court statistics.

(F) CLEMENCY BOARD.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

The Judge Advocate General organized this special board of clemency review, consisting of three lawyers chosen, as I say, especially because they reflected absolutely the views of the department and the Judge Advocate General. Seldom or never could that board find a case poorly tried. They were all well tried. So that every case that the clemency examiner reported as poorly tried went to this clemency board, when they would report back to the Judge Advocate General, frequently in language characterized by brusqueness and unjudicial temper. They would say, "It is absurd to say that this case was poorly tried" (p. 196).

Gen. Ansell also states:

More than 60 per cent of these cases were so badly tried that no man—no fair-minded and intelligent man—could say that the records can be relied upon to sustain any punishment (p. 119).

Answer.—According to a report prepared by Lieut. Col. J. Sydney Sanner (former justice of the Supreme Court of Montana), chairman of the special board of review referred to by Gen. Ansell, under date of June 15, 1919, the special clemency board had, on that date, considered 4,268 cases, of which 1,010 had been passed on by the special board of review. If it is true, as stated by Gen. Ansell, that "every case that the clemency examiner reported as poorly tried went to the clemency board," then Gen. Ansell's statement that "more than 60 per cent of those cases were so badly tried that * * * no fair-minded and intelligent man could say the records can be relied on to sustain any punishment," is inaccurate, since on June 15, 1919, out of 4,268 cases considered by the special clemency board, only 1,010, or about 25 per cent, had been reported by the clemency examiner as "poorly tried."

Of the 1,010 cases referred to the special board of review, that board found that 342 were fairly characterized as "poorly tried," "bad," "doubtful," or "unsatisfactory"; and that of those 342 "poorly tried" cases the characterization was justified in 206 by the admission of improper evidence; in 136 by the inertness or inadequacy of counsel for the accused; in 69 by poor preparation on the part of the prosecution; in 42 by errors of the court in rulings at the trial; and in 32 by the fact that no evidence was presented aliunde the plea of guilty.

[In other words, in approximately 143 of these cases, the characterization was justified on more than one of these grounds.]

The report also shows that, of the 4,268 cases considered by the special clemency board, a trifle under 1 per cent were bad; a trifle under 2 per cent were bad, doubtful, or unsatisfactory; a trifle under 5 per cent show formal irregularities; a trifle over 8 per cent were poorly tried.

(G) SAME SUBJECT—CLEMENCY BOARD.

Charge.—Gen. Ansell, in his testimony before this subcommittee, further states:

Some time in early March I observed that the clemency examiners, the officers who made the records, evidently did not understand the considerations that would have governed me in examining the records for purposes of clemency. They were deferring too much to the record. They were approaching it as they would review a record for determining errors of law, and were not taking into account what the record reflected of the human situation; not governed by those aspects, but simply by the legal determinations of the record * * * (p. 192).

Senator LENROOT. Do I understand by that, General, that the policy was that if they found what would have been in a civil court a reversible error they would recommend clemency, but otherwise not? (p. 192).

Mr. ANSELL. It was largely that; and they were pretty strict about the reversible-error proposition also. Yes, Senator; that probably expresses it as accurately as it could be expressed (p. 192).

Answer.—The truth is to the contrary.

The report of the special board of review referred to in the last preceding paragraph shows that of the first 4,268 cases considered by the special clemency board the question of the legal sufficiency of the record was raised by the clemency examiner in only 1,010 cases, or about 25 per cent of the entire number.

From February 25, 1919, to September 29, 1919, inclusive, 6,824 cases had been considered by clemency agencies in the office of the Judge Advocate General. Prior to the time at which these cases were considered by the special clemency board, the record of trial in each of the cases considered by that board had been examined as to its legal sufficiency by at least one officer in the office of the Judge Advocate General, and many of these records had been examined by more than one officer. Of the 6,824 cases examined by the special clemency board during the period stated, clemency in some form was recommended in 5,584 cases, or about 82 per cent of the entire number, and as a result of this examination a reduction in the average sentence has been brought about equal to about 73 per cent of the average sentence adjudged in the cases considered. This shows, not that the records of trial in these cases were legally insufficient or the sentences were generally considered to have been too severe when imposed, but merely that the return of conditions approximating those of peace has made possible an amelioration of the rigors of punishment required in time of war.

I append a statistical report by Lieut. Col. N. D. Ely, of the Judge Advocate General's office:

I.

Statistics based on clemency memoranda.

1. Total number of cases finally passed upon during the period, Feb. 25 to Oct. 15, inclusive	7,207
2. Less total number of life sentence cases	112
3. Balance, considered under subdivision II	7,095

II (exclusive of life sentences).

1. Number of unexecuted sentences to confinement wholly remitted	2,075
2. Number of unexecuted sentences to confinement partially remitted, or other clemency granted	3,740
3. Number of cases in which no clemency was extended	1,280
4. Average sentence to confinement before remissions ... years	6.65
5. Average sentence to confinement remaining after remissions ... do	1.845
6. Per cent of reduction	72.06

III (included in subdivision II).

1. Number of men recommended for or authorized to apply for discharge in accordance with A. R. 139 and in the form provided in section 3, A. R. 150.	584
2. Number of men recommended for restoration to duty or authorized to apply for restoration	489
3. Total number of cases in which, as shown by item No. 38 (mental ailments) on clemency memoranda, the mental condition of the prisoner was especially considered	1,000

IV.

ıber of life-sentence cases in which clemency was denied	90
ıber of life-sentence cases in which clemency was extended	22

22 life sentences in which clemency was granted were reduced as follows: ne to 40 years; six to 20 years; five to 15 years; one to 10 years; one to years; one to 7 years; three to 5 years; one to 4 years; one to 3 years; two 2 years.

l number of cases in which no clemency was extended	1,370
cent of total cases in which no clemency was extended	19.00
cent of total cases in which the mental condition of the prisoner was nsidered	22.2

(H) SAME SUBJECT. ORGANIZATION OF THE CLEMENCY BOARD.

ırge.—Speaking of the organization of the clemency boards, Ansell makes the following statements:

Crowder takes credit that the existing clemency board, upon which I am still president, was established by him upon his return to this office, as though he ıred the situation necessitating it (p. 222).

ıust be permitted to say this: Every organ of that office (the J. A. G. O.) ıd to secure * * * moderation of sentences—which now he (the Judge ıte General) calls so effectively to his aid—was instituted by me and by me Without any authority from or help of the Judge Advocate General I organ- * * * the clemency board—and it was my effort, taken in his absence, that l the necessity for the special clemency board, which, though restricted in ıovert way by the department and the office of the Judge Advocate General, ne so much recently to reduce sentences. The Judge Advocate General's e has been one of absolute reaction. He has not approved of such organization; not approved of my efforts to secure correctness of court-martial judgments eration of them (p. 244).

ıwer.—This statement of Gen. Ansell's is widely variant from ıcts. They are all summarized in the attached memorandum; in an appendix to the memorandum, is set forth the entire ıpondence on the subject. Let the facts speak for themselves. ısert here a chronological statement concerning the organization e special clemency board in the office of the Judge Advocate ral, together with copies of original documents relating thereto.

ıANDUM CONCERNING THE CREATION OF THE SPECIAL CLEMENCY BOARD IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

ıibit 1, January 11, 1919: Memorandum from Acting Judge Advocate General . to the Secretary of War.

ıibit 2, January 13, 1919: Letter from the Secretary of War to Gen. Crowder, ıitting foregoing memorandum.

ıibit 3, January 18, 1919: Memorandum from Gen. Crowder to the Secretary of ·eplying to foregoing and transmitting Exhibit 4.

ıibit 4, January 17, 1919: Form of order limiting punishments for offenses com- l since the armistice (published by The Adjutant General's telegram of Jan. 22,

ıibit 5, January 20, 1919: Memorandum from the Secretary of War to Gen. ·er, approving recommendations in Exhibit 3.

ıibit 6, January 28, 1919: Office order No. 18, J. A. G. O., signed by Gen. ·er, organizing and appointing clemency board.

ıibit 7: Plan for carrying out work of clemency board, suggested by board and ved by Gen. Crowder.

ıibit 8, March 5, 1919: Memorandum assigning officers to three divisions of ncy board and announcing rules of procedure.

'rior to the creation of the clemency board on January 28, 1919, there had d, as an integral part of the military justice division of the office of the Judge ıate General, the clemency and restoration section. A description of the func-

tions of the clemency section and a detailed statement of the attitude toward cases arising during the war are foreign to the subject of this memorandum, but it may properly be stated that the clemency section had not followed the policy of recommending reduction of sentences to confinement. In those cases where under all the circumstances the prisoner was deemed to have served a sufficient portion of the sentence, his release was recommended; while in other cases, clemency was not recommended, or was not recommended "at this time."

2. On January 11, 1919, Acting Judge Advocate General Ansell wrote a memorandum to the Secretary of War (Exhibit 1), commenting on eight particular cases and severely criticizing the procedure of courts-martial and reviewing authorities. He said, among other things: "I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. * * * From every point of view they are a travesty upon justice."

He stated that in a great number of cases he had invited the attention of convening authorities to the great severity of the punishment; and concerning the eight cases commented on by him, he stated that he would call the attention of the reviewing authority to the severity of the sentences and in some of them suggest remissions or further reductions.

He concluded by saying: "Again I have to advise you that these are not, in my judgment, isolated examples, but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believe I have observed, during this war."

He made no recommendation, nor did he suggest any remedy for the conditions he characterized. (See Exhibit 1.)

3. On January 13, 1919, the Secretary of War forwarded the foregoing memorandum in a letter to Gen. Crowder (Exhibit 2), in which he said:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose (1) very unequal degrees of punishment, and (2) perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

"I am not able to gather from Gen. Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders, and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view."

4. Responding under date of January 18, 1919 (Exhibit 3), Gen. Crowder briefly discussed the matter under the two heads:

(*a*) Unequal punishments of courts-martial.

(*b*) System of war-time penalties no longer necessary.

After stating that the only issue is in respect of the quantum of punishment, he recommended that to meet the situation in future a general order be issued (see Draft Exhibit 4).

"To meet the past situation, I propose that this office, after classifying the sentences imposed, shall proceed under approved rules to equalize punishment through recommendations of clemency."

5. In his memorandum of January 20, 1919 (Exhibit 5), the Secretary approved both recommendations, and concerning the clemency recommendation said "I * * * will be glad to have you undertake it."

6. January 22, 1919, The Adjutant General issued by telegram the following order (being identical with Exhibit 4):

"In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges or a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing shall be made a matter of record. Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

hereafter the clemency board was promptly organized. See order of Gen. er of January 28, 1919 (Exhibit 6), and also (Exhibits 7 and 8).

he clemency board has considered cases upon the court-martial records and ata furnished from the disciplinary barracks and the penitentiaries without g for applications for clemency; the clemency section (first above mentioned) nsidered cases upon applications for clemency, applying generally the same nd standards for uniformity as the clemency board.

EXHIBIT 1.

JANUARY 11, 1919.

andum for the Secretary of War.

have just finished reviewing the general court-martial cases from Camp Dix, General Order 7, which have been presented to me to-day by the Chief of the y Justice Division of this office. Those cases relate of course to that command but I fear and have reason to believe that they evidence a situation that is more general. This condition is directly due to a failure upon the part of the nartial—a failure which in this case appears to be absolute—to appreciate the haracter of their judicial functions and a similar failure upon the part of the ning and reviewing authority. Under the limitations of law, regulations and as construed in the War Department, this office was limited to advising the ing authority as to whether the record of trial was "legally sufficient to sustain dings and sentence of the court." and was not otherwise concerned with the m of punishment; this upon the view, of course, that the jurisdiction of the ning authority is final and beyond review. Nevertheless, impelled by the ible evidence found in the great number of unjust sentences passing through fice, I have presumed, with a hesitation which the delicacy of the situation ds, to invite the attention of convening authorities to the great severity of the ment in those cases in which the punishment has appeared to be so disproportoto the offense as to shock the conscience. In the light of what is transpiring , and doubtless elsewhere, I do not regard that such an administrative course, in specific instances, is sufficient to achieve and establish military justice.

he cases to which I now invite your attention have all come to me to-day as a the day's work. The officers who have handled them in this office and I are mind as to what they reveal and as to the necessity for the application of curative res. I will give you a brief summary of them.

In the case of Pvt. Sanford B. Every, Forty-ninth Company, Thirteenth Battalion undred and fifty-third Depot Brigade, the accused was convicted simply of a pass in his possession unlawfully. He was sentenced to be dishonorably rged with total forfeitures and to be confined at hard labor for 10 years. The ing authority reduced the confinement to three. We consider this a trivial , and this office will doubtless go so far as to suggest to the convening authority nasmuch as this soldier has already been in confinement about two months, tire sentence should be remitted.

In the case of Pvt. Clayton H. Cooley, Thirteenth Company, Fourth Battalion, undred and fifty-third Depot Brigade, the accused was found guilty of absence ut leave from July 29 to August 26, 1918, and from September 1 to September 8, failing to report for duty; escaping from confinement September 1, 1918. The sentenced the accused to be dishonorably discharged the service, to forfeit all nd allowances, and to be confined at hard labor for 40 years. The reviewing rity reduced the confinement to 10 years. The man has evidently been in ement since last July. Even as so reduced, the sentence is altogether too severe, his office, in returning the record to the convening authority, will so comment it.

In the case of Pvt. Charles Cino, Seventy-first Company, One hundred fifty- Depot Brigade, the accused was tried for disobeying an order "to take his rifle o out to drill," on November 1, 1918, and on escaping from confinement on mber 4. He was sentenced to be dishonorably discharged the service and con- at hard labor for 30 years, which period of confinement the reviewing authority ed to 20. In this case, the accused claimed that he was sick, and doubtless he uffering somewhat from venereal trouble. It may be that he was a maligner. r judgment, the sentence, even as reduced, was entirely too severe, and this will so comment upon it to the convening authority.

In the case of Pvt. Calvin N. Harper, Company A, Four hundred and thirteenth ve Labor Battalion, the accused was charged with desertion and convicted of ce without leave from the 12th day of August to the 13th day of November, He was sentenced to be dishonorably discharged, to forfeit all pay and allow- , and to be confined at hard labor for 20 years, which period of confinement the

reviewing authority reduced to 10. The period of confinement even as reduced is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company 36, Ninth Training Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife with a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, Fifty-eighth Company, Fifteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was found guilty of disobeying the order of his lieutenant to "give me those cigarettes;" behaving in an insubordinate manner to one of his sergeants by telling him to "go to hell," and behaving himself with disrespect towards his lieutenant by saying to him that he, the accused, did not "give a God damn for anybody." Of course there can be no question but that such conduct can not be tolerated, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was a company rumpus, which, in my judgment, might have been otherwise dealt with or under the circumstances of its commission, merited no very long term of confinement. There was no evidence of previous misconduct. The court sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, Forty-ninth Company, Fourteenth Battalion, One hundred and fifty-third Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, Base Hospital, tried at Camp Grant for insubordinate conduct, which, at worst, could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages in his review to show that such punishment was well merited.

3. If these were isolated examples, they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

4. If the courts are blameworthy, the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this, found in a camp order which provides as follows:

"Absence-without-leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court."

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction the court must realize that it has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this—and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543) and Grafton *v.* United States (206 U. S., 333). There are numerous other

decisions to this effect. (The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.)

This order contains, in effect, and was intended to convey the following directions:

(*a*) All absences without leave will be tried by courts-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay. (The limit of punishing power of a special court.)

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believed I have observed, during this war.

(Signed by Gen. Ansell.)

EXHIBIT 2.

JANUARY 13, 1919.

MY DEAR GEN. CROWDER: I inclose herewith memorandum submitted to me by Gen. Ansell. It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose first, very unequal degrees of punishment, and second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased.

I am not able to gather from Gen. Ansell's memorandum whether he recommends action by general order on my part, addressed to all commanders and imposing further limits upon the severity of sentences. I do not know what my powers in the premises are, but if I have the power to issue such an order, it would seem that it ought to be immediately prepared and issued so as to stop now any further accumulation of cases in which clemency would be necessary to prevent a harshness and severity which you and I both agree are unnecessary from any disciplinary point of view.

Cordially, yours,

NEWTON D. BAKER,
Secretary of War.

Maj. Gen. ENOCH H. CROWDER,
Judge Advocate General.

EXHIBIT 3.

JANUARY 18, 1919.

Memorandum for the Secretary of War:

1. I have read over very carefully the brief of Gen. Ansell and your submission of it, inviting my attention to—

(*a*) Unequal punishments of courts-martial.

(*b*) System of war-time penalties which has grown up and which the ends of discipline and justice do not justify us in enforcing, now that hostilities have ceased.

2. In all the cases you have in mind the records have been reviewed in either this office or the branch office in France and found legally sufficient to sustain both the findings and the sentence, so that no issue arises in respect of any of them except the quantum of punishment.

3. To meet the situation in the future, I recommend that the following general order be cabled to all our commanding officers:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 16, 1916, is obvious. Where in exceptional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war would be, under all the circumstances of the case, clearly inadequate."

4. To meet the past situation, I propose that this office, after classifying the sentences imposed, shall proceed under approved rules to equalize punishment through recommendations of clemency.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 4.

WAR DEPARTMENT,
Washington, January 17, 1919.

1. In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in exceptional cases, a court-martial adjudges or a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing shall be made a matter of record.

2. Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war would be, under all the circumstances of the case, clearly inadequate.

EXHIBIT 5

WAR DEPARTMENT,
Washington, January 20, 1919.

Memorandum for Gen. Crowder:

I have read your memorandum of January 18 with regard to unequal punishments by courts-martial.

Paragraph 4 proposes the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency. I approve this recommendation and will be glad to have you undertake it.

The recommendation of paragraph 3 I have also approved, and directed that instructions as suggested be transmitted to the commanding officers.

NEWTON D. BAKER,
Secretary of War.

EXHIBIT 6.

OFFICE ORDER No. 18. } JANUARY 28, 1919.

Under date of January 13, 1919, the Secretary of War, in returning a memorandum submitted to him by the Acting Judge Advocate General of the Army, remarked as follows:

"It would seem entirely clear that there ought to be some general plan for reviewing and modifying sentences of the kind illustrated by him, which have been imposed during the war and are characterized by severity which would not be the case in time of peace. To be sure, the offenses of which these men have been found guilty have a somewhat different color and gravity during the period of hostilities, but it goes without saying that a review of the sentences imposed during the last 20 months will disclose, first, very unequal degrees of punishment, and, second, perhaps generally a system of penalties which the ends of justice and discipline would not justify us in enforcing now that hostilities have ceased."

In response to this memorandum the undersigned proposed, as a means of preventing any further accumulation of cases in which clemency would be necessary to prevent harshness and severity, which are unnecessary from the point of view of present disciplinary requirements, the issue of the following order:

"(1) In view of the cessation of hostilities and the reestablishment of conditions approximating those of peace, both within and without the theater of war, the propriety of observing limitations upon the punishing power of courts-martial, as established by Executive order of December 15, 1916, is obvious. Where, in excep-

tional cases, a court-martial adjudges and a reviewing authority approves punishments in excess of the limits described in said Executive order, the reasons for so doing will be made a matter of record.

"(2) Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court, or by a commanding officer under the provisions of the one hundred and fourth article of war, would be, under all the circumstances of the case, clearly inadequate."

This order was approved and has been promulgated. To meet the past situation, the undersigned proposed that the Judge Advocate General's Office should classify sentences imposed and proceed, under approved rules, to equalize punishment through recommendation to clemency, which was approved by the Secretary of War.

In order to comply with the directions of the Secretary of War for a review of sentences imposed for offenses committed during the war period, with a view not only to equalizing punishment, but to adjust that punishment to present disciplinary requirements, a board to consist of (1) Brig. Gen. Samuel T. Ansell, Judge Advocate General's Department (2) Col. John H. Wigmore, judge advocate, (3) Maj. Stevens Heckscher, judge advocate, is appointed to undertake the work outlined by the Secretary of War and the submission of recommendations for clemency in order to accomplish the equalization of punishments and the adjustment of penalties to the present disciplinary requirements desired by him. The board will meet at the earliest practicable date and submit for approval a plan of procedure looking to a speedy prosecution and completion of the duty imposed.

E. H. CROWDER,
Judge Advocate General.

EXHIBIT 7.

PLAN FOR CARRYING OUT WORK BY CLEMENCY BOARD APPOINTED UNDER OFFICE ORDER OF JANUARY 28, 1919.

1. In all cases of general prisoners the records of general courts-martial for offenses committed since the beginning of the war, excepting the cases to be reported upon in accordance with this plan by the commandants of the disciplinary barracks and its branches, will be examined in the first instance by a force of clerks and examining officers in the office of the Judge Advocate General, and the form hereto attached will be filled out in triplicate for each case by the clerk in charge, except items 27 and 41; item 27 will be filled in by the officer examining the record and item 41 by the board.

2. The several commandants of the United States disciplinary barracks and its branches at Fort Leavenworth, Alcatraz, and Fort Jay will make a report at the earliest practicable moment to the Judge Advocate General of the Army in the case of every prisoner confined under his charge for the conviction of an offense committed since the beginning of the war, which report will be upon said form hereto attached, which will be filled out in triplicate in each case except as to items 27 and 41; item 27 will be filled in by the examining officer in the office of the Judge Advocate General and item 41 by the board.

3. When the form in any case shall have been completed in the office of the Judge Advocate General, except for item 41, it, in triplicate, together with the court-martial record in the case, will be immediately transmitted to the clerk assigned to service with the board and by him placed before the board. The clemency board will thereupon make its study of the case, enter its recommendation on the form under item 41, and place the form before the Judge Advocate General for a signature or other action, and for transmission to the Secretary of War. In case the board is not unanimous, any disagreeing member may file a briefly expressed nonconcurring recommendation.

4. As soon as the clemency board has been provided with the necessary assistance, it shall proceed to give consideration to the cases of the prisoners confined in the penitentiaries, and also to the cases transmitted to the office by the commandants of the disciplinary barracks and its branches, as nearly as possible in the order in which they are received. It is understood that said commandants will give precedence of consideration to cases as the cases may, in their judgment, merit it. It is believed, however, and so recommended, that said commandants should consider and transmit to this office cases in the following order of precedence:

(*a*) Those in which, because of the present information of the commandant, he believes should be immediately released.

(*b*) Cases of desertion in which the prisoners surrendered.

(*c*) Cases in which the offenses were committed within the first four months of the prisoners' first service in the Army of the United States.

5. It is believed that consideration of the cases of prisoners serving confinement outside of the United States must be deferred until after the examnaton of the cases of those serving sentences of confinement within the United States, since it is thought that the obtaining of the necessary information and the relationship of the offense to the theater of war are considerations which would concur in such postponement.

6. The personnel to assist the clemency board in this work must consist of the outset of not less than 7 officers and 10 clerks. It is not at all certain that this number of officers and clerks will be found to be sufficient. The importance of this task is such, and so much depends upon its expeditious performance, that an inadequate commissioned clerical personnel is bound to embarrass, if not render abortive, the entire undertaking.

S. T. ANSELL,
J. H. WIGMORE,
S. HECKSCHER,
Members of the Clemency Board Appointed by Judge Advocate General.

Approved:
E. H. CROWDER,
Judge Advocate General.

EXHIBIT 8.

MARCH 5, 1919.

Memorandum for the clemency board:

1. Col. Wigmore and Maj. Heckscher have been relieved from the board and Col. Easby-Smith, Maj. Ashton, Maj. Rogers, and Lieut. Tittmann detailed to it.

2. The board will be divided into three divisions. The first division will consist of Col. Easby-Smith and Maj. Ashton; the second division, of Maj. Connor and Maj. Rogers; the third division, of Lieut. Col. Kraemer and Lieut. Tittmann. The president of the board will be an ex officio member of each division, and will sit with it whenever requested by either member of the division whenever there are disagreeing views in the division, and whenever on other occasions he deems it advisable to sit with it.

3. When the two members of a division concur upon a recommendation, it will be entered as a recommendation of the board. Nonconcurrences will be specially reported to the president of the board, and all recommendations will be presented to the president of the board for his consideration before presentation to the Judge Advocate General.

4. Maj. Connor will be in charge of the instruction of the working force.

S. T. ANSELL.

(I) EFFECTS OF CONVICTION BY COURT-MARTIAL.

Charge.—Gen. Ansell says that men convicted by courts-martial become "military pariahs"; and adds:

Of course, you have got some suggestion of that in the Articles of War themselves. At least one article forbids any association with convicted men. (P. 198.)

Answer.—The truth is to the contrary.

The article referred to, the forty-fourth article of war, is the single instance of prohibition of such association and applies only when an officer is dismissed from the service for cowardice or fraud and his crime and punishment have been published in the newspapers as provided by law. After such publication "it shall be scandalous for an officer to associate with him." (Article of War 44.)

(J) INVESTIGATION OF GEN. ANSELL'S ACCUSATIONS BY THE INSPECTOR GENERAL.

Charge.—Gen. Ansell says:

And then the Inspector General, in my judgment, forgetting whatever quasi judicial character belongs to his position—and there ought to be a great deal of it—said, "You know, I am making a report on this subject by order of the Secretary of War. This thing is in Congress, and my report will go to Congress, and, Ansell, when it goes to Congress it will be very detrimental to you." And I said, "Well, General, I would rather meet you in Congress than deal with you here." (P. 209.)

Answer.—The truth is to the contrary.

This committee is in possession of a letter from the Inspector General denying that this conversation or any such conversation ever took place.

V. Appellate Power: Various Ideas Submitted to Congress.

The following projects for conferring appellate power are before this committee:

(A) OPINION OF ATTORNEY GENERAL WIRT, SEPTEMBER 14, 1818.

By the Constitution, the President is made Commander in Chief of the Army and Navy of the United States. But, in a Government limited like ours, it would not be safe to draw from this provision inferential powers, by a forced analogy to other governments differently constituted. Let us draw from it, therefore, no other inference than that, under the Constitution, the President is the national and proper depositary of the final appellate power, in all judicial matters touching the police of the Army; but let us not claim this power for him, unless it has been communicated to him by some specific grant from Congress, the fountain of all law under the Constitution. (Op. Atty. Gen. William Wirt, Sept. 14, 1818.)

(B) S. 3692 AND H. R. 9164, JANUARY, 1918.

Sec. 1199. The Judge Advocate General shall * * * report thereon to the President, who shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside. The President may suspend the execution of sentences in such classes of cases as may be designated by him until acted upon as herein provided and may return any record through the reviewing authority to the court for reconsideration or correction.

(C) PROPOSED JOINT RESOLUTION PREPARED FOR SENATOR McKELLAR, FEBRUARY 20, 1919.

* * * That the President be, and is hereby authorized, wherever the substantial justice of the case so requires, to correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact, and for that purpose to remove any record of dishonorable discharge and to make any other order appropriate in the premises, and for that purpose also to direct the submission of any or all records of court-martial judgments to the Judge Advocate General of the Army for his opinion and recommendation.

(D) GEN. CROWDER'S RECOMMENDATION IN HIS LETTER OF MARCH 10, 1919, TO THE SECRETARY OF WAR.

Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War January 19, 1918, which covers the ground more completely and more flexibly than the now pending bills, and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged whether by error of law or of fact."

This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters—the Judge Advocate General (p. 64).

(E) KERNAN BOARD REPORT, JULY 17, 1919.

Art. 50½. * * * the Judge Advocate General of the Army, who shall receive, cause to be recorded, examine and revise * * *. When such examination or revision discloses error or other cause requiring action by the President under the provisions of these articles the Judge Advocate General shall prepare a memorandum of his views and recommendations in relation thereto and submit it with the record of the case to the Secretary of War for the action of the President.

The President, as Commander in Chief, in any case tried by a general court-martial or military commission, may set aside, disapprove, or vacate any finding of guilty in whole or in part, or modify, vacate, or set aside any sentence in whole or in part, and direct the execution of the sentence as modified, and of such part thereof as has not been vacated or set aside. The President, as Commander in Chief, may set aside the entire proceedings in any case and, subject to the provision of this article, grant a new trial before such general court, military commission or special court as he may designate; or he may restore the accused to all rights as if no such trial had ever been held, and his necessary orders to this end shall be binding upon all departments and officers of the Government.

(F) S. 5320 (CHAMBERLAIN, JANUARY, 1919), H. R. 14883 (SIEGEL, JAN. 22, 1919), H. R. 15945 (JOHNSON, FEBRUARY, 1919), AND H. R. 431 (SIEGEL, MAY 19, 1919).

SEC. 1199. The Judge Advocate General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, * * *. The power to revise the proceedings of courts-martial conferred upon the Judge Advocate General by this section shall be exercised only for the correction of errors of law which have injuriously affected the substantial rights of an accused, and shall include—

(*a*) Power to disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when the record requires such finding;

(*b*) Power to disapprove the whole or any part of a sentence;

(*c*) Power, upon the disapproval of the whole of a sentence, to advise the proper convening or confirming authority of the further proceedings that may and should be had, if any. If upon revision, under this section, all the findings and the sentence be disapproved because of error of law in the proceedings, the convening or confirming authority may lawfully order a new trial by another court-martial.

Sentences involving death, dismissal, or dishonorable discharge from the service shall not be executed pending revision. If in any case a sentence though valid shall appear upon revision to be unduly severe, the Judge Advocate General shall make a report and recommendation for clemency, with the reasons therefor, to the President or the military authority having power to remit or mitigate the punishment.

(G) S. J. RES. 18 (SENATOR M'KELLAR, MAY 20, 1919).

That the President be, and is hereby, authorized and requested to constitute appoint, and convene in the Judge Advocate General's Department as many reviewing boards, composed of five commissioned officers each, as he may deem necessary to do the work speedily, the duties of which boards shall be to reexamine and review the records of conviction in every court-martial or retirement case arising during the present war and since the Mexican disturbance prior thereto, except such case wherein convictions have already been set aside and fines and penalties remitted or returned to the soldier. The said records shall be assembled by and be under the direction of the Judge Advocate General and distributed to said boards in such manner as he may deem best, and said boards shall examine into all questions both of law and of facts, and in addition they shall examine any new or additional facts which any defendant may bring before them by way of affidavits, to the end that said reviewing boards may hear and determine each case anew on the law and the facts of the record, together with such additional facts as may be adduced, and decide the cases as speedily as possible, according to the equity and justice thereof. In reaching their conclusions, the boards shall take into consideration the punishment already inflicted in each and every case, but they shall not consider the findings and judgments of the courts-martial or retirement boards as binding upon them, inasmuch as the war is over and it may not now be necessary to continue many punishments which were absolutely necessary to be inflicted in order to preserve proper military discipline during a state of war; and it shall be their duty, whenever the justice of the case may require it, to change, reverse, alter, mitigate, set aside, annul, or confirm the findings of any court-martial or retirement board convened during the present war or since the Mexican disturbance prior thereto. Such boards shall have the power and it shall be their duty in proper cases to set aside and held for naught orders of dishonorable discharges inflicted as punishment in courts-martial or retirement cases, and to enter orders granting honorable discharges or retirements, which orders shall be filed of record in the proper department containing the record of such discharged soldiers. Each board shall act by majority vote, and each board shall select its own chairman without regard to the rank of the officer. In the selection of such boards no officer shall be appointed thereon who has taken part in any court-martial or retirement trial or who

has reviewed any record arising since the beginning of the present war or since the Mexican disturbance prior thereto. * * * When an opinion shall be reached, the same shall be immediately forwarded to the President by the Judge Advocate General, with the recommendation of such board. If the President approves the finding of the board, the same shall be final; but he is further authorized and empowered to enter any order or judgment in any case, whether of mitigation or anulment, in whole or in part, of any court-martial proceeding or finding or of any finding of such boards, or he pay parole or pardon, to the end that even and exact justice shall be done in each case.

(H) S. 64 AND H. R. 367 (ANSELL BILL, MAY, 1919).

Art. 52. *Revision by court of military appeals.*—* * * shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; and such power of review shall include the power—

(*a*) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

(*b*) To disapprove the whole or any part of a sentence.

(*c*) To advise the proper convening or confirming authority of the further proceedings that may and should be had, if any, upon the disapproval of the whole of a sentence; and in any case in which all the findings and the sentence are disapproved because of such error of law in the proceedings the appointing authority may lawfully order a new trial by another court.

(*d*) To make a report to the Secretary of War for transmission to the President, recommending clemency in any case in which the sentence, though valid, shall appear to the court to be unjust or unduly severe. * * * And said court of military appeals shall have like jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence, upon application to that end made by the accused within six months after the passage of this act: *Provided*, That no case in which the sentence has heretofore been approved shall be tried again: *And provided further*, That the revision or reversal of the sentence in any such case shall not be effective to retain in the military service any person who has been dismissed or discharged therefrom in execution of such sentence thus reviewed, or to entitle any person to any pay or allowances, but shall be limited in its effect to the final determination that the separation from the service was honorable instead of dishonorable.

(I) H. R. 9156 (SEPT. 9, 1919, DALLINGER BILL).

Art. 6. *Supreme court of military justice.*—* * * shall hear and decide all cases which may be submitted to it on appeal from any military court of appeal, and its decision shall be final. It shall have the power—

(1) To disapprove a finding of "guilty" and to make a finding of "not guilty";

(2) To disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(3) To disapprove the whole or any part of a sentence and to impose such sentence as it may deem just; and

(4) To order a new trial before a regimental court or before a court of military appeal. * * * shall have jurisdiction to review and revise any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since the 6th day of April, 1917, and any sentence of death, dismissal, or discharge in the case of any person now serving confinement as a result of such sentence, upon application to that end made by the accused within six months after the passsage of this act: *Provided*, That no case in which the sentence has heretofore been approved shall be tried again: *And provided further*, That the revision or reversal of the sentence in any such case shall not be effective to retain in the military service any person who has been dismissed or discharged therefrom in execution of such sentence thus reviewed, or to entitle any person to any pay or allowances, but shall be limited in its effect to the final determination that the separation from the service was honorable instead of dishonorable.

VI. Tabular Statement of the Organization of British and French Military Tribunals.

(Memorandum by Lieut. Col. William C. Rigby, Judge Advocate.)

(A) ORGANIZATION OF BRITISH COURTS.

1. General courts-martial:

Nine or more members, all officers; in practice usually 9 or 11; commissioned at least 3 years.

Judge advocate (impartial legal adviser), prosecutor and counsel for accused. Judge advocate advises but does not govern the court.

NOTE.—"(F) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not overrule it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point. The court, in following the opinion of the judge advocate on a legal point, may record that they have decided in consequence of that opinion." (Rules of Procedure, par. 103 (F).)

Record forwarded (within the United Kingdom) by commanding general to J. A. G. without action, but with his recommendations.

Stenographic transcript taken; record very much like American G. C. M.

Practically officers' court within United Kingdom. Seldom used for enlisted men except in war time in serious cases where death or penal servitude is contemplated, which the district C. M. can not award. In peace time all civil crimes habitually turned over to civilian courts for trial. Only 12 G. C. M.'s held within the United Kingdom during the 9 years, 1905–1913 (1⅓ G. C. M.'s per annum).

"Members under instruction" usually appointed. They take no part in the proceedings but sit with the court both in open and closed sessions for the purpose merely of learning the procedure.

"Waiting members." Two or three "waiting members" usually appointed as alternates to act in case of absence or disqualification of regular members. "Waiting members" are excused as soon as the court is sworn.

At least five judges must be of rank not below captain; the president must not be under field rank (unless in emergency).

Death sentence requires two-thirds vote.

2. District court-martial:

Three or more officers (in practice usually three, sometimes five).

May award confinement and forfeiture of pay up to two years.

Is the ordinary court for trying enlisted men within the United Kingdom. (Average D. C. M. trials, 1904–1913, inclusive, ran about 3,800 per annum with an average army stationed within the United Kingdom of about 125,000 men, about one-half of the total standing British Army, the other half being engaged in service overseas.)

Not usually attended by a judge advocate (convening authority may appoint judge advocate, but rarely does). Prosecutor is usually an officer from accused's regiment—often the battalion adjutant.

Accused does not usually have counsel, though it is permitted.

No stenographic record.

Since institution of "court-martial officers" under War Office instructions of September, 1916, president is often a court-martial officer (that is, an officer with legal training corresponding roughly to an officer of our J. A. G. D.), but this is not required.

Findings and sentence are approved by the authority appointing the court (usually a brigade or territorial commander). After confirmation the record is sent for review to the J. A. G.

D. C. M. is rarely used outside of the United Kingdom (replaced by field G. C. M. on active service).

May not try officers nor award death nor penal servitude.

Judges must have been commissioned two years.

3. Regimental court-martial:

Not less than three officers of the regiment, appointed by the regimental commander.

Proceedings confirmed by regimental commander.

Limit of punishment 42 days' detention.

May not award imprisonment, discharge with ignominy, penal servitude, nor death; nor try an officer.

Each member commissioned at least one year. President not under the rank of captain (unless in emergency).

R. C. M. almost obsolete since extension in 1910 of power of commanding officers to award up to 28 days' detention without court-martial (Army act, sec. 46).

4. Field general court-martial.

The court habitually used on active service outside of the United Kingdom.

Jurisdiction over both officers and men, all offenses.

May award death, penal servitude, imprisonment, detention, field punishment, forfeiture of pay, restriction to limits, etc. Full jurisdiction of a G. C. M.

Normally consists of at least three officers. No requirement as to length of commission.

May consist of but two officers, but in such case may not award death or penal servitude.

No stenographic record; rules of procedure are not binding, but the spirit of the rules to be applied so far as practicable.

Is intended to have a summary procedure adapted to the requirements of active service.

Death sentence requires unanimous vote. Sentence is confirmed by commanding general appointing the court; but sentence of death or penal servitude requires confirmation of the commander in chief of the force (e. g., expeditionary force in France, forces in Palestine, in Mesopotamia, etc.).

In practice reviewed by the deputy judge advocate general before confirmation by the commander in chief; after confirmation, forwarded to the judge advocate general for review (but death sentences carried into execution upon confirmation by the commander in chief; records of such death sentences not afterward reviewed by judge advocate general, but merely filed in his office).

"Court-martial officer" (analogous to officer of our J. A. G. D.) appointed as additional member of F. G. C. M., sits only in the trial of such cases as the convening authority directs as being "difficult, complicated, or serious"; usually cases where death or penal servitude likely to be awarded or where the offense is a civil crime.

5. Judge advocate general:

Reviews:

(*a*) Before confirmation, general courts-martial within United Kingdom.

(*b*) After confirmation—

1. District courts-martial wherever held.
2. Field general courts-martial wherever held.
3. General courts-martial held outside United Kingdom.

NOTE.—Jurisdiction extends throughout the British Empire, except India, for which there is a separate judge advocate general. Acts also for the air forces under the ministry of air (at present Hon. Winston Churchill is minister for air, as well as secretary of state for war).

Civilian; permanent appointment; retires at 65 years of age; salary, £2,000 per annum.

Functions advisory only; reports to secretary of state for war through deputy adjutant general (army council).

Records and judge advocate general's recommendations are in fact carefully examined by the deputy adjutant general (at present Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B.), who, though he usually agrees with the judge advocate general, feels under no obligation to do so, and is not bound in any way by judge advocate general's opinion. If he disagrees, they consult; if they still disagree, refer to attorney general. If, after conference, attorney general differs from judge advocate general, goes to secretary of state for war for decision, with understanding that he will rather be guided by attorney general's advice than by judge advocate general, because attorney general is adviser to whole Government, whereas judge advocate general is adviser only to war department.

After confirmation, sovereign (that is, in effect, the secretary of state for war) has power to "quash"; judge advocate general, therefore, may recommend "quashal." Statistics show a trifle over 1 per cent of all cases coming through judge advocate general's office during the war were so quashed after confirmation.

Petitions are also received at any time after conviction on behalf of the accused. The record is then reexamined and the conviction sometimes quashed—practically an appeal.

NOTE.—Power to quash and to entertain such petitions is analogous to appellate power sought by proposed amendment to Revised Statutes 1199, in January, 1918.

6. "Military courts":

Try prisoners of war and civilians; analogous to our military commissions.

(B) ORGANIZATION OF FRENCH COURTS.

1. Conseil de Guerre in the territorial armies:

Permanent court organized in each military territorial district.

Seven judges appointed by commanding general by roster for six months—

(*a*) For the trial of an officer—all officers.

(*b*) For trial of an enlisted man, one noncommissioned officer on the court (usually "adjutant," corresponding to our regimental or battalion sergeant major).

Commissaire du Gouvernement prosecutor and legal adviser to the court; appointed by minister of war; an officer not under the rank of

captain, 25 years of age. Not required to be a lawyer. (In practice may or may not be a lawyer. In Paris, this spring, exactly 50 per cent were lawyers—six courts sitting, three commissaires officers who were lawyers, and the other three officers without legal training.)

If accused has no counsel, court appoints counsel. May be officer, soldier, or civilian. The court has power to appoint civilian counsel, who must then serve without compensation (like counsel appointed by civilian judge to defend accused in criminal cases).

The president questions accused and other witnesses. No record of testimony kept. Statements taken before investigating officer (rapporteur), read as evidence. Witnesses usually called, but not strictly necessary.

Rapporteur (investigating officer) appointed for each court by minister of war. Army officer, not under captain, 25 years age; no other requirements; not required to be a lawyer. In practice may or may not be a lawyer. Endeavor made during the war to secure officers with legal training, but not always possible to do so.

2. Conseil de Guerre in armies on active service (or in a "state of siege"):

Five judges appointed by commanding general, to serve at his pleasure.

For trial of enlisted men, one judge, a noncommissioned officer (usually "adjutant," that is, regimental or battalion sergeant major).

Functions of commissaire and rapporteur combined in one officer, "commissaire-rapporteur"; appointed by commanding general; of rank not under captain, 25 years of age. Not required to be a lawyer —sometimes is and sometimes is not. Endeavor made during the war to procure lawyers for these positions.

No preliminary investigation whatever required. Commanding general may, in his discretion, by "direct order" (sec. 156, C. J. M.), order case to trial; or may order investigation.

3. "Special courts":

Emergency war boards established for the war by presidential decree September 6, 1914 (abolished by law in 1918).

Three judges appointed by commanding general, to serve at his pleasure. President an officer, not under field rank. Other two judges—(*a*) For trial of officers—officers; (*b*) for trial of enlisted man or civilian—one officer and one noncommissioned officer.

Commissaire-rapporteur appointed by the commanding general; required only to be an officer.

No preliminary investigation required; accused may be instantly ordered to trial. (The 24-hour interval before trial allowed accused in the ordinary conseil de guerre in the armies in active service, was not required in these "special courts").

Counsel for the accused appointed by the order referring case for trial; accused advised of the counsel appointed; allowed to choose other counsel if he so desires.

No appeal; sentences instantly carried into execution (except that execution of the death sentence required the order of the commanding officer who ordered the case for trial. This officer had the right in exceptional cases to delay the execution and ask the pleasure of the President of the Republic. In 1917 it was directed that all death sentences should thereafter be so referred to the President).

4. Court of Revision in the territorial armies:

Permanent courts of revision established at Paris, Bordeaux, Lyons. Territorial jurisdiction; Republic divided between them. Another court in Algiers.

Five judges, two civilians, three officers, as follows: Civilian president (a "president of the chamber of the (civilian) court of appeals"), civilian (a judge of the court of appeals), one colonel or lieutenant colonel, two majors.

Military judges appointed by commanding general for six months; civilian judges appointed as directed by the Government (cabinet). Each judge, civilian or military, must be 30 years of age. Military judges not required to have legal training.

Commissaire du gouvernement legal adviser to the court; a field officer, 30 years of age, appointed by the minister of war; not required to have legal training but in practice usually is a lawyer. (Col. Augier, commissaire du gouvernement of the court of revision at Paris, is a very eminent military lawyer and the author of several books on military law.)

Reviews for errors of law only. Appeals must be made within 24 hours after judgment in the court below. One day further allowed counsel for accused to file "memoir"; three days for one of the judges to report on the case to the court. The court then sits in public session; hears arguments from commissaire du gouvernement and counsel for the accused and enters judgment. (In practice additional time is sometimes allowed for preparation of the accused's "memoir.")

New trials may be ordered. The case is then sent for trial to some other court than the court which tried it the first time.

5. Court of revision in the armies on active service:

At headquarters of each division and army.

Five judges, all officers, as follows: One brigadier general (president), two colonels or lieutenant colonels, two majors. Appointed by commanding general, to serve at his pleasure.

Commissaire du gouvernement, officer of field rank, 30 years of age; appointed by the commanding general.

Jurisdiction and procedure as in territorial armies, except that in practice the time for accused to file his "memoir" is almost never extended.

In emergency the number of judges may be reduced to three.

6. Court of cassation:

Civilians (but not military persons) may have recourse to the court of cassation (supreme court of Republic of France) on jurisdictional questions only. This right is suspended whenever ordinary appeals to the courts of revision are suspended.

In time of peace, court of cassation exercises powers of court of revision (which is then suspended).

7. All right of appeal may be suspended during war or state of siege by presidential decree.

No appeal or other recourse lay from the "special courts" (emergency war courts). See above.

VII. Gen. Ansell's Accusations Against Others Besides Gen. Crowder.

(A) AGAINST GENERALS OF THE ARMY.

(*a*) "The weakest grade in the Army of the United States" (p. 121); which is the grade from which are drawn convening and reviewing authorities of courts-martial.

(*b*) "Many of them jokes to everybody else in the world except ourselves and themselves" (p. 121).

(*c*) "Lacking in experience" (p. 121); citing Gens. Pershing and Wood as examples, and saying:

(*d*) "That heterogeneous collection of troops on the Mexican border," "which Gen. Pershing commanded"; "no professional soldier would ever call that a division" (p. 122); and "the command in the Philippines was not the kind of command that required general leadership" (p. 122); and again:

(*e*) "I have had a hundred times their court-martial experience" (p. 121).

(B) AGAINST THE INSPECTOR GENERAL.

(*a*) "Thoroughly reactionary" (p. 116); "the most reactionary of men"; "prejudiced and reactionary" (p. 173); "whose views savor of professional absolutism" (p. 123).

(*b*) With trying to browbeat and intimidate Gen. Ansell, in connection with the investigation of Gen. Ansell's part in the present controversy, in trying to compel Gen. Ansell to make a statement against his will by threatening that "this thing is in Congress, and my report will go to Congress, and, Ansell, when it gets to Congress, it will be very detrimental to you" (p. 209).

(*c*) "With habitually using the power of his office in connection with investigations to compel accused persons and others to make statements against their will and to incriminate themselves, by menaces, threats, and intimidation" (p. 209).

(*d*) With allowing officers in his department in camp and division to compel testimony from suspected or accused soldiers, and then use it against them (p. 209).

(*e*) With having taken part with the Secretary of War and the Acting Judge Advocate General (Gen. Kreger) in frequent conferences with the court-martial committee of the American Bar Association, under such circumstances that "I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

(C) AGAINST GEN. BIDDLE, FORMER ASSISTANT CHIEF OF STAFF.

(*a*) "Thoroughly reactionary" (p. 116).

(*b*) "Sharing with the Inspector General in views that savor of professional absolutism" (p. 123).

(D) AGAINST MAJ. GEN. KERNAN, MAJ. GEN. O'RYAN, AND LIEUT. COL. OGDEN, THE MEMBERS OF THE KERNAN-O'RYAN-OGDEN BOARD, AND LIEUT. COL. BARROWS, THE RECORDER OF THAT BOARD.

(*a*) "The most reactionary set of men in the United States" (p. 215).

(*b*) So prejudiced, and known to be so prejudiced, that many officers of high rank, holding liberal views, refused to express their views on military justice to that board (p. 215).

(E) AGAINST BRIG. GEN. E. A. KREGER, ACTING JUDGE ADVOCATE GENERAL OF THE ARMY.

(*a*) Not understanding his office; "brought to an office that he did not understand, and does not understand yet" (p. 165).

(*b*) With being opposed to and obstructing real clemency to prisoners (pp. 192–195, 204).

(*c*) With planning to disband the clemency board before it had considered the cases of prisoners from Europe (pp. 204–205), and with saying that the cases of those over there "would not require a second examination over here" (p. 207).

(*d*) With being, along with the Secretary of War, and the Judge Advocate General, in the attitude of "obstructing" the administration of clemency—"one of the obstructing officers" (p. 203).

(*e*) With pursuing (jointly with the Secretary of War, the Judge Advocate General, and the Inspector General) such methods with respect to the investigation conducted by the committee of the American Bar Association that "that investigation was never a fair investigation," but was so arranged that "that Bar Association committee sat there and heard and drank in the ultramilitary view, and they heard nothing else, except as I, single-handed, aided by one other officer, could present," "so that the departmental view might be impregnably maintained" (pp. 210, 211).

(*f*) With being, along with the Secretary of War and the Inspector General "in frequent contact" with the members of the American Bar Association committee, under such circumstances that "I for one, as long as I live, will express no respect for any such committee, no matter how high it may be, or whatever association it may be a part of" (pp. 211, 214).

(*g*) With having unjustly, in an unusual and harsh manner, and without notice, removed Col. Weeks, a Regular Army officer, "a distinguished officer," from duty in the office of the Judge Advocate General in Washington, to a relatively obscure station, which will carry immediate reduction to his Regular Army rank, because of his liberal views on clemency and concerning the system of the administration of military justice (pp. 162–163).

(F) AGAINST FORMER PRESIDENT TAFT.

(*a*) Perverting "his power to the furtherance of a plan * * * to maintain the existing vicious system of military justice and to do me great personal injury" (statement of Gen. Ansell, New York World, Sept. 16, 1919).

(*b*) Abusing "the confidence and trust of the American people and" misleading "them" (ibid); and

(*c*) Debasing "his exalted position as ex-President of the Republic to become an ignorant and bitter partisan in behalf of his friend," Gen. Crowder (ibid).

(G) AGAINST THE CHIEF OF STAFF.

(*a*) With joining with the Secretary of War, the Judge Advocate General, and the Acting Judge Advocate General in getting in touch and conferring with the court-martial committee of the American Bar Association (p. 211), so influencing that committee and its work that "its investigation was never a fair investigation."

(*b*) With joining "the whole military hierarchy, capped by your Chief of Staff," in clamoring and entering "into an agreement that these men should die," i. e., Ledoyen, Fishback, Sebastian, and Cook, "the four death cases from France," to whom the President showed clemency.

(H) AGAINST CHIEFS OF BUREAUS.

(*a*) Joining "to protest and resist the establishment of any revisory power in the War Department" (p. 207), and

(*b*) Inducing the Secretary of War "by an organized military bureaucracy to use the great power of his office to oppress, to destroy any who would dare differ with that bureaucracy" (p. 171).

(I) AGAINST THE COURT-MARTIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

(*a*) "Being a packed committee" (p. 211), "chosen as a result * * * of strenuous efforts being made by the War Department to bolster up their cause" (p. 214).

(*b*) That certain members of the committee "came to the investigation with minds foreclosed" (pp. 212–213), and that those members "have not been without their influence upon the other members of the committee" (p. 213).

(*c*) With so misconducting their investigation that "that investigation was never a fair investigation" (p. 210), and that "the hearing has not been thorough and it has not been fair" (p. 214).

(*d*) With misconducting their investigation in that "that committee * * * came here, got into touch with the War Department and the Judge Advocate General of the Army, got a list of witnesses from them, and called those witnesses and no other witnesses until just about four days before their hearings, which had extended over four or five weeks, were about to close. They then, condescendingly, gave me an opportunity to appear and called one other officer voicing my views, and then they asked me if I had a list of names * * * in advocacy of my side of the matter, and when I handed in that list they left * * * within 48 hours before any but one of those gentlemen could get here" (p. 210); "and so that Bar Association committee sat there and heard and drank in the ultramilitary view, and they heard nothing else except as I, single-handed, aided by one other officer, could present" (p. 210).

(*e*) With conferring "with the Secretary of War, the Chief of Staff, the Judge Advocate General of the Army, and the Acting Judge Advocate General of the Army" (p. 211), and with being "in frequent con-

tact with the Secretary of War and the Acting Judge Advocate General and the Inspector General" (p. 214), so that "whatever respect anybody else may have for such a committee I, for one, as long as I live, will not express any respect for any such committee, no matter how high it may be or whatever association it may be a part of" (p. 214).

(*f*) "The committee did not ask the department, so far as I am advised, to direct any officer of the Army whose name was cited by me, to appear before it, and consequently any officer or other person whom I desired called in opposition to the system could appear only by taking leave, if he were entitled to leave, and at his own expense" (p. 213).

(J) AGAINST THE SECRETARY OF WAR.

(*a*) "Thoroughly reactionary" (p. 116);

(*b*) With having submitted to Congress "in bad faith, not really desiring the bill passed nor wanting any such power granted (p. 111), on January 19, 1918, a bill to vest in the President revisory power over the findings and sentences of courts-martial" (p. 111);

(*c*) With having "arrayed himself with the solid phalanx of the Army—principally of the Regular Army—in support of this system" (p. 173); i. e., in support of the existing system of military justice, elsewhere in the testimony denounced as a "system of organized injustice";

(*d*) With being "content, however, to be imposed upon" (p. 117);

(*e*) With having, along with the Judge Advocate General, "resorted to methods which, if adopted by a man in his dealings with another man privately, would merit and receive the severest condemnation" (p. 169);

(*f*) With having been "induced by an organized military bureaucracy to use the great power of his office to oppress, to destroy, anyone who would dare differ with that bureaucracy" (p. 171);

(*g*) With having "demoted" or concurred in the demoting of Gen. Ansell from the rank of temporary brigadier general to his Regular Army grade of lieutenant colonel, within but little more than a month after bestowing upon him the distinguished service medal, as a punishment for testifying before the Senate Military Affairs Committee; not for stating other than the truth, but for "divulging the secrets of the system, giving away State secrets, things that we want to keep away from Congress and the public" (p. 161); with withholding the order so that it would not be published until the day after Congress adjourned last March (p. 164); and with pretending that "my demotion had absolutely nothing to do with my connection with the criticism of the existing system" (p. 164);

(*h*) With sending clear to France to get another brigadier general to put in Gen. Ansell's place as Acting Judge Advocate General (p. 164), who (Gen. Kreger) did not understand the office to which he was brought, "and does not understand yet" (p. 165);

(*i*) With having pretended that Gen. Ansell's demotion "was in line with the general demobilization of the Judge Advocate General's Department; that there were to be no more promotions in that department"; yet with having made "more colonels in that department since I was demoted than before" (p. 164);

(*j*) With having failed to make any fair investigation of charges against the Army court-martial system (p. 167); but, on the contrary

(*k*) With having entered into a deliberate conspiracy with the Judge Advocate General and Col. John H. Wigmore for "a plan of campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants" (pp. 165–6); and for that purpose—

(*l*) With establishing a "propaganda bureau" with "several officers and 13 or 14 clerks assigned solely for this purpose, and the Government of the United States paid their salaries" (p. 168);

(*m*) With having, through this "propaganda bureau," in pursuance of this conspiracy, prepared "a statement for the press," devoted largely to discrediting me" (p. 166);

(*n*) With having, through this "bureau," published another "very elaborate" 70-page statement "devoted to enconiums upon the system" (Gen. Crowder's letter of Mar. 10, 1918), of which 90,000 copies were sent out (p. 168), "as part of the propaganda to maintain this system and to discredit those who would attack it"; and that "the truth is not in that document," and that the cases cited in that document "are not only not fairly handled, they are falsely and untruthfully presented" (p. 169); "all with the purpose that the Congress of the United and the lawyers of the United States might be misled and deceived" (p. 169);

(*o*) With having appointed to investigate the subject of military justice and Gen. Ansell's own part in it, "the Inspector General, the most reactionary of men" * * * "the very man whom in the brief," prepared by Gen. Ansell in December, 1917, upon the power of the Judge Advocate General, "I labeled as prejudiced and reactionary" (p. 173);

(*p*) With having, in November, 1917, directed or consented that the Judge Advocate General relieve Gen. Ansell from all connection with the administration of military justice because of the latter's liberal views (p. 183);

(*q*) With having opposed clemency to prisoners, "the departmental line-up was against clemency" (p. 182), and with having, when the clemency board was finally instituted last winter, decided that the cases of prisoners overseas should not be taken up, because "they were over there * * * and that people would not be so interested in extending clemency to prisoners so circumstanced as here at home" (p. 191);

(*r*) With being, along with the Judge Advocate General and Gen. Kreger, in the attitude of "obstructing" the administration of clemency (p. 203);

(*s*) With having arranged to mislead the committee of the Amer- Bar Association investigating court-martial procedure, by facilitating the appearance before it of witnesses favorable to "the system" and obstructing the appearance of other military witnesses before it, so that the investigation of that committee "was never a fair investigation" (p. 210); and even that

(*t*) The members of that committee itself "were chosen as the result of strenuous efforts made by the War Department to bolster up their cause" (p. 214);

(*u*) With having, immediately upon his return from Europe last May, because "it was in the air" that the American Bar Association

committee's report might be unfavorable to the department (pp. 214–15), appointed another committee—the Kernan-O'Ryan-Ogden Board—composed of "the most reactionary set of men in the United States" (p. 215);

(*v*) In short, with being wholly dominated by the reactionary views of the Judge Advocate General and of the most reactionary section of the Army, and being willing to stoop to any means whatever to prevent any improvement and to destroy anyone seeking to disturb the present system.

(K) AGAINST PROF. JOHN H. WIGMORE.

Prof. John H. Wigmore, dean of the law school of Northwestern University, author of "Wigmore on Evidence" and many other books, and known throughout the world as one of the foremost legal authorities in the United States, formerly a colonel in the Judge Advocate General's Department, has been denounced as:

(*a*) "A new thought man in the legal world" (p. 265), to whom "the Constitution does not mean very much", to whom the Constitution "seems to have been the result of a long course of foolish thought by our people" (p. 265);

(*b*) With being a man opposed to clemency, or "not zealous in according clemency" (pp. 191–192);

(*c*) With having entered, with the Secretary of War and the Judge Advocate General, into a conspiracy and "Campaign to maintain and defend the existing system at all costs, and discredit the complaints and destroy the complainants" (pp. 166, 231); and with having become chief of the "propaganda bureau" organized pursuant to that conspiracy (p. 168), with 13 or 14 clerks under him, assigned solely for that purpose, with their salaries paid by the Government (p. 168);

(*d*) With having, as chief of that "propaganda bureau," prepared first, a long statement, signed by the Judge Advocate General, devoted to discrediting and destroying Gen. Ansell (p. 166), and thereafter the 70-page pamphlet letter of the Judge Advocate General to the Secretary of War on "Military Justice during the War," dated March 10, 1919, of which 90,000 copies were "published and sent to all the lawyers, preachers, and other professional men as part of the propaganda to maintain this system and discredit those who would attack it" (pp. 168–169, 231, 232); and that

(*e*) "The truth is not in that document"; that the cases cited in that document "are not only not fairly handled, they are falsely and untruthfully presented" (p. 169);

(*f*) With employing, along with the Secretary of War and the Judge Advocate General, such methods "as when employed in private affairs habitually receive the condemnation of honest men and discredit any cause" (p. 231).

VIII. Summary of the Inspector General's Findings.

The Inspector General, after a painstaking investigation of the facts in controversy, made a detailed report to the Secretary of War May 8, 1919. The report contained specific findings supported by the facts upon which they are based, adverse to the contentions of Gen. Ansell, as follows:

1. "Gen. Ansell's charge that he was relieved from duty as Acting Judge Advocate General, by reason of the difference of opinion as to section 1199, Revised Statutes, is without foundation in fact." (P. 10.)

2. "His (Gen. Ansell's) statement, repeatedly made, that General Orders No. 7, adopted to carry out the very views which he, himself, first advocated, were 'an administrative palliative,' is not in accord with the facts and is another instance where the public has been misled." (P. 17.)

3. "The fact remains that, at the time the order was issued, Gen. Crowder was Judge Advocate General of the Army and should have been consulted by his assistant, Gen. Ansell, in regard to a change of policy so radical as that effected by General Orders No. 84 and known by Gen. Ansell to be contrary to the declared policy of the Judge Advocate General and the Secretary of War." (P. 22.)

4. "From the records and from all obtainable evidence, it appears that Gen. Ansell's statement that, from November, 1917, to April, 1918, he had nothing to do with the administration of military justice and that the proceedings did not come over his desk, is not in accord with the facts. On the contrary, it appears that his initiative and authority as senior assistant remained undisturbed and that he was in no degree hampered in any changes which, within the law, he desired to make." (P. 26.)

5. "The above facts, stripped of all elements of uncertainty, lead to the conviction that Gen. Ansell's statements (concerning the four death cases from France) as to his attitude and activities in connection with the cases above considered, are misleading and widely variant from the facts." (P. 31.)

6. "Gen. Ansell does not claim that he originated the idea (clemency boards), but that the basis for the plan was his memorandum dated January 11, 1919. That is true. The Secretary of War, however, himself made the initial suggestion, and the order creating the board followed the lines laid down by him." (P. 36.)

7. "It is believed that the Judge Advocate General's Department has functioned during the war with the interests and rights of the enlisted men constantly in mind, and that the various steps taken and the measures adopted have been for the single purpose of safeguarding those interests and rights. It has been successful, except in a few isolated instances, in accomplishing that purpose." (P. 57.)

IX. Gen. Crowder's Attitude Toward Return of Acquittals for Reconsideration.

Note.—This is now ancient history, since it has been prohibited by General Order No. 88, War Department, July 14, 1919, which was recommended by Gen. Crowder.

(A) CHARGE OF GEN. ANSELL RESPECTING THE RETURN TO COURT OF ACQUITTALS.

Gen. Ansell before the Committee on Military Affairs, replying to a question by Senator Chamberlain, inquiring whether or not the War Department had not recently issued an order prohibiting the return

to courts by reviewing authorities of acquittals for reconsideration said:

Yes; although that has been agitated for 18 years, I know, and the War Department has insisted that that was a proper thing, and the Judge Advocate General of the Army, in the very hearings before the committee beginning in 1912 and terminating in 1916, insisted that that was a proper thing, that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1918 conferring this revisory power, he went before the House Committee and argued for the advisability of permitting this court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to (p. 127).

Answer.—A careful examination of the hearings of 1912 and 1916 on the 1916 revision has been made, with the result that there is not found therein any reference by Gen. Crowder to the practice of reviewing authorities returning acquittals to courts for reconsideration.

In the hearings before the House Committee on the bill to place in the President revisory power, Gen. Crowder stated the following respecting the return of acquittals to courts by reviewing authorities:

It has been permissible ever since we have had an Army for the President, in any case requiring his action, to return the case to the court and ask them to reconsider the sentence, with a view to imposing a more adequate sentence or a different form of sentence, but there is no power in the President of the United States or the Secretary of War or any authority to increase the punishment beyond what the court will sanction on reconsideration (p. 37).

He has always had that power (referring to the power of the reviewing authority to return the finding and sentence to a court indicating the punishment inadequate). They have it under the English articles, from which we draw our own. They have had it from time immemorial; it has been the rule that the convening authority could address the trial court upon the adequacy or inadequacy of the judgment and sentence of the court (p. 40).

The commanding general can not increase it (referring to the punishment). He can only address the court as to the sufficiency of the sentence. That has been the law ever since we have had a Government, and ever since we have had an Army, and that is the law in England, going back as far as our written codes go (p. 42).

I have had cases come up where a very small sentence was given for the gravest crime, and I do not know anything that would attack discipline more, if the commanding general, who is also the reviewing officer, or the Secretary of War or the President, who will become the reviewing officers of that class of cases under this legislation, could not invite the attention of the court to the effect of such a sentence upon the discipline of the Army generally. I do not think this would have survived all the centuries without criticism if it were intrinsically wrong (p. 42).

I believe a large number of the cases returned by the convening authorities to courts-martial are with a view to imposing a different form of sentence and frequently a more lenient one (p. 43).

Gen. Crowder stated at this hearing that in perhaps a majority of cases the courts adhered to their original sentences upon reconsideration, adding:

There is a great deal of independence. You will find, I think, more cases where the reviewing authority, in commenting upon a case, in the order of promulgation, disapproves than you will find where the reviewing authority approves the action of a court upon revision (p. 44).

On February 26, 1919, Gen. Crowder before the Senate Military Committee in discussing the provision in the Chamberlain bill, which attempts to preclude the reviewing authority from returning to courts acquittals for reconsideration, stated, referring to the practice of returning acquittals:

Let me say, first, it is simply a regulation and there is no law under which it is done. The War Department could wipe out the regulation to-night and could establish this very prohibition by an order (p. 247).

Further in this hearing Gen. Crowder stated, in commenting upon the power of the reviewing authority to return acquittals, that:

I think this way about it: It shocks the American people to have a verdict of acquittal reconsidered, and for that reason I am not disposed to insist upon continuing the ancient rule of returning them. I have never known, in a rather protracted period of service, of an innocent man who has suffered through this procedure, and I have certainly known of many miscarriages of justice that have been corrected (p. 254).

I am not disposed to insist upon retention of that rule. I have sometimes thought we would be justified in revoking the present rule and try out the other system of reporting the result at the proper time, but I fear we should get all kinds of protest from the reviewing authorities, commanding officers who have authority to convene courts-martial (p. 255).

Subsequent to the hearing of February 26, 1919, Gen. Crowder directed the preparation of a draft of general order to prohibit reviewing authorities from returning acquittals to courts. As a result of this movement in this matter, General Order No. 88, War Department, 1919, was published on July 14, 1919, wherein it is provided:

1. No authority will return a record of trial to any military tribunal for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty on a specification laid under that charge which sufficiently alleges a violation of some article of war; or

(d) The sentence originally imposed with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited.

3. This order will be effective from and after August 10, 1919.

(B) SAME SUBJECT: GEN. CROWDER'S ATTITUDE.

Charge.—On page 127 of the report of the hearings, Senator Chamberlain interrogated Gen. Ansell respecting the sending back of a case of acquittal, and Gen. Ansell replied, saying:

The Judge Advocate General of the Army, in the very hearings before the committee beginning in 1912 and terminating in 1916, insisted that that was a proper thing; that it was necessary for discipline; and when he sent the bill to your committee in the spring of 1913 conferring this revisory power he went before the House committee and argued for the advisability of permitting the court to reverse acquittals, and he said that he had seen many instances in his service where justice would not have been done if the acquittal had been adhered to (p. 127).

Answer.—The reference here is without any doubt to the hearing on H. R. 23628, the original of the 1916 revision, before the House committee—the hearings beginning in April, 1912; and also to the hearings on S. 3191 before the Senate Subcommittee on Military Affairs in February of 1916, and, as I have said, these are the antecedents of the much-talked-of revision of 1916. Gen. Ansell says in these hearings that I argued for the advisability of permitting the court to reverse acquittals. A very careful examination of these hearings has been made which disclosed that nothing whatever was said by me upon that subject.

Gen. Ansell further says that I came before this committee in the spring of 1918 and argued for the advisability of permitting the court to reverse acquittals. What I said was this: Senator Wadsworth

asked whether or not I had any comments to make generally on the power of reviewing authorities returning papers after acquittals, and I said:

I think this way about it: It shocks the American poeple to have a verdict of acquittal reconsidered, and for that reason I am not disposed to insist upon continuing the ancient rule of returning them. I have never known, in a rather protracted period of service, of an innocent man who has suffered through this procedure, and I have certainly known of many miscarriages of justice that have been corrected.

On the closely related subject of the practice of reviewing authorities sending inadequate sentences back for revision upward I said:

I have a number of cases which I want to put in the record in order that you may see the use that military authorities make of this power of sending inadequate sentences back for revision upward, and see whether it is an abuse or not. I am not disposed to insist upon retention of that rule. I have sometimes thought that we would be justified in revoking the present rule and trying out the other system of reporting the result at the proper time, but I fear we should get all kinds of protests from the reviewing authorities, commanding officers, who have the authority to convene courts-martial (pp. 254-255, hearings on S. 5320).

I have been entirely frank with the committee in giving the substance of this testimony. I am using the incident to show you how frequently the statements of the principal critic are, in fact, misstatements.

(C) RETURN OF CASES TO COURT FOR RECONSIDERATION OR CORRECTION. RECOGNITION AND APPROVAL OF THE POWER.

The power to send a case back to the court for revision, reconsideration, or correction has been recognized as existing independently of express statute from early times.

In 1842 Attorney General Legare advised President Tyler as follows:

In military courts-martial the power of the commander by whom they have been convened to direct them, in the event of disapproval, to revise their sentence and reconsider the proceedings, has never been doubted, and is rested solely upon the ground that the sentences of such courts are not to be put in execution until approved by that commander (4 Ops. Atty. Gen., 19).

In 1853 Attorney General Caleb Cushing wrote as follows:

It is laid down as a thing not open to controversy in all the books of military law that the superior authority may order a court-martial to reassemble to revide its proceedings and sentence. * * * The power of ordering a case back to a court-martial for revision must be conceded as indubitably existing both as to the Army and the Navy of the United States. Its apparent singularity arises from the want of careful scrutiny of the thing done, and of the nature of a court-martial in its relation to the confirming power. (6 Ops. Atty. Gen., 200, 203–204.)

Such was the state of opinion when the Supreme Court of the United States had occasion to pass upon the subject in 1879. A paymaster's clerk of the Navy, named Reed, was tried by court-martial for certain malfeasance in his official duties, found guilty, and sentenced. The revising authority, Rear Admiral Nichols, returned the case to the court with the statement that the finding was in accordance with the evidence, but that he considered the sentence inadequate. Thereupon the court reconsidered the sentence, revoked it, and substituted another and severer punishment, which the revising authority approved. Reed then sued out a writ of habeas corpus in the United States Circuit Court, which court, after a hearing, discharged the writ and remanded the prisoner. Thereupon Reed peti-

tioned the Supreme Court of the United States for writs of habeas corpus and certiorari. In both courts Reed attacked the validity of the court-martial proceedings on the grounds, first, that he as a paymaster's clerk was not amenable to trial by court-martial; and, second, *that the last sentence of the court-martial was void. Upon the latter point it was urged before the Supreme Court that Rear Admiral Nichols had no lawful authority for doing what was done; that at most he was authorized to direct the court to reconsider its sentence only for the purpose of correcting a mistake in matters of law or fact, whereas he had directed a reconsideration of the court's judgment within the limits of its discretion; that when the court passed its first sentence and forwarded the record it exhausted its powers and ceased to exist; and that Reed had been twice put in peril for the same offense and deprived of his liberty without due process of law in violation of the constitutional guarantee.* The Supreme Court, after holding that a paymaster's clerk was within the jurisdiction of the court-martial, held that the revising authority's return of the record and the court-martial's subsequent action thereon were valid and legal acts. The syllabus of the case states the court's ruling as follows:

Where, pursuant to such (Navy) regulations, a general court-martial is duly ordered, the officer clothed with the revising authority may, before it is dissolved, direct it to reconsider its proceedings and sentence; and if it, upon being reconvened, renders a sentence which he approves, such sentence can not be collaterally impeached for mere errors or irregularities, if any such were committed by the court while acting within the sphere of its authority.

A., the clerk of a paymaster in the Navy, was, by a court-martial, found guilty of certain charges and specifications of malfeasance in the discharge of his official duties. Sentence was passed upon him, and transmitted, with the record, to the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court proceeded to revise it, and, after revoking it, substituted another, which he approved, inflicting upon A. a severer punishment. A., who was imprisoned pursuant thereto, alleging that it was illegal and void, and that he was thereby unlawfully deprived of his liberty, prayed for a writ of habeas corpus. *Held*, that the court-martial had jurisdiction of the person and of the subject matter, and was competent to pass the sentence whereof A. complained. (Ex parte Reed, 100 U. S., 13.)

In 1893 the Court of Claims considered the validity of a sentence passed by a court-martial upon Gen. Swaim. In 1884 Gen. Swaim had been charged with conduct unbecoming an officer and a gentleman, in connection with certain alleged frauds. He was tried by a court-martial appointed by the President, acquitted of the specific charge, but found guilty of conduct prejudicial to good order and military discipline, and sentenced. The President, the reviewing authority in this case, disapproved the sentence as incommensurate with the offense, and returned the case to the court for reconsideration. The court-martial then imposed another sentence, which President Arthur disapproved as not authorized by law and again returned the record to the court, which imposed a third sentence, severer than the first. The last sentence was approved by the President and carried into effect. Six years afterwards its validity was attacked by Gen. Swaim in an action to recover his forfeited pay in the Court of Claims. The syllabus of the case in the Court of Claims contains the following upon the subject of reconsideration by courts-martial on return of the record by the reviewing officer:

The Army regulation, 1881, No. 923, authorizes the reviewing officer to reconvene a court so that it may correct or modify its conclusions, but does not authorize him to interfere with the proper discretion of the court.

Where the President disapproved of a sentence which was within the discretion of the court, on the ground that it was incommensurate with the offense, the case comes within the decision of the Supreme Court in ex parte Reed (100 U. S. R., 13) that the reviewing officer did not thereby require the court to impose a more severe sentence.

Speaking of the return of cases to courts-martial for reconsideration and of the legality of the reviewing officer's action in suggesting to the court the inadequacy of its sentence, the Court of Claims in the opinion in this case by Justice Nott, which later received the expressed approval of the Supreme Court, said:

The question presented by the case it believed to be a new one, unless it be identical in legal effect with that which was before the Supreme Court in ex parte Reed (100 U. S. R., 13). In that case there was an unequivocal offense involving no discretion on the part of the court, viz. "malfeasance in the discharge of his official duty." In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offense; and, if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court; in both cases the reviewing officer disapproved the leniency of the sentence; and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand, it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom; and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law.

But while the last principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in ex parte Reed is conclusive upon this branch of the case. (Swain v. U. S., 28 Ct. Cls., 173, 235.)

The Swaim case was appealed from the Court of Claims to the United States Supreme Court, which affirmed the decision at the October term, 1896. The syllabus of the Supreme Court decision states:

The action of the President in twice returning the proceedings of the court-martial, urging a more severe sentence, was authorized by law; and a sentence made after such action, and in consequence of it, was valid.

In the opinion of the Supreme Court delivered by Mr. Justice Shiras the claim that the reviewing officer was without authority in returning the proceedings to the court-martial and that his action in urging greater severity invalidated the sentence of the court, was noticed and commented upon as follows:

It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. * * * In ex parte Reed (100 U. S., 13) a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the record to Admiral Nichols, the reviewing officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of habeas corpus in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct

it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

This court held that such regulations have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial: that the second sentence was not void; and, accordingly, the application for a writ of habeas corpus was denied. We agree with the Court of Claims that the ruling in ex parte Reed, in principle, decides the present question.—(Swiam *v.* U. S., 165 U. S., 553, 534-535.)

X. Courts-Martial in Gen. Ansell's Command While He Was a Company Commander.

In his testimony before this subcommittee Gen. Ansell further states:

I commanded a company from the time I left the Military Academy for three years and then for two years more; and many of these generals had done no more, and many less: and I congratulate myself that I commanded it without a resort to courts-martial, *even summary courts, except in the rarest instances* (p. 121). (Italics supplied.)

Answer.—Let the record speak. I insert a memorandum from The Adjutant General of the Army.

For the Judge Advocate General of the Army:

The records of this office show that Lieut. S. T. Ansell was in command of Company A, Eleventh United States Infantry, on June 23 and 24, 1899; of Company D, same regiment, from some time in November or December, 1899 (actual date not shown) to May 22, 1900; of Company M, same regiment, from September 19, 1900, to October 9, 1900; of Company I, same regiment, from October 27, 1900, to September 14, 1901; of part of Company K, same regiment (in an expedition against insurgents in Southern Samar), from September 29, 1901, to October 6, 1901, and from October 18, 1901, to October 25, 1901; of Company K, from March 18, 1905, to April 8, 1905, and May 7 to May 13, 1905, and from June 28, 1905, to August 4, 1905; of Company D, from August 14, 1905, to April 30, 1906.

During the periods specified above courts-martial for 128 members of the several companies commanded by Lieut. Ansell are shown as follows:

Summary Courts-Martial (128).

Sergt. Joseph L. Anthony, fined $2, November 13, 1899, and $5 December 12, 1899.
Corpl. James B. Logan, fined $2, December 2, 1899.
Pvt. Thomas Behan, fined $1 November 14, 1899, and $8 December 14, 1899.
Pvt. Robert F. Clifford, fined $5 December 14, 1899.
Pvt. William Cocroft, fined $10 November 29, 1899.
Pvt. Frank Donnelly, fined $14, December 11, 1899.
Pvt. Robert J. Doyle, fined $5, December 11, 1899.
Pvt. George Harrison, fined $5, November 13, 1899.
Pvt. William J. Henry, fined $1, November 27, 1899.
Pvt. John J. Hollywood, fined $4, December 11, 1899.
Pvt. Adam Kuster, fined $1 November 11, and $5 December 11, 1899, $2 December 20, and $3 December 26, 1899.
Pvt. Hezekiah L. Medley, fined $3 December 4, 1899, $9 December 9, 1899, and $2 December 14, 1899.
Pvt. William E. Short, fined $10 December 6, 1899.
Pvt. John T. Smith, fined $5 December 12; $5 December 29, 1899.
Pvt. Leopold Strait, fined $5 November 13, 1899.
Pvt. James R. Whittington, fined $3 December 11, 1899.
Pvt. P. S. Childress, fined $3 January 9, 1900.
Pvt. Frank Donnelly, fined $2 January 15, 1900.
Pvt. Emil Henson, fined $12 February 7, 1900.
Pvt. George Harrison, fined $6 February 2, and $15 February 15, 1900.

Pvt. Adam Kuster, fined $8 January 20; $13 February 26, 1900.
Pvt. James B. Logan, fined $3 January 2; reduced to private from corporal February 21, 1900.
Pvt. Maurice Moroney, fined $9 January 23; $8 February 8; $15 February 20; $14.50 February 21; $12 and one month's confinement February 23, 1900.
Pvt. Frank Phipps, fined $5 and reduced to private from corporal, January 15.
Pvt. Frank Smith, fined $3 January 4, 1900.
Pvt. U. G. Blake, fined $5 April 20, 1900.
Pvt. George Kerslake, guilty, no penalty, April 2, 1900.
Pvt. Joseph L. Anthony, fined $5 March 15, 1900.
Pvt. Thomas Behan, fined $5 March 15; $7.50 March 18, 1900.
Pvt. P. S. Childress, fined $2 April 6, 1900.
Pvt. William Cookley, fined $5 and 10 days, March 18, 1900.
Pvt. George Harrison, fined one month's pay March 18, and $10 April 21, 1900.
Pvt. William J. Henry, fined $2 March 7, 1900.
Pvt. John L. Johnson, fined $5 April 19, 1900.
Pvt. David W. Madigon, fined $2 March 15, 1900.
Pvt. Frank Phipps, fined $3 April 9, 1900.
Pvt. John T. Smith, fined $2.50 March 7, 1900.
Pvt. Joseph L. Anthony, fined $3 May 19, 1900.
Pvt. Emil Hanson, fined $5 May 22, 1900.
Pvt. George Harrison, fined $5 May 22, 1900.
Pvt. William Peterson, fined $2 May 10, 1900.
Pvt. Daniel Sheehan, fined $1 May 10, 1900.
Pvt. John T. Smith, fined $5 May 10, 1900.
Pvt. William Cocroft, fined $3 October 4, 1900.
Pvt. William Crocry, fined $1 September 24, 1900.
Pvt. John P. McFadden, fined $7.50 September 20, 1900.
Pvt. Charles J. Ruth, fined $3 October 8, 1900.
Pvt. Leland D. Tompkins, fined $2 October 8, 1900.
Pvt. William J. Flwood, fined $2 December 10, 1900.
Pvt. Floyd H. Miller, fined $1 December 28, 1900.
Pvt. Jacob Stern, fined $4 November 8; $5 December 10, 1900.
Pvt. Clay A. Walker, 20 days' confinement December 29; no fine (1900.)
Pvt. John J. Maher, $1 November 5; $10 November 23; $2 December 8, 1900.
Pvt. Arthur Armstrong, fined 50 cents January 9, 1901.
Pvt. George Burk, fined $10 and 10 days, February 26, 1901.
Pvt. Albert J. Faulk, fined $1 February 13; $2 February 20, 1901.
Pvt. John M. Grayson, fined $5 January 18, 1901.
Pvt. John Kay, fined 50 cents January 10, 1901.
Pvt. Thomas H. Losey, fined $5 and 10 days January 3, 1901.
Pvt. Corry I. Lowry, fined $1 February 13; $5 February 19, 1901.
Pvt. Norman McPherson, fined 1 month's pay and confinement, February 8, 1901.
Pvt. Albert Middleton, fined 50 cents January 15; $1 January 17, 1901.
Pvt. Floyd H. Miller, fined $2 January 24, 1901; $1 December 28, 1900; $10 February 8, 1901.
Pvt. Wm. J. Murray, fined $2 February 7, 1901.
Pvt. John Murphy, fined $5 February 18, 1901.
Pvt. Charles Rollins, fined 50 cents January 9, 1901.
Pvt. Leonard Topp, fined $2 January 9; $2 February 17, 1901.
Pvt. Robert Trusty, fined 50 cents January 9, 1901.
Pvt. Walter Veasey, fined $5 February 8, 1901.
Pvt. Bert Baker, fined $10 March 16, 1901.
Pvt. Thomas H. Losey, fined $7 March 2, 1901.
Pvt. Arthur Macpherson, fined $10 March 12, 1901.
Pvt. Dennis F. Maroney, fined $5 April 23, 1901.
Pvt. Floyd H. Miller, fined $5 and 5 days March 12, 1901.
Pvt. George Riggins, fined $3 April 25, 1901.
Pvt. Jacob Stern, fined $10 and 10 days March 8, 1901.
Pvt. James T. Todd, fined $10 and 20 days March 8, 1901.
Pvt. James Craig, fined $3 February 8, 1901.
Pvt. William D. Coss, fined $10 May 9, 1901.
Pvt. Patrick Hassen, fined $2 June 15, 1901.
Pvt. Patrick McCarthy, fined $10 May 20; $5 May 23, 1901.
Pvt. Daniel J. McCullough, fined $2 June 15, 1901.
Pvt. Harry Moreland, fined $10 June 8, 1901.

Pvt. George Riggins, fined $10 June 3, 1901.
Pvt. Alden K. Riley, fined $10 May 17, 1901.
Pvt. Guy C. Stalmaker, fined $10 May , 3, 1901.
Pvt. Jacob Stern, fined $2 June 15, 1901.
Pvt. Frank Alton, fined $5 May 19; 3 months' confinement August 13, 1901.
Pvt. Charles Carlin, fined $10 and reduced to private from corporal July 22, 1901.
Pvt. William J. Elwood, fined $3 August 8; $1 August 25, 1901.
Pvt. Patrick Hasson, fined $10 July 2, 1901.
Pvt. Corry I. Lowry, fined 1 month's pay July 2, and $3 July 15, 1901.
Pvt. Arthur R. Middleton, fined $3 July 17, 1901.
Pvt. Ezra C. Peck, fined $10 per month for 2 months August 28, 1901.
Pvt. Joseph W. Perkins, fined $10 per month for 3 months August 25, 1901.
Pvt. Adam Sinning, fined $1 August 25, 1901.
Pvt. Lon B. Brewster, fined $1 September 4, 1901.
Pvt. Hugh Gallagher, fined $2 March 18, 1905.
Pvt. Michael Garvey, fined $4.50 May 12, 1905.
Pvt. Robert G. Dudley, fined $1 May 12, 1905.
Pvt. Joseph A. Flanagan, fined $1 May 10, 1905.
Pvt. William T. Munsey, fined $4 May 10, 1905.
Pvt. Ferdinand Rubach, fined $1.50 May 10, 1905.
Pvt. Dan Whitledge, fined $1 May 10, 1905.
Pvt. Howard W. Thomas, fined $6 May 12, 1905
Corpl. Kyle Housel, fined $8 August 27, 1905.
Pvt. Edward L. Johnson, fined $8 August 27, 1905.
Pvt. Boyd Bible, fined $5 September 7, 1905.
Pvt. George L. Fox, fined $1 September 7, 1905.
Pvt. Allen B. Murray, fined $2 September 20, 1905.
Pvt. Richard Sommerfield, fined $10 September 11; $12 September 25, 1905.
Pvt. Guy Swallow, fined $20 November 29, 1905.
Pvt. Edward L. Johnson, fined 1 month's pay and 1 month's confinement December 15, 1905.
Pvt. Oscar R. Milber, fined $5 December 9, 1905.
Pvt. John Monahan, fined 2 month's pay, 3 month's confinement; reduced to private from sergeant November 14, 1905.
Pvt. Theodore Plunkett, fined $5 November 19, $6 December 11, 1905.
Pvt. Richard Sommerfield, fined $10 November 20, $10 December 11, 1905.
Pvt. Frank J. Stockdale, fined $5 December 16, 1905.
Pvt. Eli Kerr, fined 1 month's pay December 15, 1905.
Pvt. Jacob Dern, fined 1 month's pay and reduced from sergeant to private January 31, 1906.
Pvt. William J. Ellis, fined $5 February 23, 1906.
Pvt. Dell S. Hart, fined $1 February 23, 1906.
Pvt. Frank Lawson, fined $10 January 19, $7 February 7, 1906.
Pvt. Frank E. Putnam, fined $8 January 20, 1906.
Pvt. Morgan Condon, fined $4 April 24, 1906.
Pvt. John J. Devine, fined $12 and 30 days' confinement April 25, 1906.
Pvt. Joshua D. Gray, fined $4 April 24, 1906.
Pvt. Arthur Hansen, fined $1 March 20, 1906.

General Courts-Martial (10).

Pvt. John Dickson, fined $10 per month for 3 months and confined for same period (par. 2), Special Orders, No. 254, Department of Porto Rico, 1899.

Pvt. Edward Fairchild, fined $15 per month for 3 months and confined for same period; also reduced from corporal to private (par. 12), Special Orders, No. 25, Department of Porto Rico, 1900.

Pvt. John Doyle, dishonorably discharged January 4, 1900 (par. 6), Special Orders, No. 260, Department of Porto Rico, 1899.

Pvt. Thomas Sweeney, dishonorably dicharged January 5, 1900 (par. 6), Special Orders, No. 263, Department of Porto Rico, 1899.

Pvt. Robert F. Clifford, dishonorably discharged February 4, 1900 (par. 5), Special Orders, No. 25, Department of Porto Rico, 1900.

Pvt. George Lester, dishonorably discharged April 11, 1900 (par. 12), Special Orders, No. 72, Department of Porto Rico, 1900.

Pvt. Frank Donnelly, dishonorably discharged April 12, 1900 (par. 3), Special Orders, No. 77, Department of Porto Rico, 1900.

Pvt. George N. Terwilliger, dishonorably discharged April 20, 1900 (par. 4), Special Orders, No. 83, Department of Porto Rico, 1900.

Pvt. Harry J. Dickerman, dishonorably discharged November 2, 1905. Special Orders, No. 217, Department of Missouri, October 21, 1905.

Pvt. William A. Barber, fined $10 January 5, 1906, Special Orders, No. 4, Departmen of Missouri, 1906.

P. C. HARRIS,
The Adjutant General.

OCTOBER 6, 1919.

It is fair to state that such investigation as it has been possible to make (necessarily complicated and incomplete) indicates that the number of trials in the company commanded by Lieut. Ansell is below the average of other companies of Infantry for the same period: but the statement that he resorted to courts-martial, even to summary courts, only in the rarest instances, is not justified. In view of the small punishment inflicted in many of the cases, it would seem that the infractions could have been made the subject of company discipline.

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

MONDAY, NOVEMBER 3, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman), Lenroot, and Chamberlain.

STATEMENT OF HON. NEWTON D. BAKER, SECRETARY OF WAR.

Senator WARREN. Mr. Secretary, it is not necessary to explain to you what we have before us, because you understand that it is the matter of military justice. We have been getting considerable testimony in this matter, and we should be glad to have you make a statement to us in your own way.

Secretary BAKER. Senator, I feel that your hearings have been so exhaustive, and so many matters of record have been dealt with, and the records have all been put into the testimony, so that perhaps we would make more progress in getting any contribution that I can make if the members of the committee would ask me questions about any things that still remain unanswered in their minds. I have relied upon Gen. Crowder to present the records of the Department as far as any record is admissible, and I understand he has done so in a very voluminous and full way, and I scarcely know in what direction you desire to have me testify.

Senator WARREN. Senator Chamberlain, will you proceed with the Secretary?

Senator CHAMBERLAIN. Mr. Secretary, you have read over the proposed Articles of War—Senate bill 64, I believe it is called—written by Gen. Ansell, have you?

Secretary BAKER. Yes; quite casually, Senator.

Senator WARREN. Here is a comparative print of the present Articles of War, with that bill, in parallel columns.

Senator CHAMBERLAIN. The fact that that bill was introduced by me does not indicate that I approve of all the provisions in it. It was prepared by Gen. Ansell at the request of some members of the committee at the hearings had in February, 1919. There are some changes in the present Articles of War which are quite radical, and I am not prepared to agree with them in their entirety, but some of the features I would like to ask you about; namely, first, providing for some method of appeal other than now exists for a man convicted by court-martial.

Secretary BAKER. I have not had a great deal of time to follow, and I can not say that I have followed, with completeness, the hearings that have been had before this committee on that subject.

As I have observed the system of court-martial administration, or military justice administration, in the department, the chief defect of which I have been personally conscious was the inability of the final reviewing authority, which is the President, to quash a trial and order a trial de novo. A very large number of cases have been presented to me as the adviser of the President in the matter, in which apparently there was a dereliction of duty which ought to have been disciplined, and yet with a defect in the record of such a character as to make it quite impossible to administer discipline upon such a record, with the result that the proceeding had to be disapproved, and no further trial had. I think that is a mistake in any system of justice. I think there ought to be an opportunity for reversal on either the facts or the law, and a trial de novo.

I can illustrate what I mean by this. For instance, I do not want to deal with a case by name, but I will deal with the outstanding facts of a case. An officer was tried, and about a thousand pages of record taken. He was convicted by the court-martial of improper relations with a woman. The question as to whether he was guilty or not depended upon the continuance of a prior marriage of the woman, and that, in turn, depended upon the validity, *vel non*, of the divorce decree which she had sought from her previous husband; unless the husband from whom the divorce was sought had in fact died at the time of her marriage with the officer, in which case, of course, there would have been no necessity for the divorce. The record, although it contained a thousand pages of testimony, was silent on the question as to whether or not the previous husband was still living. We had the conflict of presumptions to deal with: First, the presumption of continued life in the previous husband; second, the presumption of innocence on the part of the officer; and as the officer at the time that he was supposed to be guilty of this wrong-doing had contracted another marriage, the presumption of innocence of the immediate offense with which he was charged involved a presumption of guilt of bigamy in order to clothe him with a presumption of innocence of the offense with which he was charged. I am a lawyer. I went over the case with very great care, personally, I had it inspected by a large number of lawyers, and every lawyer agreed that that record was fatally defective, and the officer was finally acquitted of any wrongdoing. In the meantime the husband whose continuance of life was the essential omission from the record was known by everybody to be walking about the streets in perfect disregard of any presumption. I think that is the kind of a case in which the power to reverse or modify or affirm is a very important power, and so far as my observation of it goes, or my reflection on the subject, the bill which I sent to Senator Chamberlain and to Mr. Dent in the year 1918, giving the President as Commander in Chief of the Army the right to reverse or modify, would have accomplished all that was necessary in that particular class of cases.

On the general question of a court of appeal I can only make observations without reaching a settled judgment. Obviously, nobody ought to object, and I think nobody would object, to an appellate tribunal that would pass upon these cases, if it were not for the fact that war is a very different state of affairs from peace. If you had an appellate tribunal functioning in the Army in peace times, its value, I think, would go without saying. No harm could come to

anybody by reason of the delay that would come by reason of having the appeal sought. The French have that; but when the emergency of war comes, the President of the French Republic, by decree, suspends the functions of the appellate power, as I understand it. I think that is open to at least these objections: First, that it warns the soldier that the bars are down, so that he feels, inevitably, that some safeguard which is thrown around him in time of peace is stricken away from him in time of war, that I think must have a bad effect on the soldier.

In the second place, I think it is notice to the officers that they are no longer restrained by the normal peace time restraints; and so I am fearful that having a procedure which may be conceded to be wise in time of peace, but which is stricken down in time of war, would have the double effect of making the soldiers feel that they were without a customary remedy, and making the officers feel the lack of the same responsibility which they feel in time of peace because they know their proceedings are going to be reviewed. As a matter of fact, and I speak now only from my personal observation, I have read literally hundreds of court-martial records, and my own experience as a lawyer has been upon the public side. I was city solicitor of Cleveland for a great many years, and as such solicitor had charge of the prosecutions in the city courts of Cleveland. Bringing that experience to the examination of these records, I am persuaded from such records as I have seen that the sense of responsibility on the part of the officers compares very favorably with the sense of responsibility that you find in civil courts anywhere. I think that the explanation of that lies in this, that officers know that they will not maintain discipline unless they have the respect of their men, and that the sort of respect which they must have must be based on reputation for being just in their treatment of their men. I think, looking over records that I have seen, and judging the processes by the opportunities of observation that I have had, that there is no disposition on the part of courts-martial to be either more summary in their judgment of the facts, or less careful in their application of the law, or more severe in their adjudication of penalties, than is customary in the ordinary criminal courts of the country.

Senator CHAMBERLAIN. Taking the case that you used by way of illustration a while ago, the particular officer in question was acquitted by the court-martial?

Secretary BAKER. No; he was convicted by the court-martial.

Senator CHAMBERALIN. And was the conviction sustained by the approving authority?

Secretary BAKER. The conviction was sustained by the convening authority.

Senator CHAMBERLAIN. Yes. That was the commanding officer?

Secretary BAKER. The commanding general; yes.

Senator CHAMBERLAIN. It was approved by him?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Then the record came to the Office of the Judge Advocate General?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Then what course was pursued?

Secretary BAKER. The Judge Advocate General reviewed the record and said that the proceedings were fatally defective, and I finally

adopted his view and recommended to the President that he disapprove the proceedings, as they involved dismissal and they had to come to the President; and the President disapproved the proceedings.

Senator CHAMBERLAIN. But there was no power in the Judge Advocate General or in the Secretary of War to pass upon the case and act, yourselves?

Secretary BAKER. There was not, and in my judgment ought not to be.

Senator CHAMBERLAIN. There is not in any of these cases, is there? You know the controversy, of course, between Gen. Ansell and others as to the interpretation of section 1199 of the Revised Statutes, Gen. Ansell on the one hand and on the other hand Gen. Crowder?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Gen. Ansell claiming that under that section 1199, there is in the Secretary and the Judge Advocate General the power to modify or to practically reverse the sentence of a court-martial?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Gen. Crowder, on the other hand, holding that his office has no power; that if the court had jurisdiction and if the trial was regular, no matter how many errors might have been committed, he has no power to reverse or modify it?

Secretary BAKER. Yes; I know that controversy.

Senator CHAMBERLAIN. You entertain the view of Gen. Crowder with reference to the power under that section of the Revised Statutes?

Secretary BAKER. Yes. Perhaps the committee would care to know just what took place in that particular instance.

Senator CHAMBERLAIN. In this case?

Secretary BAKER. No; in general on that statute.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. Gen. Crowder was detailed to be Provost Marshal General, and at the time of his detail I rather reluctantly put him in charge of that work, because of my having come to rely very confidently upon his assistance and judgment as Judge Advocate General. He is one of the best lawyers I have ever been in contact with in a life of 25 years at the bar, and I rather reluctantly detailed him to the Provost Marshal General's Office, with the understanding that he would retain general supervision of the work of the Judge Advocate General's Office, and give it such attention as was necessary.

One day Gen. Ansell brought in to me, in my office, the first of his briefs on section 1199, and asked me to read it personally; said that it was on what he thought was a very important question, and one as to which I should express a personal judgment after I had read the whole argument. I read that brief two or three days after he brought it to me, and I then sent for Gen. Crowder. When the General came in I rather clumsily attempted a jesting or playful attitude with him. I said, "Gen. Crowder, how long have you been Judge Advocate General of the Army?" He told me the number of years. I said, "Is it possible that you have been Judge Advocate General for as many years as that, and have not discovered that there is a statute which gives the Judge Advocate General the power to reverse and modify court-martial proceedings?" The General took the question

very seriously, and said that he did not think that that was a possible situation. I said, "Well, here is a brief which Gen. Ansell has handed me, and it is very persuasively written, for an interpretation of section 1199 of Revised Statutes which you have never called to my attention. I would like to have you take the brief, read it, and let me have your views.". He took the brief, and subsequently handed me a written reply. That was sent to Gen. Ansell, as I recall, and he made a counter brief.

I examined the whole question then individually, personally going to the library of the Judge Advocate General's Office for my authorities, and decided the question. I decided that section 1199, by traditional interpretation, by settled construction, and by the decision of such courts as had passed upon it, did not have the meaning which Gen. Ansell ascribed to it. That decision, I feel quite certain, is unshakable so far as the legal question involved is concerned, and I appended to my decision a statement which I believe in very deeply, that in time of war the executive departments ought not to extend their powers by doubtful or new constructions of statutes which have a settled construction, but that a frank appeal to the legislature is the way to get new power, if new power is needed. I then instructed Gen. Crowder to prepare a bill which could be sent to the military affairs committees of the Senate and the House, which would give such additional power as might be necessary to correct these records. That bill was drawn, and I sent it to Senator Chamberlain and to Mr. Dent, with a letter urging its immediate consideration. The bill never was considered, of course, but that was the end of that dispute so far as I had anything to do with it.

Senator CHAMBERLAIN. The House took some evidence on it.

Secretary BAKER. Well, I did not recall that fact. It may be.

Senator CHAMBERLAIN. The Senate Committee on Military Affairs concluded not to act upon it. It was called to the attention of the committee. It was not ignored, but the committee declined to act. I do not know what discussions were had, but the theory of it was—at least my theory of the bill was—that it did not really afford any relief. It undertook to confer upon the President powers that he already had. The President, as the Commander in Chief of the Army, practically reversed the decision of the court below.

Secretary BAKER. No; he did not reverse it. He set it aside.

Senator CHAMBERLAIN. That is practically the same thing.

Secretary BAKER. No; I do not think it is practically the same thing. It would have left the Department without a remedy to have set it aside.

Senator CHAMBERLAIN. He set it aside because, as you say, the record was wholly insufficient to sustain such a conviction; or there was lack of record.

Secretary BAKER. In a vital matter.

Senator CHAMBERLAIN. So that the President in the same way set it aside.

Secretary BAKER. There never has been any question of the power of the President to disapprove a court-martial proceeding in the class of cases which reach him.

Senator CHAMBERLAIN. No.

Secretary BAKER. There never has been.

Senator CHAMBERLAIN. So that the bill which you sent to the House and the Senate in January, 1918, did not confer any additional authority on the President, unless it gave him the power—and that, in the last analysis, would be the power of the Secretary of War and the Judge Advocate General—to examine into and to review all of the cases where there had been improper convictions.

Secretary BAKER. That "unless" is a very large unless.

Senator CHAMBERLAIN. Yes; but he had that power before?

Secretary BAKER. No; I beg to differ from you, Senator. The President has always been conceded to have the power to disapprove the proceedings of a court-martial in certain classes of cases. Now, the bill which was sent and which did not receive the approval of the Congress speaks for itself. It is before the committee. It undertakes to give the President exactly the power which Gen. Ansell contended was in section 1199.

Senator CHAMBERLAIN. And in the Judge Advocate General's Department?

Secretary BAKER. And in the Judge Advocate General's Department.

Senator CHAMBERLAIN. Yes; so that, in the last analysis, that bill which you sent up and which is in the record, practically left the power with the Judge Advocate General, because the President himself could not examine these infinite details of convictions?

Secretary BAKER. Oh, obviously, that is true.

Senator CHAMBERLAIN. Do you think the appellate power ought to remain within the Military Establishment itself?

Secretary BAKER. Yes; within the Military Establishment, supervised by the civil authority, which is the President, and the Secretary of War for him.

Senator, I have looked back over the list of my predecessors, from the beginning of this Government, and I find that they have been men of the most exalted character.

Senator CHAMBERLAIN. Nobody questions that.

Secretary BAKER. I looked back over the list of my recent predecessors, Mr. Garrison, Mr. Stimson, Mr. Taft, Mr. Root, Gen. Wright, Gen. Dickinson, Mr. Lincoln, Mr. Stanton, and the country has no more illustrious names.

Senator CHAMBERLAIN. Nobody questions that, Mr. Secretary.

Secretary BAKER. I looked back over the list of the Presidents, and I found the same element of exalted character, and the same confidence on the part of the public; and I can not persuade myself that any power intrusted to men of that type is improperly intrusted.

Senator CHAMBERLAIN. There is no question about that, Mr. Secretary; but you know as a practical man, as well as I do, that it is a physical impossibility that the Secretary of War, with the numerous responsibilities that devolve upon him, should examine these cases in detail. Take your own case; it is a physical impossibility for you to examine and review minutely in detail all the cases that come up. He relies, and must rely, on his military advisers.

Secretary BAKER. Certainly.

Senator CHAMBERLAIN. So that you do not question the integrity of the Secretary of War when you raise a question as to his ability to do things which it is physically impossible for him to do.

Secretary BAKER. Of course you raise a question which is really beside the issue. What the Secretary of War does is to select a Judge Advocate General whom he knows, and he watches that Judge Advocate General just as he watches any other subordinate. He learns to know how far he can rely on his discretion, his judgment, his industry, his knowledge, his sense of fairness; and when he finds that he has a subordinate upon whom he can not rely as to all those qualities, he replaces him with somebody upon whom he can rely.

Senator CHAMBERLAIN. What can be the objection to an appellate tribunal, partially civilian, if you please, or all civilian, if you please, but in the last analysis, having their judgments subject to reversal by the President? What objection can there be to a civilian tribunal to consider cases?

Secretary BAKER. The objections are practical and theoretical. I do not know enough to express a very positive opinion about the military difficulties, and yet I do think I know enough to illustrate the embarrassments. For instance, if you have a civilian tribunal, it has to sit somewhere, like the Supreme Court sits in Washington. Now, in France this kind of a case arose. We had a poor, misguided soldier who, under the influence of drink, or under some other maddening influence, raped a 4-year old French child, killed her, and secreted her body in an ash barrel. She was living with her grandparents. The guilt was obvious, unquestioned; finally admitted. That man was tried by court-martial, and the record of the case shows that it was faithfully and well tried; and he was hanged. Now, if that man had been sent out of the French village where that occurred to Washington or to some other place in the United States pending an appeal to a tribunal sitting over here, if the record of that case had been sent to Washington and a long delay had taken place between the offense and the punishment, the very agitated state of mind of the French village in which that crime took place would have made it certain that all sorts of rumors as to the escape of that man from the consequences of his act would have been circulated universally, and it is very difficult to tell what relations would have been developed between our Army and the French people among whom the soldiers were billeted.

Senator CHAMBERLAIN. He was not brought before the local tribunal?

Secretary BAKER. No, sir.

Senator CHAMBERLAIN. You would not have to remove him from the *locus in quo?*

Secretary BAKER. No, but then you would have had this situation, that you would have had to have him in the *locus in quo* for several months, or remove him to another place of imprisonment, in which case rumor on the subject would have been circulated everywhere that he had been sequestered or carried off so as to escape the consequences of his crime. What happened was that when that execution took place the word went all over France, spreading from those villagers everywhere, that our Army protected the civil population among whom they were stationed. While I do not believe in capital punishment, and while I have in public and in private opposed it as a matter of belief, I think that the effect of that execution was undoubtedly very powerful in reconciling the French civil population to the billeting of American soldiers in their villages.

Senator CHAMBERLAIN. Yes. That was an exceptional case, just as the cases of the four young men who were sentenced to be shot, in France, were exceptional cases. But there have been over 20,000 general court-martial cases and over 300,000 summary court cases.

Secretary BAKER. Yes.

Senator CHAMBERLAIN. In practically none of which cases was any such crime as that concerned.

Secretary BAKER. Unfortunately there have been a large number of crimes similar to that. But what I am illustrating by that is not the particular crime, but the fact that when you have the Army in the field in places remote from our own country, you must make this military code so that it will fit the circumstances wherever they happen to be. We have soldiers in Siberia now, we have had them in northern Russia, and we may have them in Silesia. We have had them in Italy, where there was an inflamed state of the public mind, and all sorts of difficulties of reconciliation and conciliation.

Senator CHAMBERLAIN. Do you think in those cases the authorities here should lose touch with those men?

Secretary BAKER. Not at all; but I think we ought to build a system which is adapted to the task which the Army has to perform.

Senator CHAMBERLAIN. You, then, would not oppose any civil appellate tribunal?

Secretary BAKER. I would not approve a tribunal which could conclude the President. I think we have, in effect, a civil tribunal now.

Senator CHAMBERLAIN. The President?

Secretary BAKER. No. I think the boards of review which are appointed in the office of the Judge Advocate General and are composed in part of civilians—who are wearing the uniform, it is true, but are civilians with the civilian point of view—and military men, and in time of peace military men.

Senator CHAMBERLAIN. What is their power?

Secretary BAKER. Their power is to advise the Secretary of War.

Senator CHAMBERLAIN. Yes; but that many regard as not a sufficient power.

Secretary BAKER. I believe it to be a sufficient power.

Senator CHAMBERLAIN. Of course, there is a difference of viewpoint. You may be right. That is the point we are trying to determine.

Secretary BAKER. I think it is a sufficient agency. My opinion is based upon two points: First, I have not found it to work badly; I think it works well. In the second place, if you have that agency in time of peace and are going to attempt to suspend it in time of war, as the French do, I think that the effect of such suspension on both soldiers and officers would be bad.

Senator CHAMBERLAIN. But here is the trouble we have. Here is a man convicted by general court-martial, we will say, in the United States, and the evidence may or may not have been sufficient, or there may have been prejudicial error at the trial of that man. There may have been things occurred at the trial which in a civil tribunal would have caused a reversal of that decision; yet the man is convicted. The approving authority approves the judgment. In other words, that man then becomes a convict; he is convicted.

The case comes here to the Judge Advocate General and is referred by him to one of these reviewing boards you speak of. All in the world that this board can do and all in the world that the Secretary

of War and the Judge Advocate General can do is to advise the exercising of clemency, or to advise a change in the judgment; but if the judgment is still maintained by the reviewing authority, the man is still a convict. There is no power to reverse for prejudicial error.

Secretary BAKER. I have no possible objection to the extension of the authority of the President so that it will reach down to reverse the authority of the convening authority if it conflicts with the Judge Advocate General. I believe that to make the Judge Advocate General superior in authority to the Commander in Chief is bad.

Senator CHAMBERLAIN. I will ask you this. You know. Are there not cases that are in the hands of the President that he has not been able to dispose of at all?

Secretary BAKER. Recently they have all been disposed of.

Senator CHAMBERLAIN. How long were they there?

Secretary BAKER. They were there for six or eight weeks.

Senator CHAMBERLAIN. Are there not some that have been there over a year?

Secretary BAKER. I do not remember that there are any that have been there that long.

Senator CHAMBERLAIN. I think, if you will examine into it, you will find there are some. We lag behind the British authorities on the matter of court-martial proceedings. We have the same Articles of War, practically, with reference to courts-martial, that Great Britain had 100 years ago. But Great Britain has gotten away from it, and their reviewing authority is practically a civilian, according to Col. Rigby.

Secretary BAKER. But he has only advisory powers.

Senator CHAMBERLAIN. But they practically do not differ from his views. The cases are very rare where they have departed from his views.

Secretary BAKER. They are relatively rare, but that is rather a tribute to the ability with which the trials are conducted than evidence of any authority on the part of the reviewing power.

Senator CHAMBERLAIN. Can you put into this record your objections to the authority of the Secretary of War with reference to this authority, whatever it is, below the President?

Secretary BAKER. I am perfectly willing to state them now. I believe that in time of emergency, concentration of command is entirely necessary for the discipline of the Army. I think that the Constitution recognizes that, by making the President Commander in Chief, and providing that discipline shall flow through the President to the Army. That is the first objection. The second is that I think, as Gen. Crowder gives me the figures, 88 per cent of the offenses tried by court-martial are military and not civil offenses, and that military men are better able to judge the facts and circumstances. They have more expert information as to what the significance of the facts is which are adduced in those trials, than civilians could possibly have. And in the third place, I am quite clear in my belief that any system built up for the Army ought to be adapted to the emergency uses of the Army as well as its peace-time needs, and that any necessity for an appellate tribunal remote from the field of action, with the consequent delay, is not adapted to the emergencies of actual, active field operations.

Senator CHAMBERLAIN. You feel that the judgments of courts-martial have been satisfactory and legal?

Secretary BAKER. That is, of course, a generalization that it would be dangerous to indulge. I do not think that any human agency works with invariable and unerring accuracy.

Senator CHAMBERLAIN. In the main they have been?

Secretary BAKER. In the main they have been.

Senator CHAMBERLAIN. What was the use of these reviewing boards, if in the main the court-martial system has worked satisfactorily?

Secretary BAKER. I think the reviewing boards have served a very useful purpose, in readjusting and equalizing—particularly readjusting—the punishment. When a war is going on and you are in the stress of actual operations, the need of discipline is a very strong and urgent command upon everybody's conscience who is at work. When peace is reestablished it is possible to take a very much more lenient view of the penalties which have been imposed under actual war conditions. The whole system of justice in the Army, as Gen. Crowder, I feel sure, must have explained to you, is not punitive and is not exemplary, but is corrective, and I think the handsomest thing about the Army is the effort that it has made at Leavenworth and Alcatraz and Jay to bring about the rehabilitation of men who have been convicted of minor derelictions.

Senator CHAMBERLAIN. I quite agree with you.

Secretary BAKER. Now, when the armistice came it was possible to readjust the penalties imposed and bring them into harmony with the normal action of the Army's system of justice. Those boards served a very useful purpose.

Senator CHAMBERLAIN. That is entirely at variance with the testimony of a number of officers here, with the Kernan report and the testimony of Gen. O'Ryan, all of whom have testified practically that the purpose of the system is to operate *in terrorem*; not to correct the faults of the men, but to set an example to others.

Secretary BAKER. I think that is natural and perhaps necessary while active operations are going on. I think the restraining influence during active operations is essential. Take those four death cases in France, which have been so much talked of, and so completely misunderstood.

Senator CHAMBERLAIN. I would be glad to have you give us an account of them.

Secretary BAKER. I would be very glad to. Take those four cases. The feeling on the part of Gen. Pershing, Gen. Bullard, and Gen. March was in no sense a savage feeling, a desire to bring about the execution of those young men; but each of those officers was acting under the most impelling sense of duty and of conscience. They had before them the experience of the Union armies in the Civil War, wherein, by reason of the leniency of President Lincoln, it was stated and believed by everybody that examined it, that very many more death sentences had ultimately to be executed because of the leniency of the President, which had broken down the discipline of the Army.

Senator CHAMBERLAIN. I would like to have you give the history of those cases as you understand it.

Secretary BAKER. I shall be glad to do so. Those four cases were brought into my office at one time, by Gen. March, among a large number of other papers. He said, in effect—I do not undertake to quote him exactly—"Mr. Secretary, here are the first death sentences from France. There are four of them, two for sleeping on outpost duty, and two for disobedience of orders. They were in Gen. Bullard's command. He was the convening authority, and he has recommended the execution of the death sentence in each of the cases. Gen. Pershing had the cases sent to his headquarters, and attached a very urgent recommendation to the department that the sentences should be carried out, in the interest of discipline. I have examined the cases, and I have attached my own recommendation that the sentences be carried out." I said, "Very well, General; leave them with me. I will examine them personally." I realized, of course, that being the first cases, they were important, and I undertook to examine the records.

A day or so later Gen. Crowder came in to see me, and he told me that he had agreed formally with the recommendation as to the execution of those sentences; that the records were legally sufficient; but that he was troubled about the question as to whether clemency ought not to be exercised. I said, "The cases are with me, Gen. Crowder, and nothing will be done about them until I have given them personal study." At that time I had not studied them.

Once or twice later, I do not remember how often, Gen. Crowder came in. I do not remember whether I sent for him or he came voluntarily, but each time he came we discussed generally the question of clemency in the cases, and finally I, as I recall it, took them to my house, and read the records very carefully. I discovered, first, the extreme youth of these boys. They divided them into two classes; first, the boys who slept on outpost duty. The boys who slept on outpost duty were mere children. They had fallen asleep as they stood in the front trench. Apparently they were still standing at the place where they were supposed to be on duty. They had not gone off and sat down or lain down, but as they stood up against the parapet with their guns in their hands, their heads had just nodded over and they were asleep. This showed that they were completely exhausted, that there was no cessation or intentional withdrawal from duty, but that tired nature had just reached its limit. In each of those cases the officer, a sergeant, had gone up to the boy and taken his gun away from him, and then had him roused and had him come to get his gun. But the striking thing about it was that they had not gone off and sat down or lain down. Having been in the trenches myself I realized how impossible it was for a man to sleep in the day time, with the noise of exploding shells and all the confusion of battle around him. Such conditions made it impossible for a man to get his natural rest. I came to the conclusion that in those cases it was simply an impossible thing to take those boys out and shoot them.

The other two cases were cases of disobedience of orders. By a singular circumstance, it appeared, I think I myself discovered that they were both members of a company which had been trained by an officer who had objected to going to Europe to fight, on the ground that he was of German extraction, and that he could not fight

against his relatives. I may be telling you things that you already know.

Senator LENROOT. Was that the Henkes case?

Secretary BAKER. Yes. I discovered that those boys who disobeyed orders were trained in his company, and it seemed to me that boys of 18 or 19 years of age who had gotten their ideas of obedience from a captain who was himself in the state of mind that Henkes was in, could hardly have been held to have had as fair an opportunity to learn their obligations as if they had been under an officer who was not under that sort of stress. I sent for Gen. Crowder and called his attention to that fact, which up to that time, so far as I knew, he had not noted. He said he thought that was an important item. I did not disclose to Gen. Crowder or Gen. March or to anybody else what I proposed to do about those cases, but I studied them personally, and finally dictated and sent to the President a letter recommending that commutation should be had in all four cases.

Senator CHAMBERLAIN. I thought you said a while ago that you approved the sentences?

Secretary BAKER. I never said anything like that.

Senator LENROOT. He said Gen. March approved them.

Secretary BAKER. Gen. March formally approved.

Senator CHAMBERLAIN. I did not think that you had formally approved them, but——

Secretary BAKER. I never approved them for a minute; never had any idea of approving them; unless the circumstances turned out to be different from what I thought.

The fact is that the whole history of Mr. Lincoln's experience with the enforcement of the death penalty during the Civil War was familiar to me, and I had a general knowledge of the situation in foreign armies both in this and other wars.

These cases presented squarely an issue of the greatest gravity. When a man goes to sleep on outpost duty or refuses to obey a proper military order, he does not commit the same kind of offense as is involved in similar derelictions in civil life, or in the Army in peace times. A sleeping sentinel exposes his associates to terrible consequences, and if disobedience of orders is tolerated no one in a military command can know whether the things he is directed to do will be supported by the others to whom supporting orders are given, or whether he will be left bravely to obey and die while others disobey and cause his disaster. It was plainly necessary to use these first four cases in a way that would stir the Army and the men in it to a realization of their duty to one another and their duty to the country. As I thought the matter over, I came to the conclusion that in view of all the circumstances of these cases it would be possible for the President to commute the sentences, but to do it in an order which would inspire the Army with a fresh sense of devotion, and I therefore wrote to the President and at the same time wrote an order for his signature which, when published to the Army, would have the character of a direct message from the Commander in Chief, impressing every soldier with a new and earnest sense of responsibility.

Senator CHAMBERLAIN. Will you insert those letters in your testimony?

Secretary BAKER. They are in, somewhere; I do not happen to know where. If they are not, I shall be very glad to insert them.

(The letters referred to are as follows:)

WAR DEPARTMENT,
Washington, May 1, 1918.

MY DEAR MR. PRESIDENT: I present you herewith the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, each of which involves the imposition of the death penalty by shooting to death with musketry.

These cases have attracted widespread public interest, and with the papers are numerous letters and petitions urging clemency, most of which are of that spontaneous kind which are stirred by the natural aversion to the death penalty which humane people feel. Many of them are from mothers of soldiers whose general anxiety for the welfare of their sons is increased by apprehension lest exhaustion or thoughtlessness may lead their boys to weaknesses like those involved in these cases which the newspapers have described as trivial and involving no moral guilt, with the consequence that sons whose lives they are willing to forfeit in their country's defense may be ingloriously taken for disciplinary reasons in an excess of severity. Many of the letters are from serious and thoughtful men who argue that these cases do not involve disloyalty or conscious wrongdoing, and that whatever may have been the necessities of military discipline at other times and in other armies, the progress of a humane and intelligent civilization among us has advanced us beyond the helpful exercise of so stern a discipline in our Army in the present war.

I examined these cases personally, and had reached a conclusion with regard to the advice which I am herein giving before I had seen any of the letters or criticisms.

The record discloses the fact that the divisional commander, the commander in chief, Gen. Pershing, the Chief of Staff, Gen. March, and the Judge Advocate General concur in recommending the execution of the penalties imposed. The Judge Advocate General limits his concurrence to the technical statement that the proceedings in the cases are regular, and expressing regret that a more adequate conduct of the defense of the several men concerned was not provided, concurs in the recommendation of Gen. Pershing. As I find myself reaching an entirely different conclusion, and disagreeing with the entire and authoritative military opinion in case, I beg leave to set out at some length the reasons which move me in the matter.

The cases must be divided into two classes, and I will deal, first, with the two young men convicted of sleeping while on duty, namely, Pvt. Jeff Cook and Pvt. Forest D. Sebastian, both in Company G, Sixteenth Infantry.

These cases are substantially identical in their facts. The accusations were laid under the eighty-sixth article of war, which reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

In both cases a corporal inspecting along a front line trench found these young men standing in the proper military position, leaning against the trench, with their rifles lying on the parapet of the trench within easy reach of their hands. Each man had his head resting on his arm, and his arm resting on the parapet. The offenses were committed, in the Sebastian case on the night of November 3 and 4, and in the Cook case on or about the 5th of November. In both cases the testimony was exceedingly brief, and showed that the night was dark and cold, that the soldiers had their ponchos and other equipment on, and in one case it was a fair inference that the poncho was drawn over the ears and trench helmet in such a way as to make it difficult for the soldier to hear the approaching steps of the corporal. In each case the corporal laid his own rifle upon the parapet and took that of the soldier, carrying it away with him, and instructed the other sentinel, the men being posted in this outpost duty in twos, to shake the soldier and tell him to report to the corporal for his gun. In each case the corporal shamed the soldier for his neglect of duty, and pointed out to him the fact that not only his own life but those of others were at stake, and that he should be more zealous and alert. In neither case does either the corporal or the fellow-sentinel swear positively that the accused was asleep; I confess that on all reasonable grounds, taking the circumstances into consideration it seems to me entirely likely that both men were asleep; but it is important to note that in neither case had the accused stepped away from his proper military post to sit down or lie down; both being found standing at their post of duty in what is admitted to have been a correct military position, and if they were asleep their heads literally nodded over on to their arms without any intentional relaxation of attention to their duty so far as can be gathered from any of the surrounding circumstances.

These soldiers are both young. Sebastian enlisted into the Regular Army by volunteering on the 18th of April, 1917, having had no previous military experience, his age at that time being 19 years and 6 months. He was, therefore, slightly more than 20 at the time of the alleged offense. Cook enlisted on the 11th of May, 1917, without previous military experience, his age at that time being 18 years and 11 months. He was, therefore, at the time of the alleged offense, slightly under 20 years of age.

From the testimony, it appears that both of these young men had been posted as sentinels doing what is called double sentry duty, going on duty at 4 p. m., and remaining on duty until 6 a. m., with relief at intervals by other sentinels during the night, but with no opportunity to sleep during the night because of there being no place where they could secure sleep. It further appeared that neither of them had slept during the day before after having spent the previous night on gas sentinel duty, although both had tried to sleep during the day preceding the night of the alleged offenses but found it impossible because of the noise. In both cases the commanding officers of the soldiers who forwarded the charges and recommended trials by general courts-martial added to his endorsement as extenuating circumstances the youth and failure of the soldiers to take the necessary rest when off duty on the first occupation of trenches.

It is difficult to picture to the eye which has not seen it the situation in which these young soldiers were placed. In the month of November the section of France in which these soldiers were stationed was cold, wet and uncomfortable in the extreme. No sort of shelter of any comfortable kind could be provided near the trenches, because it attracts enemy observation and fire. Throughout one long night they performed duty as gas sentinels, during the next day, when they perhaps ought to have sought more rest than they did seek, they found it difficult to secure any sleep because of the noise and discomfort of their surroundings. As a consequence on the night of the alleged offenses they had reached the place at which exhausted nature apparently refused to go further, and without any intentional relaxation of vigilance on their parts they dozed in standing positions at their posts of duty.

I am quite aware of the gravity of this offense, and of the fact that the safety of others, perhaps the safety of an army and of a cause, may depend upon such disciplinary enforcement of this regulation as will prevent soldiers from sleeping on sentinel duty; and yet I cannot believe that youths of so little military experience, placed for the first time under circumstances so exhausting can be held to deserve the death penalty, nor can I believe that discipline of the death sentence ought to be imposed in cases which do not involve a bad heart, or so flagrant a disregard of the welfare of others, and of the obligation of a soldier as to be evidence of conscious disloyalty.

In both of these cases the reviewing judge advocate quotes with approval some observations of Gen. Upton who in his work on military policy points out that action taken by President Lincoln in the early days of the Civil War pardoning or commuting sentences in cases of death penalty led to the need of greater severity at a later period in the interest of discipline; but the cases which Gen. Upton had in mind were cases of desertion in the face of the enemy involving cowardice, and cases of substantially treasonable betrayal of the nation, and I can see no persuasion in them as an example. Rather it would seem to indicate that the invocation of this opinion of Gen. Upton indicates a feeling on the part of the reviewing judge advocate that while these particular cases might not be deemed on their own merits to justify the death sentence, that, nevertheless, as a disciplinary example such action would be justified. I am not, of course, suggesting that any of the military officers who have reviewed these cases would be willing to sacrifice the lives of these soldiers even though innocent; but I do think that if these cases stood alone no one of the reviewing officers would have recommended the execution of these sentences; their recommendations being, in my judgment, soldierly and in accordance with the traditions of their profession, and based upon a very earnest desire on their part to save the safety of their commands, and the lives of other soldiers; but, nevertheless, to some extent influenced by the value to the discipline of the army of the examples which their execution would afford.

I have not sought to examine the learning of this subject, and, therefore, have not prepared a history of the death penalty as a military punishment; but I think it fair to assume that it arose in times and under circumstances quite different from these, when men were impressed into armies to fight for causes in which they had little interest and of which they had little knowledge, and when their conduct was controlled without their consent by those who assumed to have more or less arbitrary power over them. Our Army, however, is the army of a democratic Nation fighting for a cause which the people themselves understand and approve, and I had happy and abundant evidence when I was in France that the plain soldiers of our expeditionary forces are aware of the fact that they are really defending principles in which

they have as direct an interest as anybody, principles which they understand, approve, and are willing to die for.

I venture, therefore, to believe that the President can with perfect safety to military discipline pardon these two young men; and I have prepared and attached hereto an order which, if it meets with your approval, will accomplish that purpose, and at the same time, I believe, upon its publication further stimulate the already fine spirit of our Army in France. Such an order as I have here drawn would be read by every soldier in France and in the United States, and coming from the Commander in Chief would be a challenge to the performance of duty, quite as stimulating as any disciplinary terror proceeding from the execution of these sentences. In the meantime, public opinion in this country would, I believe, with practical unanimity approve such action on your part.

In the cases of Stanley G. Fishback and Olon Ledoyen, the charges are substantially identical in that each of them is accused under the sixty-fourth article of war of having "Willfully disobeyed any lawful command of his superior officer." The facts show that on the 3d day of January, 1918, these two young men in broad day light in the theater of war, at a place back of the actual line, were directed to bring their equipment and fall in for drill. Each refused, whereupon they were warned by the lieutenant who gave the order not to persist in their refusal on the ground that grave consequences would ensue. They were not warned that the penalty of disobedience was death; but were advised earnestly to comply. Both persisted in their refusal. Each gave as his reason for refusing that he had been drilled extensively the day before, that they had gotten cold, the weather being extremely severe, and that they had not yet recovered from the effects of that exposure.

Both pleaded guilty at the trial.

It is perfectly obvious that this order ought to have been obeyed. It was a proper military order, and it seems to me inconceivable that such obstinate refusal on so trivial a matter could have been made with any consciousness that the death penalty was the alternative. Nevertheless, the disobedience was willful, undisciplined, and inexcusable, and it ought to be punished with a suitable punishment.

The Judge Advocate General in reviewing these cases limits himself again to the technical correctness of the proceedings; but in a subsequent memorandum he called the attention of the Chief of Staff to the fact that four cases of sleeping on post arising in the same regiment at approximately the same time resulting in acquittal of the accused on substantially the same evidence as that recited in the Sebastian and Cook cases above reviewed, and that in six cases similar offenses committed elsewhere in France had led to very moderate penalties. The Judge Advocate General says in this memorandum:

"In addition to the foregoing, the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement."

In other words, the Judge Advocate General reviewing generally the state of discipline in the Army in France, and the steps taken to enforce it, reaches the conclusion that up to the time of the trial of these cases the offenses of which these soldiers were convicted had been regarded as quite minor in their gravity. The Chief of Staff in commenting upon this memorandum of the Judge Advocate General is able from his own recollection to add that the willful disobedience cases lately tried in France did not occur in the actual theater of war, making at least that much of a distinction. But the case still remains one in which suddenly a new and severe attitude is taken without the record disclosing that any special order had been made notifying soldiers that the requirements of discipline would call upon courts-martial thereafter to resort to extreme penalties to restore discipline.

Both Ledoyen and Fishback are young. The record shows that Ledoyen enlisted on the 3d of February, 1917, without previous military experience, his age at that time being 18 years and 1 month. Fishback enlisted on the 17th of February, 1917, without previous military experience, his age being 19 years and 2 months. Each of them at the time of the commission of the alleged offenses was, therefore, less than 20 years of age.

The record in the Fishback case shows that there had been previous shortcomings on his part in the matter of obedience. That is to say, he had once failed to report for drill for which he was required to forfeit 15 days' pay; a second time failed to report for drill, penalty not stated; and a third time failed to report for fatigue duty, for which he was sentenced to one month at hard labor and to forfeit two-thirds of his

pay for two months. He seems, therefore, to have found it difficult to accommodate himself to the discipline of the life of a soldier, and his offense hereunder reviewed is aggravated by this previous record.

By a very extraordinary coincidence this record discloses the fact that these two soldiers were members of a company commanded by Capt. D. A. Henckes. It is from the captain of his company that the soldier most immediately learns discipline and obedience. The captain sets the example, and inculcates the principles upon which the soldier is built. Now, this particular Capt. Henckes, although for many years an officer in the Regular Army, was himself so undisciplined and disloyal that when he was ordered to France with his command, he sought to resign because he did not want to fight the Germans. Born in this country, and for 20 years an officer in its Army, under sworn obligation to defend the United States against all her enemies, domestic and foreign, he still sought to resign; and when the resignation was not accepted, and he went to France, the commander in chief was obliged to return him to this country because of his improper attitude toward the military service, and his country's cause in this war. He was thereupon court-martialed, and is now serving a sentence of 25 years in the penitentiary for his lack of loyalty and lack of discipline.

I confess I do not see how any soldiers in his company could have been expected to learn the proper attitude toward the military service from such a commander. I do not suggest that the shortcomings of Capt. Henckes be made an excuse for their disobedience, but these mere youths can hardly be put to death under these circumstances, and I, therefore, recommend that the sentence in each case be commuted to one involving penal servitude under circumstances which will enable them by confinement in the Disciplinary Barracks at Fort Leavenworth to acquire under better conditions a wholesome attitude toward the duty of a soldier. Orders accompanying this letter are drawn for your approval which will carry out the recommendation here made.

In view of the fact that both Fishback and Ledoyen had been previously guilty of minor offenses as disclosed by the record the penalty suggested is three years' confinement.

Respectfully submitted.

NEWTON D. BAKER, *Secretary of War.*

In the foregoing case of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Sebastian, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

In the foregoing case of Pvt. Jeff Cook, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Cook, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

In the foregoing case of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans.

In the foregoing case of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans.

The WHITE HOUSE, May, 1918.

Secretary BAKER. The President wrote me a note soon after, thanking me for the attention with which I had scrutinized the cases, saying that he would be very glad to follow my advice about it. Now, that is the whole history of those cases. I never heard, until Gen. Ansell wrote a letter to some Member of the lower House of Congress, that he had had anything to do with that at all. Gen. Ansell's statement that it was necessary for him to bestir himself to prevent execution of those sentences has no basis whatever in fact. He may have bestirred himself, but my action was without the least knowledge of any opinion or action of his.

Senator CHAMBERLAIN. Do you know whether or not any Member of the House saw the President about these four cases before your letter to the President?

Secretary BAKER. I have no means of knowing that; but I know that the President never communicated to me that he had been seen by anybody about it, and the first talk I had with the President about it was when I sent him my recommendation of commutation.

Senator CHAMBERLAIN. In looking over those records, did it strike you that these young men—I think all four of them—had not had the proper defense interposed for them?

Secretary BAKER. The records legally are conclusive of the actual guilt of the four.

Senator CHAMBERLAIN. They are bound to be, because two of them, at least, plead guilty.

Secretary BAKER. I am not certain. I think all four of them did. Two of them did, at least.

Senator CHAMBERLAIN. So that the records are legally sufficient, but there was not submitted to the trial court the fact of the environment of these young men, and of their having been on duty for a long time, or the circumstances.

Secretary BAKER. Yes; it appeared in the record that they had been unable to sleep the night before, and the surroundings were all shown. Of course they were perfectly known to the court. The trial was at the front where knowledge of conditions was general.

Senator CHAMBERLAIN. Was it explained by counsel in these trials that with a plea of guilty they might be sentenced to death?

Secretary BAKER. I think so. If that was not so, it would have been a defect, because the law requires it.

Senator CHAMBERLAIN. Do you think they were old enough to understand the seriousness of the offense?

Secretary BAKER. Oh, yes; they were quite old enough for that.

Senator CHAMBERLAIN. The military authorities all recommended the execution of the sentence, officially?

Secretary BAKER. So far as I know, without exception.

Senator CHAMBERLAIN. There have been only about 25 executions over there, have there not, and here?

Secretary BAKER. There have been no executions for military offenses during this war.

Senator CHAMBERLAIN. None at all?

Secretary BAKER. None.

Senator CHAMBERLAIN. You wrote a letter to the President some time ago stating the subsequent history of two of these boys?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. One of them was killed in actual battle, and one of them was wounded. What became of the other two?

Secretary BAKER. The other two, the commutations were not complete commutations, as there was perfectly obvious disobedience of orders. In their case there was commutation to two or three years at Fort Leavenworth.

Senator CHAMBERLAIN. Do you know whether they are out now?

Secretary BAKER. I do not know whether they are still at Fort Leavenworth or whether they have been released.

Senator CHAMBERLAIN. One of those boys was killed in action and the other was wounded in one fight and recovered and went back and was wounded in a second action; so that they did possess that soldierly quality, notwithstanding their breach of duty?

Secretary BAKER. Undoubtedly.

Senator CHAMBERLAIN. Do you think it would be feasible or advisable for Congress to enact a law which would make one or two, or possibly a majority, of a court that in the last analysis would be subject to the Commander in Chief of the Army, to constitute an appellate tribunal to review these cases of general courts-martial, or possibly others, to ascertain whether or not there has been prejudicial errors and make their recommendations?

Secretary BAKER. Perfectly feasible.

Senator CHAMBERLAIN. What do you think would be the result?

Secretary BAKER. I do not think it would improve the present review.

Senator CHAMBERLAIN. If you had heard some of the testimony here—I do not know how much you know of it—you would have ascertained that, I think, the statement has been made by some one, and possibly by you, inferentially, that while Gen. Crowder's heart appealed against the execution of the sentences, he finally recommended it. Is there not a disposition upon the part of the military authorities to stand together on cases of that kind?

Secretary BAKER. I think not. I have never discovered it.

Senator, those death cases presented as difficult a question of discretion and judgment as any cases I have ever faced in my life. The whole history of the war was standing there to be looked at. Every man who has exercised clemency in cases like that has realized, and must realize, that when he does it he is possibly exposing large numbers of other people to very serious consequences.

Senator CHAMBERLAIN. Yes; that may be true; but I think there is a very distinguished Member of the Senate at this time who was caught sleeping at his post and his commanding officer took his gun away from him, but he was not sentenced to be hung.

Secretary BAKER. Yes; and that is a very happy and fortunate circumstance, and I have not the least idea that there was ever any untoward circumstance followed from it. I think of Lincoln with an aching heart. Mr. Lincoln, when he first began to deal with death sentences, could not sentence men to death who had fought in the

Army of the country, and after he had commuted a large number of those sentences, the number of desertions and of derelictions of duty was such as to imperil the safety of the Union Army, and he had finally to yield.

Senator CHAMBERLAIN. Yes; but Mr. Lincoln's kindness and tenderness with his men was not what the military authorities advised. That is what I am getting at. This is taking some of these cases absolutely out of the jurisdiction of the military authorities, where trial had been had and there were errors at the trial—prejudicial errors.

Secretary BAKER. I have already expressed my entire sympathy with your plan to make prejudicial error the basis for a reversal of the judgment by the President.

Senator CHAMBERLAIN. Do you think that if that proposed amendment of January, 1918, was embodied in the law, that is all the articles need to be amended?

Secretary BAKER. I would not say that. I think if that had been embodied in the law it would have given the President the power to reverse, modify, or affirm, and I think that would have accomplished the purpose which you now have in mind by a court of review.

Senator CHAMBERLAIN. What additional power would that have given to the President over the amount he has now—over what he exercises?

Secretary BAKER. It would have given him the power to reverse the findings and have a trial *de novo*.

Senator LENROOT. Do you feel quite clear on that?

Secretary BAKER. That is what I hope it would do. That is what I think it ought to do.

Senator LENROOT. I have it before me here. It is on page 108 of this record. I read from page 108, as follows:

> The President may * * * return any record through the reviewing authority to the court for reconsideration or correction.

That does not carry, to my mind, the idea of a new trial.

Secretary BAKER. Just above that it says:

> * * * the President shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside.

Senator LENROOT. Now, just follow on there a little further.

Secretary BAKER (reading):

> The President may suspend the execution of sentences in such classes of cases as may be designated by him, until acted upon as herein provided, and may return any record through the reviewing authority to the court for reconsideration or correction.

Senator LENROOT. That does not imply trial of the case *de novo*.

Senator CHAMBERLAIN. Mr. Secretary, the possible wrong that might be perpetrated by the military authorities when no appeal is had, or there is no power on the part of the appellate tribunal to reverse or modify the judgment of the court below, was exemplified in the cases of those negroes who were convicted in Texas, was it not?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. In that case those men were sentenced to be executed and were excuted before the record of their conviction reached the War Department?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And within 48 hours after conviction?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. That led the War Department to the adoption of General Order No. 7, did it not?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. But for that order which was issued, and which was suggested by the hardship in that particular case, these boys in France might have been executed without the record ever reaching Washington?

Secretary BAKER. That would not have been possible, since the commander in the field did not have authority to execute the death sentence for sleeping on post or disobedience of orders without referring the case to Washington. There are three classes of court-martial cases—first, those in which the President is the convening authority; second, those in which the President is the confirming authority; and third, those in which a commander subordinate to the President is the convening authority.

With regard to the first of these, no instance arose in this war. The second class includes all death and dismissal cases, except only death sentences in case of murder, rape, mutiny, desertion in time of war, and spying. In crimes of the latter class, the commanding general or department commander may execute the death sentence without reference to the President; but the four death sentences under consideration were not within the excepted classes and therefore were of necessity referred to the President as the confirming authority. The third class of cases above referred to, in which the commander subordinate to the President is the convening authority, represents 98 per cent of the cases. As to them the President has no function, except that where there is jurisdictional error he may set aside the whole proceedings.

General Order No. 7 directed the submission to the President of all death, dismissal, and dishonorable discharge cases, with certain exceptions in the actual theater of war. There was no defect of power to issue this order, though there may have been a defect of foresight.

Senator CHAMBERLAIN. Well, you say there was no defect of power?

Secretary BAKER. That there was no appeal. But General Order No. 7, of course, accomplished a complete remedy.

Senator CHAMBERLAIN. It suspended the execution until the reviewing authority here could look at the record?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. That was the substance of it?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And the records of all death sentences reached here?

Secretary BAKER. All death sentences and dismissals.

Senator CHAMBERLAIN. That was not because of any action of any reviewing authority, but because of a general order issued by the War Department?

Secretary BAKER. It was a general order issued by the War Department on the recommendation of the Judge Aduocate General.

Senator CHAMBERLAIN. Why was that necessary?

Secretary BAKER. I do not know that I understand you.

Senator CHAMBERLAIN. Why was it necessary to issue that order? Why did you issue that order?

Secretary BAKER. In order to afford the reviewing authority opportunity to submit them to the Secretary of War.

Senator CHAMBERLAIN. Therefore probably the judgment of conviction in those Texas cases would have afforded opportunity for the reviewing authority to have the execution of those men in Texas sustained or revoked?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Now, Mr. Secretary, if the purpose of the judgments of courts-martial was corrective only, as you have indicated, why have you found it proper or necessary to create these reviewing boards, and why have you found it necessary to exercise clemency in so many cases?

Secretary BAKER. Our Army, Senator Chamberlain, was made up of 4,000,000 men, of whom a very large number came from civil life, both men and officers. They had had little or no previous military experience, and they were under a very strong sense of the necessity of whipping the Army quickly into a highly efficient condition. The army they were creating was to meet the most highly trained and disciplined body of men in the world. As a consequence, the training our men received was intensively real; both officers and men felt that this was no idle practice or moot court exercise, and both in our training camps at home and in the training abroad men acted under the pressure of a great responsibility. They were preparing their organizations to function in battle and had no opportunity to give the long drawn-out demonstrations of the value of discipline which peace-time training affords, but in a very real sense felt obliged to assert and maintain a rigid discipline. As a result, many of the cases of dereliction of duty which under peace-time conditions would have been merely the basis of admonition and counsel were in fact made the basis of charges, and long-term sentences were imposed in order that they might impress upon the men who learned of them the necessity for discipline. In most of the cases in which such long-term sentences were imposed death sentences might have been imposed; but clearly this new army, judging itself and molding itself for its great task, sought to get its discipline by long-term prison sentences rather than by the frequent imposition of the death penalty.

The sentences imposed in this fashion throughout the Army varied very widely. In some organizations there were more emergency officers than in others. The circumstances under which particular derelictions of duty took place differed widely; no settled disciplinary policy had time to assert itself throughout so widespread and large a group of military units. The consequence was that these sentences represented a very unequal imposition of penalties and, undoubtedly, represented in many instances a variety of judgment which was in part due to inexperience and in part to the excitement and earnestness which knowledge of the character of this war instilled into all of those who were preparing to take their part in it.

Now, when the war was over, it was possible to survey the whole situation. There was no longer occasion to inspire other people with the fear of serious penalties, and so the boards of review undertook carefully to balance and equalize the judgment of the penalties which

had been imposed by the undisciplined army. I think the boards were absolutely necessary and that they have fully accomplished the purpose which it was necessary to have them accomplish.

Senator CHAMBERLAIN. Where did you find authority for the creation of those boards?

Secretary BAKER. The authority undoubtedly lies in the Judge Advocate General's power. In the last analysis, the boards have no power but to advise the Judge Advocate General, and the Judge Advocate General advises the Secretary of War. The boards are created simply in the ordinary organization of the Judge Advocate General's Office.

Senator CHAMBERLAIN. I do not disapprove of the exercise of clemency on behalf of these men now. I heartily approve of it. But I am wondering why it was necessary, if the judgments in the first instance were corrective merely.

Secretary BAKER. I think it would be wrong to say that the judgments were corrective merely. I did not mean to be so understood. What I said was that the theory of the Army administration of justice, the fundamental theory of it as evidenced by what happens when men are sent to Fort Leavenworth, is correction and not punishment. Now, undoubtedly, while this war was going on a great many very severe penalties were imposed of an exemplary character for the purpose of dissuading other people from doing the things that had brought these men into difficulties. That was undoubtedly true as to conscientious objectors; undoubtedly the court-martial sentences passed in the conscientious-objector cases were to make persons who might be disposed to take refuge in pretended conscientious objection feel that that was not a safe refuge.

Senator CHAMBERLAIN. Then, do you agree with Gen. O'Ryan that they were *in terrorem*?

Secretary BAKER. I think many of them were, while the war was on, and I think there was need for the example. But I think there was need, after the war, for the work of the reviewing boards.

Senator CHAMBERLAIN. Do you know how many are now in prison for military offenses?

Secretary BAKER. I do not know how many. Gen. Kreger gave that to you. He gave that in his testimony here.

Senator CHAMBERLAIN. You know Gen. Crowder promised when this thing came up in February that there would be a general jail delivery within 60 days.

Secretary BAKER. I did not know that he quite promised that. As I understood, he said that all the cases would have been reviewed within 60 days.

Senator CHAMBERLAIN. Yes; I think that is what he said.

Secretary BAKER. I did not know that he promised a general jail delivery.

Senator CHAMBERLAIN. He said in this February hearing, in answer to a question of Senator McKellar, as follows, on page 271 [reading]:

> Gen. CROWDER. Now, addressing myself to the elements of that briefly, I want to say that before 30 days I shall have 60 per cent, or may be 70 per cent. of these sentences remitted in their excessive portions; and within 60 days I hope to have the whole field cleared up, so that you need not consider the question of punishment. That is the order. They will be worked out very expeditiously. So there remains to be considered only this question of removing the stigma of conviction.

Now, we do not remove the stigma of conviction by any action of these boards.

Secretary BAKER. Yes; I think that is true.

Senator CHAMBERLAIN. So that a man may have been unjustly convicted and sentenced, and the action of this board does not remove that.

Secretary BAKER. I think you are confusing two things. Sentence to excessive punishment and unjust conviction are two entirely different things.

Senator CHAMBERLAIN. They are pretty closely associated.

Secretary BAKER. They are not even first cousins, as I see it. Where a man is unjustly convicted, this stigma of conviction does attach to him until he is either pardoned or the conviction is disapproved. But where a man is legally, properly found guilty and the judgment of the tribunal errs only in the quantity of the sentence imposed, clemency is a proper remedy.

Senator CHAMBERLAIN. That may be, but if all these sentences of these courts are correctly imposed, why should clemency be exercised at all?

Secretary BAKER. I do not contend that the sentences imposed upon these military prisoners were proper sentences to be served. Nobody ever supposed that they would be served.

Senator CHAMBERLAIN. I can not understand why anybody should understand that they would not be served, where the thing was approved by the military authorities.

Secretary BAKER. Everybody who knew the system of discipline in the Army knew by token of past experience, and by the settled practice in the Army, that a long-term sentence to Fort Leavenworth is an indeterminate sentence, and that its termination depends on the good behavior and corrigibility of the prisoner.

Senator CHAMBERLAIN. Do you know how many conscientious objectors there are still in prison?

Secretary BAKER. I do not know. Perhaps 70 or 80 of those that are classed as conscientious objectors; although that is an exceedingly misleading phrase. It includes the religious objector and the political objector, the anarchist and revolutionist. All are equally "conscientious objectors."

Senator CHAMBERLAIN. Clemency was exercised in behalf of how many?

Secretary BAKER. I have not the figures, but I think originally there were something over 500 men in prison who were generically grouped as conscientious objectors. Clemency was exercised in behalf of most of them, I think.

Senator CHAMBERLAIN. None of them performed any military service?

Secretary BAKER. Well, none of them performed military service; there may have been some of them that went into the disciplinary battalion afterwards, although I am not certain of that.

Senator CHAMBERLAIN. When they were released were they given the pay of soldiers from the time they were drafted into the service up to the time they were discharged?

Secretary BAKER. My impression is that the local judge advocate's office determined first that they were entitled to their pay, and many of them were paid; and a large number of them sent the checks back

to me to reimburse the Government, and the checks were turned over to the Treasury Department.

Senator LENROOT. Are they given a discharge?

Secretary BAKER. Some of them. It is a discharge that is not honorable or dishonorable. It is a peculiar discharge, certifying simply that the soldier is discharged from the Army and has performed no military service.

Senator CHAMBERLAIN. It is a yellow ticket?

Secretary BAKER. I do not know the color.

Senator CHAMBERLAIN. I believe that is all.

Senator LENROOT. Mr. Secretary, with reference to the present practice, are disapprovals made wherever prejudicial error is found by the reviewing authority?

Secretary BAKER. You mean in the action of the Secretary of War and the President?

Senator LENROOT. Beginning with the first reviewing authority—that is, the convening authority—is it the practice to set aside—or disapprove, rather—the findings wherever prejudicial error is found?

Secretary BAKER. Senator, I can not answer that. I can only say that I have inquired a number of times of Gen. Crowder and Gen. Kreger, and my best recollection is that in their judgment commanding officers, convening authorities, almost invariably follow the advice of the Judge Advocate General's Office. I think I have been told there were two or three instances of their adhering to their view when there was a difference of opinion, when their own departmental or division judge advocate was very strong, and they preferred to follow their own judge advocate. I think there were only two or three cases.

So far as my own action is concerned, my recollection of the figures is that there were 8 or 10 cases in which I declined to follow the Judge Advocate General's advice. It was not, however, upon questions of the existence of prejudicial error, but it was largely upon questions of clemency. I took the view in this war that a drunken officer was an intolerable thing; that so far as I was personally concerned, I could not take the responsibility of sending anybody else's son into battle under an officer who had so far forgotten the requirements of his place as to become drunk while an officer; and while, in civil life, I was perfectly willing to give a man a second chance on that failing, that where it involved the lives of other men I could not have some officer break down in the middle of the battle and be found drunk and his men leaderless, if he had previously shown his susceptibility to the weakness. So that in three or four cases where the Judge Advocate General's Office recommended that, although the proof of drunkenness was clear, it was a first offense and therefore a reprimand or something of that kind would be sufficient, I declined to agree with that and adhered to the finding of the court for that reason. I do not recall ever having disagreed with the Judge Advocate General's recommendation upon any other class of cases, although there may have been one or two.

Senator LENROOT. And wherever you, yourself, were of the opinion that prejudicial error existed, you recommended the disapproval of the finding?

Secretary BAKER. Oh, clearly.

Senator LENROOT. Did you apply the same rule to prejudicial error as would be applied in a civil court?

Secretary BAKER. So far as I know, the rule is identical.

Senator LENROOT. For instance, take a case of this kind—and I am not giving an actual case but merely a hypothetical case—of evidence being admitted of other offenses than that charged. The evidence aside from the testimony might in itself be sufficient to sustain the verdict, and yet that would be prejudicial error in a civil court. Would you so regard it in a case of this sort?

Secretary BAKER. I would follow the established rules on that question, which are that previous offenses which show a disposition to commit the particular offense are admissible.

Senator LENROOT. No; I did not mean that. I meant where it would be reversible error in a civil court.

Secretary BAKER. Oh, clearly.

Senator LENROOT. Now, with reference to this court of appeals——

Secretary BAKER. Senator, to amplify my answer to your question, I can say this, that every review which comes before me from the Judge Advocate General's Office of a conviction, contains an appeal to the law books. The Supreme Court of the United States and the Federal courts and the State courts are all cited on questions of evidence.

Senator LENROOT. Now, with relation to the establishment of this court of military appeal, aside from the question, if such a court is created, of how should it be created, there seem to be two principal objections that have been urged, and you have spoken of both of them this morning, I think; one of them, the dangers of delay in time of war; and secondly, which has been more emphasized by other witnesses, the seeming incongruity of a subordinate officer controlling the actions of his superiors.

With reference to the latter objection, I take it for granted that it is assumed that in the creation of such a court it would be clothed with the same powers that a reviewing authority now has in making that objection.

Secretary BAKER. I should think so.

Senator LENROOT. But if the jurisdiction of that reviewing authority was limited to passing upon questions of law—the ascertainment of prejudicial error—would that objection still hold?

Secretary BAKER. I think the objection would still hold. It does not seem to me to be very important, in time of peace. I can not imagine anybody having the slightest objection to it in time of peace.

Senator LENROOT. If an appeal were allowed direct from the court-martial to such a court, and the jurisdiction of the court limited to these questions of law, its duty being, if reversible or prejudicial error was found, to transmit the record to the convening authority for a new trial, or if such error was not found, to transmit the record to the confirming authority for further action, could there be any possible objection from the standpoint of controlling superior authority?

Secretary BAKER. None; and in time of peace it would be a most desirable arrangement.

Senator LENROOT. You would approve of that?

Secretary BAKER. Yes; I can see no objection to that. Of course I think we are a little misled by our talking of "civilians" and

"military men," because the people in the Judge Advocate General's Office are all civilians, as a matter of fact. There are very few of them who have had much military experience, and when we have appointed men in the Judge Advocate General's Office, the thing that my predecessors have always done, and I have always done, is to search among civilian lawyers until we found a man of satisfactory ability, with actual legal experience. We examine their qualifications very closely, and we get excellent material. The men in the Judge Advocate General's Office are a very high type of lawyers, both those temporarily in the service and those who are permanently there. I have been associating with lawyers all my life, and it has been a great inspiration to me to see the thoroughness and the lawyer-like way in which those men treat their profession.

Senator LENROOT. In reference to the constitution of such a court, if it were created, even though a majority were composed of military men of the Regular Establishment, if they were appointed for definite times, in the first place they would naturally be selected because of their special qualifications?

Secretary BAKER. Undoubtedly.

Senator LENROOT. And in the second place, their devoting their entire time for a given period would tend to make them specially qualified, would it not?

Secretary BAKER. Undoubtedly.

Senator LENROOT. So that even though a majority of the court was composed of military men, such a court would be much better qualified to pass upon those questions than the reviewing authority now—for instance, the convening authority?

Secretary BAKER. I think such a court, whether a committee of the Judge Advocate General's Office or another tribunal created by some other legislation, would undoubtedly bring to bear upon a record a higher degree of skill than can be looked for from convening authorities acting upon the record.

Senator LENROOT. You would say, would you not, Mr. Secretary, that unless pressing necessity exists for reposing authority in the President or somebody who may not be qualified to pass upon the law, or who, because of his other duties, finds it physically impossible for him to give his consideration to the cases individually, it would be very much better to place that authority in the hands of qualified persons, who would give that attention to it?

Secretary BAKER. Surely, Senator.

Senator LENROOT. And then, I understand you, that in time of peace, with the suggestion that I have made, not to interfere with the discretion of the reviewing or confirming authorities, but to confine it solely to passing upon questions of law, you would see no objection to such a court?

Secretary BAKER. None whatever.

Senator LENROOT. In time of war, for instance, with reference to the late war, if such an appellate tribunal could be created in the field of operations, would there be any objection then?

Secretary BAKER. None, that I can see.

Senator CHAMBERLAIN. That is so of the British system?

Secretary BAKER. I can see no possible objection. If I understood you correctly, it results in this, that in time of peace there would be the appellate tribunal which would review these records, and if

it found prejudical error, would send them back to the convening authorities and tell them to try the case over again.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. But if they found nothing prejudicial there, it would send it up to the confirming authority with a recommendation for the confirmation.

Senator CHAMBERLAIN. Yes; and the court itself exercise no discretion whatever.

Secretary BAKER. Yes, and in the field operations a similar body to that, organized to deal in a similar way.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. I can see no objection to that at all.

Senator CHAMBERLAIN. Mr. Secretary, speaking of the point that was made by Senator Lenroot with reference to civilian lawyers who are temporarily commissioned in the Judge Advocate General's Office, while I am in accord with your view that they are high-class men, yet have you not found, as a matter of fact, in your experience as Secretary of War, that wherever a civilian dons a uniform, he stands more or less in awe, or rather more or less in the attitude of a military inferior, of those who are above him, and does not frequently exercise his own judgment in the matters which come before him?

Secretary BAKER. No; I have not discovered that, Senator.

Senator CHAMBERLAIN. Well, I have.

Secretary BAKER. I think my experience is larger than yours, Senator. I think that no tribute to the officers of the Army would be too great which explained and made known the independence of judgment, the integrity of conscience, which they exhibit toward their duty.

Senator CHAMBERLAIN. We have had civilians in uniform come before committees of the Senate and express regret that they had ever put on the uniform; and in undertaking to discharge the duties which come to them they are bound more or less by military etiquette. They can not help it.

Secretary BAKER. Senator, I get every day of my life papers which originate in an inquiry in the War Department, and they will start with a second lieutenant and go up to the Chief of Staff, and I find complete independence of judgment in the indorsements that are put upon those papers by military men.

Senator CHAMBERLAIN. You may be right about it. I doubt if you have had more experience than I.

Secretary BAKER. I am not disposed to deny that there are, every once in a while, flunkies in the Army. There are in every place.

Senator CHAMBERLAIN. It is not flunkies in uniform that I am talking of, but men in your own office have been demoted in the service for disagreement with their superiors in the service.

Secretary BAKER. I do not happen to remember any such cases.

Senator CHAMBERLAIN. How about Gen. Kenly?

Secretary BAKER. I do not think that he was demoted for being in disagreement with his superiors.

Senator CHAMBERLAIN. A very short time elapsed in his case, after he came up and told about the aviation section, before he was disciplined.

Secretary BAKER. I feel quite sure that no discipline was inflicted upon Gen. Kenly.

Senator CHAMBERLAIN. Then look what happened to Ansell.

Secretary BAKER. Well, what happened to Ansell?

Senator CHAMBERLAIN. He was practically taken out of that office which he occupied, the Judge Advocate General's Office.

Secretary BAKER. Yes; all right.

Senator CHAMBERLAIN. I am speaking of what happened to him because he disagreed with his superiors.

Secretary BAKER. He not only disagreed with his superiors, but he doubted his superiors, and he was generally—well, it is almost impossible to describe the state of mind into which Gen. Ansell got.

Senator CHAMBERLAIN. I do not think that the record has anything to show that he doubted his superiors. What became of Gen. McCain, who, in the performance of his functions in The Adjutant General's Office, differed with the Chief of Staff?

Secretary BAKER. I never knew that Gen. McCain differed with the Chief of Staff on any official matter. I will be glad to put in this record what happened to him. Gen. McCain was the first officer I came in contact with when I came to Washington. I admire him, and I admire him now. He is a soldier, every inch of him; and I gave Gen. McCain the reward that the soldier's heart delights in. I took him out of an office in the department and put him at the head of a division to go to France to fight. How that can be regarded as punitive action, I can not understand.

Senator CHAMBERLAIN. Did he ask it?

Secretary BAKER. No.

Senator CHAMBERLAIN. I think he did not. I think that Gen. McCain thought that he could serve his country better in The Adjutant General's Office. He was for maintaining the *status quo* in The Adjutant General's Office. He was in conflict with the Chief of Staff.

Secretary BAKER. I never knew that he was. Gen McCain was a vigorous, capable officer, and as such was selected to go to France when that was the highest reward in the gift of the Secretary of War. Men have wept in my office for the chance, and I gave it to Gen. McCain.

Senator CHAMBERLAIN. Did Gen. McCain ask it?

Secretary BAKER. No; Gen. McCain was a soldier. He did his duty where he was put.

Senator CHAMBERLAIN. He never had any experience out of The Adjutant General's Office? He was there for many years, was he not?

Secretary BAKER. At the time I put him in command of a division, I was under the impression that he had had experience in the command of troops. It seems that I was misinformed as to that. I thought Gen. McCain had led a regiment in the Philippines with conspicuous gallantry, and I had the idea that here was a fine soldier that ought not to be kept here doing bureau work when the rewards of his profession lay with the Army in the field.

Senator CHAMBERLAIN. Had he been in the field?

Secretary BAKER. I do not know.

Senator CHAMBERLAIN. He had had more to do with the service of The Adjutant General's Office, had he not?

Secretary BAKER. I do not know. But my idea, as I said, was that he had that record of service in the field.

Senator CHAMBERLAIN. You knew that he had been for many years in The Adjutant General's Department?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And he was a young officer when first assigned there? Who recommended him for that service in the field? He did not ask it?

Secretary BAKER. I selected him, personally.

Senator CHAMBERLAIN. You do not know that he was insisting upon maintaining the authority of The Adjutant General's Department and that he separated measurably from the Chief of Staff?

Secretary BAKER. No.

Senator CHAMBERLAIN. I wish you had found that out.

Secretary BAKER. I knew, of course, that there were constant questions of jurisdiction arising among all the bureaus there; but that there was any disagreement, any conflict of authority, between Gen. McCain and Gen. March, I never heard until now.

Senator CHAMBERLAIN. I just cite those instances to show the justice of my contention that where an inferior officer separates in his views from his chief, he is very apt to feel the ax.

Secretary BAKER. That is not the fact, Senator.

Senator CHAMBERLAIN. Well, I am convinced that it is.

Secretary BAKER. What is the fact is this, that officers of the Army come down here and testify before the Committees on Military Affairs of the Senate and of the House, and then anything that happens to them, no matter what, is regarded as punitive and disciplinary.

Senator CHAMBERLAIN. Of course you can always say that it is not punitive.

Secretary BAKER. You can not run the Army on the fact that if a man comes down here and testifies before a military committee, he is removed from the control of his superiors. The Army can not be run that way.

Senator CHAMBERLAIN. What happened to Col. Weeks?

Secretary BAKER. Col. Weeks was sent down to be department judge advocate of the Department of the Southeast on the recommendation of Gen. Kreger, because he was not in harmony in the operation of that office.

Senator CHAMBERLAIN. That is exactly what I am trying to call your attention to now; where the inferior officer is not in harmony with his chief, he goes out, somewhere.

Secretary BAKER. Yes; of course: and he ought to.

Senator CHAMBERLAIN. That is what I am trying to get at.

Secretary BAKER. Of course, he ought to.

Senator CHAMBERLAIN. He does, anyway,

Secretary BAKER. That is fortunate. You can not run an office with everybody running it in opposite directions.

Senator CHAMBERLAIN. But the chief always happens to be right.

Secretary BAKER. The chief must be right as long as he is chief. As soon as the chief goes wrong, you change the chief.

Senator CHAMBERLAIN. Have you ever changed a chief?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Where?

Secretary BAKER. I changed a chief when I put Gen. Kreger in charge of the Judge Advocate General's office.

Senator CHAMBERLAIN. That was a change on paper rather than in practice. Gen. Crowder is still Judge Advocate General.

Secretary BAKER. Yes; he is now. Gen. Kreger was the operating head for a while.

Senator CHAMBERLAIN. I believe that is all.

Senator LENROOT. I have nothing further.

Senator WARREN. Mr. Secretary, in Gen. Crowder's testimony he alluded to differences in statements made on the question of veracity as between himself and Gen. Ansell, and he spoke in a passing manner of that testimony regarding the Secretary of War. Do you want to allude to that testimony, to any of the statements made?

Secretary BAKER. Senator, I do not think I have any observations to make about it beyond this: Somewhere in his testimony—I do not know where it is, but somewhere in Gen. Ansell's testimony—there is a statement that the Secretary of War was inaccessible to Gen. Ansell. I want to enter the most positive and unequivocal contradiction to that statement. Gen. Ansell came into my office with as much freedom as my own secretary came in. He came when he wanted to come, and there never was a suggestion that the Secretary of War was inaccessible to Gen. Ansell.

Senator CHAMBERLAIN. I think probably that has been misapprehended a little bit. I think Gen. Ansell, when he was authorized by Gen. Crowder to reach you, reached you through military channels—through the Chief of Staff.

Secretary BAKER. The impression which Gen. Ansell's testimony gives—I know nothing about what he intended to say, but the impression that his testimony gives—is that it was necessary for him to reach me through military channels, and exactly the opposite is the truth. He came to me freely, and he came to me upon all sorts of occasions, and there is not in the records of the War Department a single recommendation of Gen. Ansell's looking to a better adjustment of the Judge Advocate General's office, which was ever presented by him and refused by me, with the solitary exception of the matter of section 1199 of the Revised Statutes, in which I did not agree with Gen. Ansell, and the recommendation that all of the court-martial cases that had been reviewed by Gen. Ansell—by the board of which he was president—should be reviewed over again because the work had not been properly done, which I did not believe. I do not happen to remember all the things that are in this record that Gen. Ansell said that could come within the scope of——

Senator WARREN. The committee has no interest in that, unless you want to take it up.

Secretary BAKER. I have no interest in it, but this is the feeling I had about it. A very serious controversy arose between Gen. Ansell and Gen. Crowder. Senator Chamberlain, of course, espoused Gen. Ansell's side of that controversy.

Senator CHAMBERLAIN. His view, rather.

Secretary BAKER. Yes; his view; and I think his side of the controversy.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. The matter was spoken about in many forums where I had no opportunity to reply, where it was impossible for me to reply. I was Gen. Ansell's superior officer, and might be called

[illegible] to be his judge. When Senator Chamberlain spoke up on the floor, of course I had no [illegible] on the floor. When he or Gen. Ansell made speeches in other places, or gave newspaper interviews, of course I had no opportunity to reply to them, because I had to remember that I might be called upon to judge Gen. Ansell's actions. What has seemed to me to be important in the whole matter is this, that if the controversy was one which was affecting prejudicially the administration of justice in the Army, then it would be necessary for me to act in the matter, and I am simply referring the matter to the Inspector General of the Army, and you have his report, and you have the instructions that I gave him. I asked him to find out whether the disagreements and the controversy in the Judge Advocate General's Office were of a character that were affecting prejudicially the administration of justice or not, and on that ground I proceed from that office to the merits of the policy. Gen. Chamberlain went through the case carefully in his report here, and it discloses that the administration of the office was not prejudiced by that controversy. It then seemed to me to be a matter that was largely indifferent.

Senator WARREN. Have you anything to proceed upon by these questions that you wish to present for our consideration?

Secretary BAKER. Nothing at all, that I recall, unless there is something in the minds of the committee.

Senator WARREN. Have you anything further, Senator Lenroot?

Senator LENROOT. No.

Senator CHAMBERLAIN. I have nothing further.

Secretary Baker subsequently submitted the following memorandum:

The typewritten manuscript of the hearing was submitted to me through the courtesy of the chairman of the subcommittee and I was invited to make any additions or corrections. I have read it carefully and was much perplexed at the inconsistency between my answers to the questions of Senator Chamberlain and those of Senator Lenroot with regard to the creation of an appellate power. This inconsistency I can only explain by the fact that in answering Senator Lenroot I had in my mind the same sort of a tribunal as suggested by Senator Chamberlain, which would function under the President as Commander in Chief of the Army. My mind at that time apparently was dealing with the case which comes to the President as the convening authority, and my answers to Senator Lenroot's questions are therefore misleading, since he plainly had in mind the creation of an appellate tribunal which would function independently of the President in errors of law. It seems to me important that I should state clearly that the law I recommend is that an appellate power.

The President being the Commander in Chief of the Army, the supervisory control of discipline must of necessity rest in him and be exercised through such subordinate agencies in the Army as the exigencies of the service from time to time require; and, in so far as discipline is enforceable by trial by such tribunals as Congress shall from time to time establish. The institution of any extraneous and independent appellate power, interrupting the exercise of the full powers of the Commander in Chief, would inevitably weaken and most certainly gravely impair the authority of the President as the Commander in Chief and the commanding generals chosen by him in fields of action. The idea of an appellate power is wise and our experience in this war shows its propriety. There should be no case of discipline in the Army beyond the reach of the Commander in Chief for correction. To accomplish this complete control boards of review organized in the office of the Judge Advocate General, or, when the Army is operating in actual warfare, organized for independent commands, should have the power, under regulations prescribed by the President and, therefore, by his authority, to review court-martial proceedings and, upon the detection of errors of law, should have the right to return a record to the convening authority, pointing out the error of law and directing a reversal or disapproval of the proceedings

and the restoration of the accused to his previous status. This should, however, be systematically organized under the direction of the President and at all times under his control and subject to general orders from the President which would lay down the policy to be followed under the law in the administration of discipline through the imposition of penalties.

The creation of a court of appeal with the power to substitute its judgment for that of the President as Commander in Chief, is, in my judgment, unnecessary and would be destructive in large measure of the single channel of command upon which efficient discipline in a military organization necessarily depends.

The emphasis laid in the discussion upon errors of law, as distinguished from errors of fact, seems to me to take too narrow a view both of the appellate power desirable and of the nature of court martial proceedings. The appellate power should be able to reach errors of fact as well as errors of law, and the President and those delegated by him under regulations to act in his behalf, should have the power to control these proceedings for errors of fact as well as mere technical errors of law. As a matter of fact, we have had in the War Department some controversy as to what is an error of law, and sometimes palpable errors of fact have been held to be errors of law in order that a remedy might be applied. We ought, therefore, not to prescribe a narrow technical rule, but a broad and generous power which will enable the President to supply a remedy when an error is discovered.

(Thereupon, at 12.15 o'clock p. m., the subcommittee adjourned, subject to the call of the chairman.)

ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

SATURDAY, NOVEMBER 8, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 11 o'clock a. m., Senator Francis E. Warren presiding.

Present, Senators Warren (chairman) and Chamberlain.

STATEMENT OF MR. E. M. MORGAN, PROFESSOR, LAW SCHOOL, YALE UNIVERSITY, NEW HAVEN, CONN.

Senator WARREN. Col. Morgan is here this morning, and we shall hear him now. Col. Morgan, I suppose you know that this subcommittee is considering the military justice law that exists, and suggested amendments thereto, particularly as proposed in Senate bill 64, introduced by Senator Chamberlain, which I presume you have seen.

Mr. MORGAN. I have seen that; yes, sir.

Senator WARREN. The committee would be glad to have you, in your own way, make any observations you care to make about the present law and the proposed bill.

Mr. MORGAN. Do you want me to state my experience with the Judge Advocate General's Department, first?

Senator WARREN. Of course, so far as the law is concerned, that is what we are particularly concerned about now. Any incident that you wish to state we would be glad to have; but what we are trying to do is simply to see what we should do in way of legislation.

Senator CHAMBERLAIN. Let me suggest, first, as a basis, that Col. Morgan state what his connection with the Army was and what his experience has been.

Senator WARREN. I assumed that he would do that.

Mr. MORGAN. That is what I was asking about. I wanted to know if you desired me to state my experience.

Senator WARREN. State what you have been doing in connection with the administration of the law.

Mr. MORGAN. In September, 1918, I was commissioned as a major in the Judge Advocate General's Reserve Corps, and I was ordered to duty in Washington as assistant to the Judge Advocate General. Later in the month, I was made chief of a new division, called the War Laws Division, in the Office of the Judge Advocate General.

Senator WARREN. What rank were you given?

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Senator WARREN. What rank were you given?

Mr. MORGAN. Major, judge advocate.

As chief of the War Laws Division, one of my duties was to go over all of the current opinions of the Judge Advocate General and to select those that were of sufficient importance to be sent out to the service, either by way of abstracts or mimeographed copies. At first the reviews of cases in the military justice division did not come over my desk. The extent to which I was concerned with them was simply in passing upon certain suggested notes upon the administration of military justice which the chief of that division thought ought to go to the service.

Senator WARREN. You are speaking of going to the service; do you mean abroad, or here?

Mr. MORGAN. All the judge advocates in the field.

Senator WARREN. In this country and abroad?

Mr. MORGAN. Every place. On our mailing list we had all the judge advocates who were in the service. Later, all the reviews of court-martial cases came over my desk, with the idea that I should select therefrom statements of the new or important principles that were being applied, and send them out to the service.

Thereafter, I was detailed to organize the war risk insurance division of the Judge Advocate General's Department; and after that was organized, I was made chief of the general administration division of the office, which was also designated the miscellaneous division.

While I was chief of that division I was getting out, among other things, notes on military law. These were sent to the service. They dealt with the proper interpretation of the Articles of War, the interpretation being based upon accepted American military writers, such as Col. Winthrop, Gens. Davis, O'Brien, and Benet, and the English writers, particularly upon the decisions of the Judge Advocate General during this war. In that way, I became familiar with practically all the important decisions of the Judge Advocate General upon the administration of military justice. Furthermore, when the force was comparatively small, we had frequent conferences on the really important cases, and in that way I kept somewhat in touch with them.

Later I was made chairman of the general board of review of the office, which reviewed all opinions of officers before they went to the Judge Advocate General for signature. This did not include the military justice opinions, however.

Afterward I was detailed as acting chairman of the special clemency board. I acted in that capacity for three or four weeks immediately prior to my leaving the service on May 31, 1919.

I left the service with the rank of lieutenant-colonel, which was merely one grade above that in which I entered, having been promoted in July, 1918. That, I believe, gives my qualifications.

Senator WARREN. I will state that this subcommittee consists of three members, but Senator Lenroot is also a member of an important conference which is sitting this morning, and he can not be here. I told him that Senator Chamberlain would be here, and he said to go on without him.

Mr. MORGAN. My experience firmly convinced me that the existing system is defective in four or five particulars. To begin with, the procedure for preparing charges and bringing the accused to trial, as it was practiced during a greater part of the war, seemed insufficient.

Senator WARREN. You say the greater part of the war. Will you explain when?

Mr. MORGAN. Yes; during the entire period of hostilities it seemed to me that the cases all showed that the charges had been preferred without any particularly thorough preliminary examination. That was attempted to be changed by an amendment to paragraph 76 of the court-martial manual, and the introduction of paragraph 76-a. That change was made in response to a memorandum of the Acting Judge Advocate General of April 4, 1919, and it finally got through the General Staff and the War College, I believe, after I left the service in July, 1919.

The new paragraphs promulgate a regulation requiring a thorough investigation of the facts, before a charge is preferred. They also require the officer, who is to appoint a general court-martial, to seek the advice of his judge advocate as to whether or not a prima facie case is made out and as to whether or not the charge states a violation of law. He was not, therefore, required to do that, and under the regulation he is not bound to follow the advice given.

The new bill makes additional safeguards there, in that it requires charges to be preferred under oath, and makes the opinion of the legal officer binding.

Senator WARREN. I understand you to say that that was promulgated before you left, and not put into practice until after you left?

Mr. MORGAN. No, it was not promulgated before I left. It was suggested before I left, by a memorandum of April, 1919. I left on May 31, and the particular changes in the court-martial manual came out in July.

Senator WARREN. Yes.

Mr. MORGAN. The guaranties of impartiality of the appointing authority and the court struck me also as being defective. There was, as you all know, on the statute books a provision which prevented the appointment of a court by a person who was the accuser or the prosecutor. That had been on the books since the passage of the act of May 3, 1830. But there was, and is yet, no provision disqualifying an appointing authority for actual bias or constructive bias, unless he is the accuser or prosecutor. In the same way the members of the court are subject to challenge by the accused only for cause. There is no peremptory challenge, and there is not any challenge of any kind to the panel. There is nobody to determine the truth or falsity of challenges except the remaining members of the court. The result was, as occurred in a great number of cases—that is, in enough cases, anyway, to cause my attention to be especially attracted to it—where three or four persons were charged separately and were to be tried separately for having committed a joint offense, all the cases were referred to a general court. This court would try case A, for example. When case B came up for trial, since the evidence would be practically the same and would concern the same transaction, counsel for the defense in case B must challenge only one member at a time. When he challenged one member of the court, the other members of the court, who were subject to exactly the same challenge, would have to pass upon that challenge. It would seem fairly obvious that those other members were disqualified to pass upon that particular challenge, and that there really ought to be some basis for challenging the whole panel in a case of that character. At least, it strikes a civilian lawyer that way.

That was one of the things that I found that most military lawyers could not be made to see. They could not see why a jury or a court which had tried A for an offense in which B, C, and D were all involved could not go right on and try B for that same offense, and then try C for the same offense, and then try D for the same offense, where the testimony would be practically identical in all the cases.

Senator WARREN. Your idea is that the fact of trying A and finding him guilty would so bias their minds that they would not try the remaining cases upon the facts as they appeared?

Mr. MORGAN. I could not think, Senator, that they could try the second, third, or fourth cases impartially. At any rate, by the time that they got to the fourth case they would know just exactly what testimony was going to be introduced, and they would have their minds all made up just as soon as the case began.

Senator WARREN. What would be the consequence if A was found guilty, and if for the case of A the panel was challenged and a new panel found B not guilty; what about challenging the panel then? Of course the accused would not do it, but the Government would have a right to.

Mr. MORGAN. I should think that the Government ought to have a right to.

Senator WARREN. In trying 3 or 4 men for the same offense, to get a panel in some of these smaller cases would be quite difficult. I realize the justice in your contention, but I wondered whether, if legislation read that way, there would have to be exceptions made of those cases where there are not sufficient officers. Of course in important cases, you understand, they would have to go until they did have men enough.

Mr. MORGAN. Yes; and you understand an accused can be sent to any place in the country for trial, and that, of course, would take care of any real practical difficulty with reference to that matter.

Senator WARREN. And as to the peremptory challenges, you think that they should have the privileges that they have in civil life?

Mr. MORGAN. Yes. I do not know that they should have so many peremptory challenges as are given in actual practice in civil life, because, of course, there the challenges run sometimes to a very great number; but undoubtedly your experience has been that of other men who are interested in the law, that it is impossible, frequently, to get men, who are really biased, off a jury, because of the answers that they make to the questions put to them; and furthermore, there may be a perfectly good reason why an accused should have them off without disclosing fully to the court the reasons therefor. That is, there ought to be some basis for peremptory challenge, and the thing that strikes me is that there ought to be, of course, some method of trying challenges for cause, other than that of leaving it to the remaining members of the court.

Senator WARREN. Simply a peremptory challenge?

Mr. MORGAN. You ought to have peremptory challenges; yes, sir.

Then the point that has always struck me as being most remarkable in the court-martial system is the inadequacy of the presentation of the facts and the law at the trial. Of course, the trial is supposed to be a criminal prosecution; and your court-martial manual tells you that the rules of evidence that are applicable in Federal courts are to be applied by the court-martial, except in so far as they are

changed by the court-martial manual, which operates as a regulation of the President.

These rules of evidence, even with their changes in the chapter on the evidence in the court-martial manual, are just as difficult of application as the rules which the United States district court has to apply in the trial of criminal cases. The questions of law that are presented in these courts-martial are just as intricate, in many cases, as those that are presented to the United States district judge or any court of first instance. And yet there is no provision for any judicial supervision of the trial, there is no provision for legal learning on the part of either the members of the court or any official that corresponds to a nisi prius judge, nor is there any provision for learning on the part of the counsel for the prosecution or for the defense, other than that which necessarily attaches to the status of a commissioned officer. The cases really show an astounding ignorance on the part of counsel for the prosecution, of counsel for the defense, and members of the court. It would be difficult to believe, really, the facts revealed by the records.

While I was reviewing cases as chairman of the special clemency board, at times, when a case was marked "well tried," or "poorly tried," or "very poorly tried," I would dip into the record and see how the thing went. I remember striking one case, which I hardly think is a fair sample, but which is a striking example of ignorance of counsel and court. It was a case where a man was on trial for desertion. Counsel for the prosecution simply read the charges and read a provision of the court-martial manual which said that if a man was absent without leave for an extended period, that justified an inference of desertion. He did not put in a word of testimony, but he said, "We rest." Counsel for the accused called his man and said that he desired to have him make an unsworn statement; not to have him go on the stand and make a sworn statement, but to make an unsworn statement. The accused went on the stand and stated that neither at a specified time and place, nor at any other place, did he ever intend to desert the service of the United States; and then he rested. They were going to proceed to argument, when counsel for the prosecution insisted that counsel for the defense had no right to argue on that unsworn statement, as it was not testimony. Of course it was not. The court there interrupted to ask if counsel for the prosecution did not have any more testimony. He said no, that he did not have more. Then the court asked him if he did not have the testimony of the officer who arrested the man. He said, "No, that officer could not testify to anything except what was shown on the investigation." Thereupon the court closed and went into session to consider their judgment, and they came out with the startling announcement that they found there was not sufficient evidence to justify either conviction or acquittal, and they therefore ordered counsel to move for a continuance until they could get evidence that would justify acquittal or conviction.

Frequently you find cases where a counsel for the defense has made absolutely no defense, where it is shown by subsequent investigation at the disciplinary barracks that his client was an imbecile, absolutely incapable of forming the intent that was necessary for the commission of the offense with which he was charged.

I remember one case where a chaplain acting as counsel said that he was not going to make any defense on the ground of mental incapacity on the part of the defendant; that the court could see him; that they could judge of his mental capacity; and he did not believe in sending these soldiers to "nut" boards, as they call boards of psychiatry in the Army, because he believed a soldier of that kind ought either to be emasculated or to be sent to Leavenworth, anyhow. That man was defending a client on the charge of desertion, which was an offense during the war for which his client could have received a sentence of death and did receive a sentence of 10 years.

Senator WARREN. That was his defense?

Mr. MORGAN. That was his defense, and that was all.

Other cases I remember where counsel simply stated, on the trial for desertion, where a man was on trial for his life, that he had not had any time to make any investigation.

Senator WARREN. I can see, of course, the applicability of those stories, and of course it is very interesting; but explain, as you go along, or later, how we should change the law to cover that.

Senator CHAMBERLAIN. I would like to have him give those instances.

Senator WARREN. Of course, I am not cutting him off, but we want his advice about how to correct these things.

Mr. MORGAN. I am simply giving these cases as so many illustrations, and I think they are fairly characteristic of the facts.

Senator CHAMBERLAIN. The chairman speaks of them as "stories." You do not give them as stories or on hearsay, but you are speaking of cases that actually came to your attention when you were in the Judge Advocate General's Office?

Mr. MORGAN. Yes; I can give you the reference to every one of these cases.

Senator WARREN. The chairman has not any intention whatsoever of challenging that.

Senator CHAMBERLAIN. No.

Senator WARREN. The only point is, to keep in view all the time what our duty is, to propose some law to overcome this, and we want that as well as to get these instances, which are valuable. We want your advice as to how we may, by legislation, prevent those things.

Mr. MORGAN. Yes; I understand that, Senator. I am simply trying to point out that under the present system, counsel for the prosecution and counsel for the defense, and the court, who are the functionaries, of course, that have to try these really serious criminal cases, are all ignorant of the fundamentals necessary to prove an offense or a defense. Counsel for the prosecution frequently does not know what elements he has to prove; and counsel for the defense has very little idea, really, of what he should put in in order to free his client.

In other words, they do not know or appreciate either the substantive law or the rules of evidence that are applicable in the particular case. That is because, I think, the matter of attending to courts-martial is an extra duty usually put upon very busy line officers, and usually these line officers, who are for the prosecution or the defense, have to do that as extra duty and not as their chief duty. We hold courts-martial, of course, whenever it is convenient to hold them, but we do not detail men exclusively for the work.

The result under the present system seems to me to be just this, Senator: It is as if you turned loose a common-law jury to try a case, with unskilled counsel, and without any judicial supervision at the trial at all. Now, it seems to me that the proposed bill, Senate 64, does provide a remedy for that, first in providing for judicial supervision at the trial by an officer learned in the law, who shall really take the place of a nisi prius judge. This officer, who is called the judge advocate of the court, would decide the truth or falsity of all challenges, thus remedying one serious defect in the present system. He would also be able to rule judicially on the admission or exclusion of evidence, having proper qualifications therefor in his learning as to the rules of evidence and as to the rules of substantive law applicable to the case. You would have there at least a judge who knew the law.

Now, as to the learning of the judge advocate, in the changes to the court-martial manual that were made by changes No. 5, it is attempted by regulation to get more skilled counsel. It is provided that a man should not be a trial judge advocate—that is, the prosecuting officer—unless he has had experience at least on a court-martial and has acted as assistant judge advocate, I believe. It is also stated there that counsel for the accused should have the same qualifications as the trial judge advocate, where possible; and of course accused has the privilege of getting civilian counsel. The bill writes that into legislation and makes it mandatory on the parties to furnish trial judge advocates of learning. It seems to me that that will correct to a very great extent the crudeness of the trial.

Senator WARREN. You make that very clear. Now, so far as the other members are concerned, you have to accept them as you would a jury drawn from the body of the people?

Mr. MORGAN. Yes.

Senator WARREN. You draw them from the body of the Army?

Mr. MORGAN. Yes.

Senator WARREN. And of course you have to take them by and large, as they come, except that they are selected by the skill of the man who makes the appointments.

Mr. MORGAN. Exactly, sir. I think there is no question about that. We have got to realize that there are some drawbacks in the Army that could not possibly be overcome, I suppose, with reference to a military trial. The next thing that strikes the civilian lawyer as most peculiar is the control of the appointing authority over the court. As you know, under the present system a general court can consist of anywhere from 5 to 13 officers. A panel may be arranged with 13 officers, and those 13 officers may begin the trial. Either the appointing authority or any superior military authority may remove any one of those officers at any time during the trial, relieve him from court-martial duty, and send him to any other duty; and as long as he keeps that court above 5 members there can be no objection on the part of the accused or on the part of the prosecution; so that you might start a trial with 13 officers and end it with 5.

Furthermore, the appointing authority may add new members during the trial of a case, provided he does not exceed the statutory maximum. So that if he has 5 members on now, he may add 3 members in the middle of the trial. To these new members the testimony that has been taken will be read over.

Senator WARREN. I was going to ask you how that would be conveyed to them.

Mr. MORGAN. Yes; they just have the testimony read over. They do not begin the trial de novo. So that you might, presumably, begin a trial with 13 members of the court and end with 5, and have among the 5 members who decide the case no man who was on the original panel. These 5 might have heard most of the testimony merely by having it read over to them. O'Brien, the military writer, disapproves of this practice. O'Brien says it is entirely illegal. Col. Winthrop says that it had been in vogue in our Army for over 50 years when he was writing.

Senator WARREN. You propose to change that by having a fixed number?

Mr. MORGAN. Yes; as the bill states.

Senator WARREN. Do you allow any latitude on account of location, and so forth, as to the number?

Mr. MORGAN. I would make it as small as I thought could conveniently and justly try cases, and then fix it at that for all general courts, wherever they might be sitting.

Senator WARREN. If you put it at 10 or at 13, it must be that number?

Mr. MORGAN. Yes.

Senator WARREN. And you would not allow changes during the trial?

Mr. MORGAN. I should not allow these changes. Now, I do not say that there has been any manipulation.

Senator WARREN. I understand. We want to get at your ideas of the law as it should be.

Mr. MORGAN. But you can see that there is a tremendous chance for manipulation of the membership of the court.

Senator WARREN. What have you to say about the desirability of using enlisted men for any part of the membership of the court?

Mr. MORGAN. I think, theoretically, it is a fine thing, but practically, I do not know, Senator. I have talked with many regular officers, and almost all of them have, to that feature of the present bill, offered objections that seemed to me to have weight. Some of them have said this, that it would divide a court into officers and enlisted men, and there would be a sharp conflict each time. I doubt very much whether that would be true, but I do think that under our present system the enlisted men would be entirely overawed by the officers.

I have felt that some representation of enlisted men might very well be provided for, on the same theory that the French did it. They always provided that when an enlisted man or a noncommissioned officer was to be tried, one of the members, at least, should be a noncommissioned officer, the idea being to get the enlisted man's viewpoint in the court.

Senator WARREN. Yes; we have had that matter before us.

Mr. MORGAN. Yes; I suppose you have. But on that proposition I really do not feel competent to answer, because I have never had any experience in the field, and I do not know what effect that would really have upon the man when he was returned to his company after having convicted a comrade, or anything of that sort. I do not know what effect that would have.

Of course you all know that the reviewing authority under the system as it was during the whole war, and up to August 10, 1919, had practically absolute command not only over the personnel of the court, but over the findings and sentence of the court, the power of sending the case back for revision, as it is called.

Senator CHAMBERLAIN. From the commanding officer?

Mr. MORGAN. Yes, sir; that is the appointing authority sending the case back for revision; and the appointing authority would send it back with an indorsement to the effect that he did not agree with the finding of not guilty, for example. Of course he did not have to send it back if he did not agree with a finding of guilty. In such case he could disapprove the sentence, or the finding and sentence. But if he wanted to change a finding of not guilty to guilty, he would have to send the case back with an indorsement, and I have seen them accompanied with very strong arguments to the effect that the court should make another finding. I think you have statistics before you showing changes from guilty to not guilty, showing that in one-third of the cases the court made the changes suggested, and in the other two-thirds of the cases, adhered to its finding. I have seen no statistics of the number of times when the court increased the penalty at the request of the reviewing authority; that is, where the appointing authority sends back an indorsement in which he says that the court will reconvene and consider the adequacy of its sentence, and adds certain arguments or statements, or suggestions are made to show its inadequacy. Such statistics were, to my knowledge, compiled.

Senator WARREN. As I understood you, the court adhered to its findings in two-thirds of those cases?

Mr. MORGAN. No; it was only from not guilty to guilty. They changed from not guilty to guilty in one-third of those cases, and adhered to their findings in two-thirds; but where the convening authority has sent the case back for an increase of the sentence, in a large majority of such cases, they did not adhere to their sentence; they changed it. Those statistics were compiled, but I was not able to find them; and I noticed that Gen. Crowder in sending the statistics to the Senate Committee included only those where the change in the finding was from not guilty to guilty. Now, that, of course, strikes a civilian as something entirely unusual, and the War Department has finally yielded to public sentiment, in so far as to issue a general order, No. 88, which was issued in July, effective August 10, 1919, which forbids the sending back of a case for revision upward of the sentence.

Senator WARREN. I understood that to be the fact. I do not know the date when it was effective.

Mr. MORGAN. Yes; of course it is since the termination of hostilities. In fact, it became effective on August 10.

Senator CHAMBERLAIN. That general order forbade the convening authority to send not-guilty cases back for a finding of guilty?

Mr. MORGAN. Yes; or that a sentence should be sent back for revision upward, and unless this sentence was mandatory by act of Congress and the court had given a sentence under the statutory minimum. Of course, the proposed bill would take away the control of the appointing authority over the personnel of the court and over the finding; that is, so far as to prevent the court from sending back a finding of not guilty for reconsideration. In fact, the present

reviewing authority's functions, so far as the review of the particular record is concerned, are pretty well eliminated by the present bill.

Then the other matter on which there has been considerable dispute, and where the civilian lawyer is somewhat shocked, is that there is no real judicial review for the correction of errors. There is a review, of course, but it is a review by the power of military command all the way through; and during the war, of course, it was demonstrated that the review by the military command as authorized in the Articles of War was inadequate. I think General Order No. 7 and General Order No. 84 of 1918 demonstrated that conclusively. Of course, you remember the occasion of the issuance of General Order No. 7. It was on account of those cases in the South.

Senator WARREN. Yes, that has been gone into very thoroughly before the committee.

Mr. MORGAN. I need not go into that at all, then. General Orders 7 and 84 showed conclusively that some sort of review by a legal officer was an absolute necessity.

Senator WARREN. And you approve of those orders?

Mr. MORGAN. Oh, yes; I approve thoroughly of those orders. But I think that they ought not to be left to Army regulations or general orders. The matter ought to be covered by legislation. The orders do not go far enough.

Senator CHAMBERLAIN. In that connection, that brings up the construction of section 1199 of the Revised Statutes.

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. You know the contention of Gen. Crowder on the one theory of it and the contention of Gen. Ansell on the other?

Mr. MORGAN. Yes.

Senator WARREN. Do you mind expressing your views with respect to section 1199 of the Revised Statutes?

Mr. MORGAN. As an original question of statutory construction, it seems to me there could be very little doubt that section 1199 was intended to give the Judge Advocate General the power which an appellate court usually has to revise or reverse judgments of military tribunals. I think the legislative history of the act, the circumstances under which it was passed, the ordinary legislative meaning of the term "revise" and the term "review," as used in the constitutions and codes of the various States, show very clearly, very convincingly, that the words "revise" and "review" were intended to make the Judge Advocate General's Office, or the bureau of military justice as it was called at that time, a real appellate tribunal.

Senator CHAMBERLAIN. With power to reverse or modify?

Mr. MORGAN. Oh, yes; to reverse or modify: and I think that is made doubly clear by the fact that the act related to the military establishment and used the word "revise," which for at least 75 or 100 years prior to the passage of the statute had a definite, technical meaning in the military service. The power of revision in military law is much broader than the power that any ordinary appellate court has to revise. The only decision on the case was the case of ex parte Mason, as you know, which for a long time was unpublished but now has been published in the Federal Reporter. That case contains a dictum to the effect that no power to revise is really

given to the Judge Advocate General in section 1199. That is pure dictum, however, and an analysis of the decision will show that the court did not understand the military system at all. It thought that there was a power, some place, of review, and that the Judge Advocate General had the duty of pointing out, merely, and that the proper military authority would revise, forgetting that, in ex parte Mason, if the power did not rest in the Judge Advocate General, there was no power to revise anywhere, for the appointing power had approved the sentence. But there is no doubt—that is, in my opinion there is no doubt—that the military authorities from the time of the enactment of the statute down to the time when Gen. Ansell questioned its interpretation, had really construed the statute as not granting this power of revision.

The military theory has always been that the power to revise or power to control a court-martial sentence is necessarily an attribute of command; and secondly, that it can not be exercised by a staff officer, and the Judge Advocate General and the officers in charge of the bureau of military justice were staff officers. I believe it was on that theory that the Judge Advocate General's Office held that that statute was not intended to give really revisory power.

Senator CHAMBERLAIN. In your opinion is not that a strained construction of it?

Mr. MORGAN. I think, as I said before, Senator, as a matter of original statutory construction, it is very badly strained. I think it disregards not only the ordinary meaning of the word "revise" as used in civil legislation but it entirely and absolutely disregards the meaning of "revise" as used in military language and in the military law for at least from 75 to 100 years prior to the passage of the statute.

Senator CHAMBERLAIN. What would have been the effect to have placed a different construction upon section 1199—that is, the construction which would have permitted the Judge Advocate General to have reviewed, modified, or reversed a verdict of a court-martial?

Mr. MORGAN. It would have, of course, given the Judge Advocate General the right which an ordinary appellate tribunal has to say that a judgment of conviction must be set aside. The case would then, of course, go down to the lower court, the military commander, in accordance with that judgment.

Senator CHAMBERLAIN. Such a construction of that would necessarily have saved all this conflict?

Mr. MORGAN. Yes; such a construction would have saved most of this controversy.

Senator CHAMBERLAIN. And would have protected the rights of a convicted man?

Mr. MORGAN. There could not be any question in my mind that practically all of these cases that have been so much talked about would never have arisen if that provision had been interpreted in that way. We should have really had a court of military appeals; and if we had had a court of military appeals passing upon the regularity of these trials, in the way that an appellate court usually does, it would have caused the commanders below to have been more careful about the conduct of the trials, it seems to me.

Senator WARREN. It would have been, of course, still under the military arm entirely?

Mr. MORGAN. Yes.

Senator WARREN. You think it is better to have a controlling factor finally outside of the military line?

Mr. MORGAN. I am thoroughly convinced of that, Senator, for two or three reasons. I think the provisions of the present bill are really admirable in that respect. I base that conclusion upon my experience in what would seem to me test cases in the War Department. As long as you keep the whole matter within the military department, as long as you have military officers who form this court of appeals under the control of line officers, under the control of the military hierarchy, with the matter of promotion and preferment, and so forth, all being dependent upon these higher officers, you are bound to have the judgments of the subordinates influenced by the desires of the superiors. We have had two or three examples of that in my experience. I am quite sure you are very familiar with them, and if I am repeating too much, you just stop me.

Senator WARREN. That is all right.

Mr. MORGAN. You remember the time of the first four death cases from France that caused so much trouble—or that caused so much newspaper talk. In those cases, if there had been no civilians connected with the Judge Advocate General's department—civilians in uniform, really, as officers—I doubt very much whether anything would have happened except an execution of those sentences. In the first place, those cases went to Gen. Bethel, a Regular Army officer, judge advocate of the American Expeditionary Forces, and he recommended the approval of the conviction and attached a memorandum, as I remember it, which was a very strong argument for the execution of the sentences. The appointing authority, of course, approved them. The records were transmitted through Gen. Pershing, who was not the appointing authority, and who, as a matter of ordinary routine, would have done nothing whatsoever with the cases. Nevertheless, he attached a memorandum saying that the execution of these men was necessary, or highly advisable, at any rate. Those records came to our office with those indorsements on them. The officer who first reviewed the cases thought there was sufficient evidence to justify a conviction and that the sentence was authorized by law. They went to Gen. Crowder, who saw all these indorsements on them, and he wrote a memorandum, which was in the files, addressed to the Chief of Staff, in which he said in effect that it was highly important that the War Department should present a united front to the President on those cases, and he wanted a personal interview before he sent the records over. After he had had the personal interview he signed the review which recommended the execution of the sentences.

The only dissent from that proposition came from Col. Clark, to begin with. He was a civilian in uniform who was assisting Col. Davis, at that time chief of the military justice bureau. Col. Clark went to Gen. Ansell about those cases personally. He just happened to meet him in the hall, as I remember, and in that way those records were called to Gen. Ansell's attention. He went to see Gen. Crowder about them and was told to put his views in writing, which he did. It seems to me that if the whole matter there had been in the hands of strictly military people, without these civilians happening to interpose, those sentences would have been executed, for under the office

practice at that time Gen. Ansell would not have seen them. Now, I am assuming with reference to this, Senator, that those sentences ought not to have been executed. I know that they were not executed. They were held up by the President, and I am assuming that that action was proper. I have not, myself, read the records in those four cases.

Senator WARREN. Before you get away from that, if I do not interrupt you, I want to ask you this.

Mr. MORGAN. No, you are not interrupting.

Senator WARREN. If this committee should recommend and the Congress should pass a law to have a reviewing authority in part or altogether of civilians, you would consider it very much better than to attempt to alter the construction of the words "revise" and "review?"

Mr. MORGAN. Oh, yes; I should, certainly.

Senator WARREN. In other words, to have concluded that that language was susceptible of that interpretation, so as to give this general review that you want, would really have left us in worse shape than we may be in as a consequence of this possible legislation which you are supporting?

Mr. MORGAN. I think that is right, Senator. That is, I believe this: I believe that we should have a system which was much more faulty if section 1199 were construed as I think it should have been construed and the system left unchanged, than we shall have if you adopt this proposed bill, because I think that if section 1199 had been construed that way, we should have a system that would be fairly workable—that is, the abuses would not have challenged the attention of Congress if 1199 had been given that other construction, but I do think that the new system would be much better.

Now, the other cases in which I had that matter forcibly brought to my attention were the negro rape cases. You, I know, remember those cases, where 19 negroes were convicted of rape. It was a big, long record. The judge advocate of the division was a Regular Army officer with the rank of lieutenant colonel. I know that when he came down to the office of the Judge Advocate General with those records, he had them all ready, practically, for a rubber stamp "approved." He thought they would be approved without any question. On the board of review under Col. Reed there were three or four civilians in uniform who were greatly shocked at those records, and were absolutely convinced that there was no ground for upholding the conviction of any of those men. I know that the regular officer in charge of the military justice division, when he saw the alternative was between disapproving the conviction and approving the conviction of all, would have been in favor of approving the conviction of all of them, and then letting the matter be determined by an appeal to the clemency of the President.

The third case was a notorious case, with which you are all familiar, the Tapalina case. On the day that the Judge Advocate General wrote to the Secretary of War a letter for transmission to Senator Chamberlain here, in which he upheld the conviction of Tapalina and showed how it was entirely just, and how Tapalina had really been accorded much more protection than he would have gotten in a civil court, on that very day or the day before, he was informing the Adjutant General that the man had been unjustly convicted, that the

injustice should be righted as soon as possible, and that the man should be given a chance to be reinstated on application.

I think those three cases are enough to base a conclusion on, that if the trial is left entirely to the military, whether you put it in the Judge Advocate General, he being a staff officer, or in the Chief of Staff—however that may be—you will not get nearly as satisfactory a review on the merits, as you will if you establish a court where civilians compose part or all the court. Now, I do not know, Senators, that I have anything further. I should be very glad to attempt to answer any questions.

Senator WARREN. You have touched upon the points that we have had most inquiry about.

Senator Chamberlain, do you wish to ask some questions?

Senator CHAMBERLAIN. Have you ever formulated in your own mind a plan for the organization of an appellate tribunal? How would you have it composed, in part of Army officers and in part of civilians, or in whole of civilians?

Mr. MORGAN. I should have it composed in whole of civilians, if I had anything to do with it.

Senator CHAMBERLAIN. For instance, take the case of a man who has been convicted by court-martial; the court was convened by the commanding authority, and there were irregularities in the trial—possibly prejudicial error; and suppose that it came up to this tribunal that you have in mind, and because of errors committed at the trial, the appellate tribunal composed entirely of civilians should conclude that the judgment ought to be set aside, or that it ought to be revised or modified in some way; what would you have done with the finding of the appellate tribunal?

Mr. MORGAN. I should have it transmitted to the appointing authority to be executed, and if a new trial was granted, the appointing authority should determine whether or not the man should be tried anew or let go, so that it should not be taken out of military control.

Senator CHAMBERLAIN. You would not have the military code or military discipline transferred from the military authority, by this system, to a civilian authority?

Mr. MORGAN. No; I do not think it would be, at all. I think that judicial officers ought to rule on questions of law, and I do not believe that the decision of questions of law can ever be properly said to be an attribute of military command.

Senator CHAMBERLAIN. I am agreed with you on that.

Mr. MORGAN. And I think that is just the crux of the dispute between the two opposing parties. The military theory is just exactly what Col. Winthrop says of it in his book. He says that a court-martial is not a court; that it is a mere administrative body. I have his language here. He says that courts-martial are:

> simply instrumentalities of the Executive power, provided by Congress for the President as Commander in Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein and utilized under his orders or those of his authorized military representatives.

Senator CHAMBERLAIN. That theory of it, however, has been set aside by the Supreme Court of the United States in the Runkle case.

Mr. MORGAN. Yes. Col. Winthrop, with all due respect to him—you know, he is by far the most scholarly and able writer we have on

the subject of military law—has misinterpreted those decisions of the Supreme Court which say that the court-martial is not a part of the Federal judicial system. He thought, therefore, that it must be a mere executive agency. Of course, the Supreme Court of the United States has said that courts-martial are not appointed under the third article of the Constitution; but there is nothing better settled than that the third article of the Constitution does not exhaust the power of Congress to appoint judicial tribunals. All of the courts of the Territories are appointed under a different provision of the Constitution. And the Supreme Court in the Runkle case quotes Attorney General Bate's opinion to the effect that the proceeding from the beginning to the end is judicial, and that the court-martial is a court which sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice, and that it can not be conducted according to the will of any man, but must be conducted according to law.

Senator CHAMBERLAIN. The Supreme Court of the United States decided against the theory in the Runkle case, did it not?

Mr. MORGAN. Yes, I think so. The Runkle case was decided in 1887, and Winthrop's first edition came out in 1886; so that it had not been decided when Winthrop's first edition came out. He did not change that point in his second edition. Up to the decision of the Grafton case in 1907 all military writers thought that the double jeopardy clause of the Constitution did not apply to the court-martial.

Senator CHAMBERLAIN. And it was made to apply by that decision?

Mr. MORGAN. By the Grafton decision.

Senator WARREN. You would have this appellate court send back on account of points of law or points of fact?

Mr. MORGAN. On points of law; but I consider it really a point of law where there is no evidence to justify the findings; do you not think that, Senator?

Senator WARREN. I wanted to get your view about it. We have had various opinions, usually along the line of sending cases back for errors of law alone. At the same time we have opinions on the other hand that they should have also the matter of judgment in the cases.

Mr. MORGAN. I do not agree with that. I think that the findings of this lower court should be treated as the findings of a lower court are treated by civilian appellate tribunals.

Senator WARREN. That is an error of law, where there is no evidence to sustain the conviction.

Mr. MORGAN. Yes; that is an error of law. The case ought not to have gone to the jury. The court should have directed a verdict for the defendant.

Senator CHAMBERLAIN. The greatest fear of some of our military friends in regard to any modification of authority by the appellate tribunal is that it will interfere with the discipline of the commanding officer. I can not see that this proposal of yours would take the system out of the final control of the commanding officer.

Mr. MORGAN. I do not think it would, except on questions of law.

Senator WARREN. As I understand you, your court merely says, "Here, you have not tried this according to law; go back and try it again according to law."

Mr. MORGAN. Yes, exactly.

Senator WARREN. It does nothing on findings of fact.

Mr. MORGAN. No, unless the finding of fact is entirely unsupported by the evidence.

Senator CHAMBERLAIN. You know that in the English system—Col. Rigby went into that at great length—they have a civilian tribunal, which is the judge advocate, who is a civilian officer appointed for life or during good behavior, and his recommendations do not interfere with military control.

Mr. MORGAN. No.

Senator CHAMBERLAIN. But the courts in trying these cases almost always follow his rulings.

Mr. MORGAN. Yes, they practically do, and then there is an appeal from the general court-martial to the civil courts in England.

Senator CHAMBERLAIN. Has not the system become, in Great Britain, such that if the members of a court-martial disobey the rulings of these civilian authorities, they do it at their own risk?

Mr. MORGAN. Yes. It is rather dangerous to be a member of a court-martial in England on account of the fact that if the members act illegally in the trial of a case, they can be sued civilly for damages.

Senator CHAMBERLAIN. That has actually occurred?

Mr. MORGAN. Yes, that has actually occurred. The famous case on that you will find cited in Mr. Garfield's argument in the case of Milligan, in 4th Wallace. The name of the officer who was tried was Lieut. Frye. He was tried by a naval court-martial and erroneously convicted. Afterwards he was sentenced to an excessive term of imprisonment. He had never served any part of the excess of the sentence. When he was brought back to England the errors were discovered. Thereafter he sued the president of the court-martial and recovered 1,000 pounds damages. The court informed Lieut. Frye that he had this same right of action not only against the president of the court, but against every member of it, and taking his cue from that he served summons on every one of the members of the court-martial. Some of these, Rear Admiral Mayne and Capt. Rentone, were, at time of service, members of another naval court. This court passed a resolution censuring any civilian authorities, no matter how high they might be, for daring to interfere with the functions of a court-martial. That resolution went to the king, and he approved it. Mr. Chief Justice Willes ordered every one of the members of the court-martial arrested for contempt of court. After two or three months every member of the court-martial signed a most humble apology to the court for any reflection they might have cast upon the civil court and begged leave to withdraw the resolution. Chief Justice Willes, when the apology had been read in court, ordered it to be recorded in the remembrance office, so that it would be a warning that whosoever "think themselves above the law will in the end find themselves mistaken," and in England there are many more cases of damages against members of courts-martial than here.

Senator CHAMBERLAIN. The object of it was not to induce actions against members of courts-martial, but to make them careful.

Mr. MORGAN. To make them careful. The manual of military law in the English army prints an account of the Frye case that I have referred to, with comments, showing the attitude of the civil courts toward the military and warning the officers that they must be careful to keep within the law.

Senator CHAMBERLAIN. On that I do not understand you that you wish to impose penalties as in England?

Mr. MORGAN. No. But I want to say this: I have yet to see the case where a judicial review would have interfered with the control of mere military discipline. There is a great deal of talk about its interfering with speedy trials and discipline; but, as a matter of fact, trials by court-martial are not particularly speedy. There is a provision of the seventieth article of war—which, by the way, I think ought to be changed—to the effect that the trial has to take place within 40 days after the arrest. That is the maximum limit applying to every place. Of course it is not observed.

Senator CHAMBERLAIN. It can not be.

Mr. MORGAN. It can not be observed.

Senator WARREN. I understand you have had this view in your mind while you were reviewing these cases, so that as you have passed from one case to another you have had it in your mind whether it would have interfered with military discipline or not?

Mr. MORGAN. Yes, sir; and I think that the operation of General Orders 7 and 84 has shown very clearly that it has not interfered with the administration of discipline; that General Orders 7 and 84 worked so far as speed was concerned.

Senator CHAMBERLAIN. It has shown the absolute propriety of your contention?

Mr. MORGAN. I think so. That is my deduction from it.

Senator WARREN. That would naturally be the inference?

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. Have you anything else in mind?

Mr. MORGAN. I have not any other suggestions in mind, Senator. I think I have covered the main features of the bill and of the existing system.

Senator WARREN. Do you want to inquire any further, Senator?

Senator CHAMBERLAIN. I do not recall anything now that I care to ask. There is so much of it that we might go into, but I think you have covered it pretty generally.

Senator WARREN. I think the witness has covered quite well the points that we are particularly interested in.

Senator CHAMBERLAIN. I want to ask you this question. It might with propriety have been stated in the opening. You went to Yale University as a teacher of law?

Mr. MORGAN. Yes.

Senator CHAMBERLAIN. And you practiced law before that?

Mr. MORGAN. Yes, I practiced law in Minnesota for 8 years, and then taught law in Minnesota for 5 years.

Senator CHAMBERLAIN. At what school?

Mr. MORGAN. At the University of Minnesota Law School.

Senator CHAMBERLAIN. And you were called from there to Yale?

Mr. MORGAN. I was called from there to Yale.

Senator CHAMBERLAIN. And you were at Yale when you went into this service in the War Department?

Mr. MORGAN. I had not yet reported for duty at Yale.

Senator CHAMBERLAIN. At the completion of your service in the Judge Advocate General's office you went to Yale as professor of law?

Mr. MORGAN. Yes; that is where I am now.

Senator CHAMBERLAIN. As to the cases which you have cited here, I know that the chairman did not mean to suggest that they were rumors, but it might be inferred from the record that you were stating them as rumors. They were cases that came to your attention while you were chairman of the clemency board in the Judge Advocate General's office?

Mr. MORGAN. Yes. I can give you the file number of each one of them.

Senator WARREN. I was not thinking of that, at all.

Senator CHAMBERLAIN. I know you were not, but I was afraid that it might be so construed.

Senator WARREN. What I wanted to get at was exactly what Col. Morgan has testified to, his idea as to the changes in this law, and his reasons for it.

Mr. MORGAN. In order that there may be no misunderstanding, and in order that the specifications and basis of my criticism may be supported by specific instances, I offer as part of my testimony, and ask to have printed as such, a speech made by me before the Maryland Bar Association, at Atlantic City, N. J., on June 28, 1919:

(The speech referred to is here printed in full, as follows:)

MILITARY JUSTICE.

ADDRESS BY COL. EDMUND M. MORGAN, PROFESSOR OF LAW AT YALE UNIVERSITY, BEFORE THE MARYLAND STATE BAR ASSOCIATION, ATLANTIC CITY, N. J., JUNE 28, 1919.

Mr. Chairman and gentlemen of the Maryland bar: The indictment which I bring against the existing system of so-called military justice, which Col. Wigmore seems to consider well-nigh perfect, contains the following counts: (1) That it is not only archaic but also anachronistic and un-American. (2) That as to substantive law, it provides for a government of men not of laws. (3) That as to procedure, it affords the accused no substantial protection. It grants him no statutory safeguard against trial upon unfounded charges; it does not guarantee him a fair or impartial trial; in fact, by furnishing a court, a prosecutor, and a defender, all untrained and incompetent, it makes a fair or impartial trial almost impossible; it permits a revision of findings of not guilty and a revision upwards of punishments; it requires no judicial regulation or supervision of the proceeding at any stage. (4) That its administration during this war has been as unreasonable, as unjust, and as un-American as the system itself.

The system is not only archaic but also anachronistic.

Our Articles of War came to us through the British Code of 1765. How we got our articles of 1776 is told in the autobiography of John Adams:

"Aug. 19, 1776.—Mr. Adams and Mr. Jefferson were appointed a committee to hear Tudor and to revise the articles. It was a very difficult and unpopular subject. * * * There was extant one system of articles of war which had carried two empires to the head of command, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. * * * I was therefore for reporting the British articles totidem verbis. (Jefferson agreed.) * * * The British articles were accordingly reported.

"Sept. 19, 1776.—This was another measure that I constantly urged on with all the zeal and industry possible, convinced that nothing short of the Roman and British discipline could possibly save us. * * * In Congress, Jefferson never spoke, and all the labor of the debate on those articles, paragraph by paragraph, was thrown upon me."

These articles were enacted, and, as Mr. Adams says, were in force in 1805, having survived the adoption of the Constitution. In 1806 they were reenacted without fundamental change. The so-called code of 1874, which was in force when Gen. Crowder first proposed his alleged revision of 1912–1916, is thus described by him:

"It is substantially the code of 1806, as 87 of the 101 articles which made up that code survive in the present articles unchanged, and a considerable number of the remaining articles survive without substantial change."

And a thorough examination of the present articles will demonstrate that they made not a single fundamental or systemic change in the code of 1874. To use Gen. Crowder's own words:

"As I have already pointed out, I hope the committee will give us a law sanctioning the meaning we have read into the old articles by construction alone. That is a real argument for this project of revision. I want to get off the uncertain ground where we have been for 106 years."

With reference to procedure, he said:

"If Congress enacts this revision the service will not be cognizant of any material changes in the procedure, and the courts will function much the same as heretofore."

These articles did make prosecutions before general courts easier, and thereby operated against rather than in favor of the accused. But the chief end accomplished by the Crowder revision was merely a rearrangement and a classification of existing statutes.

The fact, therefore, is that our Army—not only the small body of professional soldiers who make up the Regular Army, but the civilians, the citizens in uniform, who won this war and who must fight every war in which this Nation engages—is governed by a code, which, to use the language of Mr. Adams, "had carried two empires to the head of command," and which was designed to enforce "Roman discipline" and the discipline of the British armies of 1776.

And that means a discipline—a system—that reflects the relation of retainer and overlord. As you know, the Roman Republic began with a citizen army, but when after the overthrow of Carthage, Rome took on imperial ambition and magnitude, the Roman army, as Coulton says, "soon settled down into a regular type to which all professional armies tend to conform." Col. Fairbanks, one of Gen. Crowder's trusted assistants, puts it thus:

"The high officers spring from the aristocracy, the mass of the Army is voluntarily recruited and is kept together by the strictest discipline. Foreigners imported in large numbers formed separate units. This army, irresistible against Rome's enemies, in time proved equally dangerous to the State itself. * * * Soldiers lost all relation to civil life and recognized allegiance only to their commanders. As Coulton remarks, 'A nation in arms had formerly overthrown the kings; professional armies now overthrow the republic.'"

And Delbruck asserts that the nearest analogy to this world-conquering army of the Roman Republic is found in the English Army of the eighteenth century.

There you have it! Our army of citizens in uniform—our army of civilians protecting the Republic—subjected to a system of so-called military justice designed to fit an army of professional soldiers serving an empire for hire! Could there be a greater anachronism? Could anything be more un-American?

The existing system provides for a government, not of laws but of men. Many of the punitive articles do not define the offenses which they denounce. The fifty-eighth article does not define desertion, and the definition of that offense has been considerably broadened by interpretation during this war. The sixty-sixth article does not define mutiny. In the fall of 1917, 12 experienced noncommissioned officers were convicted of mutiny, because they did not obey an order to report for drill while in confinement under arrest. The circumstances of the case as disclosed by the record demonstrated beyond peradventure, that the men were not guilty of mutiny. But the conviction and sentence had been approved by the reviewing authority; and there was no method by which this conviction could be quashed. The only recourse for these men was through clemency, which connotes guilt. And the usual uncertainty of the specific punitive articles is made more uncertain by the so-called general article, which denounces "all disorders and neglects to the prejudice of good order and military discipline, and all conduct of a nature to bring discredit upon the military service." What constitutes such disorder, neglect, or misconduct depends upon the commanding officer, the court, or the reveiwing authority, as the case may be. What one officer may consider an offense another may entirely overlook. What a particular office may deem a violation of this article if done on Monday, he may regard as immaterial if committed on Tuesday. There is no legal test, and no legal method of enforcing any alleged or supposed test.

With the exceptions that certain corporal punishment is forbidden, that the death penalty may be inflicted only where expressly authorized, and that a penitentiary may be designated as the place of imprisonment only for certain military offenses and for civil offenses where the authorized and imposed period of confinement exceeds one year, the punishment is entirely in the discretion of the court and the reviewing authorities. The penalties imposed for the same offense exhibit the widest variance. Courts have during this war imposed for absence without leave penalties varing from 3 months to 99 years; for disobedience of orders, from a few months imprisonment

to the death penalty. The present Acting Judge Advocate General himself told me of two cases wherein the accused were charged with using contemptuous words against the President. Soldier A used the words and was tried in England; Soldier B used practically the same words and was tried in France. Soldier A was sentenced to three months' confinement. Soldier B was sentenced to 25 years. "And," said the Acting Judge Advocate General to me, "all I could do in each case was to say, 'The evidence justifies the finding, the sentence is authorized by law.'"

As to procedure, the present system affords the accused no substantial protection.

First. It grants him no statutory safeguard against trial upon unfounded charges. It is true that the Manual for Court-Martial provides for a preliminary investigation before charges are preferred. And it has been asserted that few, if any, innocent men are brought to trial, because the preliminary investigation is thorough and because only serious offenses are prosecuted. Nothing could be further from the truth. The preliminary investigations are made in the most slipshod manner by men untrained and inexperienced in the investigation of facts. To substantiate this statement I need go no further than to say that under date of April 4, 1914, the Judge Advocate General's Office sent to the Secretary of War certain proposals for the "Modification of Rules of Procedure in the Administration of Military Justice," designed among other things—

"(a) To require an officer preferring a charge to transmit therewith over his signature a brief but comprehensive summary of the evidence upon which he bases the charge.

"(b) To insure careful preliminary investigation of charges before reference for trial to the end that only such charges as are properly referable for trial to be so referred.

"(d) To lay down with greater particularity the duties and responsibilities of investigating officers and staff judge advocates, with a view to guarding against the possibility of (1) hasty or ill-considered action by any officer exercising court-martial jurisdiction, (2) ordering any person to trial before a general court-martial without full and careful as well as impartial investigation of the case and unless a reasonable probability of the guilt of the accused has been made to appear, or (3) trivial charges being referred to a general court-martial."

It is well that number (3) was mentioned and time that the chief law officer of the War Department should recognize the absurdity of some of the prosecutions. For example, in case 101776 a soldier was brought to trial before a general court-martial for stealing two cans of condensed milk—the alleged larceny of 11 cents for which he was sentenced to three months' confinement. In case 121131 a soldier in sick quarters took $3.10 out of the pocket of a pair of trousers hanging upon the wall. He went out of the room, became conscience-stricken and within a few minutes replaced the money. He was tried for larceny of the money, found guilty and sentenced to dishonorable discharge and one year's confinement. But, let it be remembered, that the Judge Advocate General is proposing that these safeguards be thrown around the accused, not by statute but by a general order—a general order which may be revoked by the same authority that makes it. This would be a protection that would protect only so long and in such cases as the War Department desired. The evil is recognized, but the remedy proposed is inadequate.

Second. It does not guarantee him a fair or impartial trial; in fact, by furnishing a court, a prosecutor and a defender, all untrained and incompetent, it makes a fair or impartial trial almost impossible.

This is a strong statement, but I make it advisedly, knowing that it is supported by the facts. In the first place, when we speak of a court-martial, we must rid our minds of our ordinary conception of a court. While a court-martial performs the functions of a court, and, as the United States Supreme Court said in the Runkle case, is a court which "sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice," yet it is entirely unlike our common-law court. It is more like a mere investigating committee. The general court consists of from five to 13 officers detailed usually from the line of the Army. They need not be learned in the law, and usually have no more knowledge thereof than they get from the Courts-Martial Manual. They ordinarily have no person of legal learning to guide them either in their investigation or in their deliberations. The trial of cases is with them a side issue. It is a disagreeable burden imposed upon them in addition to their normal duties, and is to be discharged with as much expedition as possible. These officers hear the evidence presented, rule upon questions of fact and law arising during the trial, and make findings and impose sentences. No one could expect these line officers, unguided by any person similar to a judge in the civil courts, to conduct trials according to law. And if one may rely upon the records, any one so expecting would be doomed to disappointment. I could cite to you numerous examples, but the following will suffice.

Case ———: The accused was on trial for murder. His plea was self-defense. The theory of the prosecution was that he had stabbed the decedent from behind while decedent was peacefully eating his breakfast. The theory of the defense was that the decedent had badly beaten the accused on the previous evening, that as accused was passing behind decedent with a bread knife in his hand decedent rose from the table and made a threatening movement toward the accused, and that accused, believing decedent to be armed and fearing injury, stabbed and killed decedent. The first witness for the prosecution described the stabbing. Upon cross-examination, counsel for accused asked the witness leading questions tending to show that the witness had paid very slight attention to the encounter. He was successfully attaining his object when the president of the court interrupted with: "Stop asking him leading questions." "But I have the right to ask him leading questions on cross-examination." "Yes, but you have no right to put the answer into his mouth. You are making this witness say whatever you want him to say." The president of the court was a fierce-looking colonel. Counsel for accused was a youngster. The record shows that he did no effective cross-examining thereafter.

Case ———: The defense of accused was an alibi. Accused offered two witnesses besides himself. Each of the witnesses was interrupted by the president of the court, warning him that he was under oath and explaining the offense of perjury. The accused was likewise interrupted in his testimony, and advised that perjury was a more serious offense than that for which he was on trial. Counsel for accused was reprimanded and threatened with disciplinary proceedings if he did not desist from asking leading questions, while the prosecutor was permitted to ask leading questions freely.

Case 119773: The following is a review by a special branch of the special clemency board in a case where the accused had been found guilty and sentenced to 15 years in confinement.

"The case was poorly tried in that (*a*) irrelevant testimony of a character to create bias against the accused was received over objection; (*b*) incompetent evidence of like character was also admitted; (*c*) counsel for the accused was checked by the court in his perfectly proper objections and motions; (*d*) proper and justified request for continuance to secure witnesses was denied; (*e*) improper argument by the judge advocate.

"The trial was irregular, unfair, arbitrary, and ridiculous."

Case 113212: Accused was charged with desertion. The prosecution rested after merely reading the charge and specification. The accused made an unsworn statement denying that he had any intent to desert the service. The court, after inquiring whether the prosecution had no more evidence, was closed. Later it reopened, and announced: "The court finds there is insufficient evidence to justify a finding of guilty or acquittal, and instructs the judge advocate and counsel for defense to ask a continuance." Imagine a real court requiring evidence from the accused where there was no evidence by the prosecution. When the court met again it convicted the accused.

The foregoing cases illustrate as well the ignorance of the prosecutor or trial judge advocate, who also is usually an officer detailed from the line. He is not required to have, and very rarely does he have, any legal training. He is expected, so far as he is able to do so, to act as legal adviser to the court, and in theory he is to see to it that the rights of the accused are not violated. In practice, the best that can be said of him is that he usually has higher rank and less unfamiliarity with the law and procedure than has counsel for the accused.

In a large percentage of the cases the accused would be better off without counsel than with the counsel assigned. The records show an almost unbelievable ignorance or disregard of the rights of the accused by his counsel. I have seen record after record, where had counsel not put on any witnesses accused must have been acquitted. Indeed, judge advocates who review records know that it is a common experience for accused's own counsel to be responsible for accused's conviction. And it is not a matter for astonishment when it is remembered that counsel is usually assigned, that he is ordinarily a comparatively young and inexperienced line officer, that this work is in addition to his regular duties and that he gets practically no credit for it. The records show that in less than 2 per cent of the cases counsel is a civilian; in about 3 per cent he is a chaplain; and in over 77 per cent he is an officer of the rank of lieutenant. These facts may explain cases like the following, but they can neither excuse nor justify them.

Case 117174: A soldier was on trial for desertion. The only action at the trial by counsel is indicated by his statement, as follows: "In view of the fact that I have had no opportunity to investigate the charges against the prisoner, I would like for the court to let him go on the stand and make an unsworn statement in his own behalf." Now, desertion in time of war is a capital offense. This soldier was on

trial for his life. Think of counsel entering a trial of such seriousness without preparation! The accused was found guilty and sentenced to imprisonment for 20 years. And the startling truth—the all-important fact, which was not brought out at the trial and which would have been decisive proof of innocence—is that the accused was an imbecile!

Case 118220: Accused was tried for desertion. All evidence except that of mere absence without leave was hearsay and inadmissible by the most well-established rules of law. Conviction and sentence to 25 years' imprisonment followed. Accused was mentally defective. A branch of the special clemency board, headed by a former judge of a State supreme court, reviewed the record and said: "The findings are not sustained by competent evidence. The record is a discredit to military justice."

Case 121043: Accused was tried for disobeying an order of a military policeman and for striking him in the face. He was found guilty and sentenced by the court to 20 years' imprisonment, which the reviewing authority reduced to 10 years. Here also the accused was an imbecile—a fact not suggested at the trial.

Case 123826: Accused was absent without leave from September 3, 1918, to October 15, 1918. He went home to see his sick mother, who died while he was there. On his way back to camp he stopped to visit his aunt, where he was apprehended. He was tried and found guilty of desertion and sentenced to 10 years' imprisonment. No mental defect was suggested at the trial. In fact, accused was an imbecile, having the mental development of a four-year-old child.

Case 119330: Accused was on trial for desertion. He was defended by a chaplain who evidently was of the opinion that accused was mentally unbalanced. His speech of defense for the accused was a simple statement that he did not think accused was mentally responsible, but that he did not believe in sending men before "nut boards" (boards of psychiatry), for such mentally irresponsible soldiers "should either be emasculated or sent to Leavenworth." The accused was found guilty and sentenced to 10 years' imprisonment. Imagine counsel in a capital case so cavalierly denying the right of his client to interpose the defense of mental irresponsibility.

The officers constituting the special clemency board, reviewing the records of trial of men in confinement, found over half the cases poorly tried. And some cases which they described as well tried were so bad as to be almost ridiculous. The plain, simple fact is that the average court-martial trial would be a comedy, were it not fraught with such tragic results for the accused.

Third. Under the present system, the officer who appointed the court and to whom the court must transmit its findings and sentence, may return for reconsideration and revision findings of not guilty or sentences which he deems too light.

The court, on reconsideration, is not obliged to change its finding or to increase its sentence; but an examination of cases chosen by Gen. Crowder at random shows that in one-third of the cases sent back for revision it did change its finding of not guilty to a finding of guilty, and that in a great majority of cases so returned, it increased the punishment to conform with the recommendation of the reviewing authority. Gen. Crowder has said that he knows of no cases where injustice was worked by such revised findings or sentences. If so, it is because he is so blind that he won't see. He need look only at the following cases, which are not exceptional:

Case No. 110526: The accused was charged with murder. The court found him guilty of manslaughter and sentenced him to 10 years' confinement. The revising authority sent the case back with a sharp indorsement to the effect that accused should have been found guilty of murder. On reconvention the court so found, and sentenced him to life imprisonment. The special clemency board found the first action of the court proper, and reduced the sentence to eight years.

Case 116691: The accused was found guilty of absence without leave and sentenced to confinement for one year and forfeiture of two-thirds of pay for a like period. The reviewing authority sent the case back for revision with an improper statement as to the effect of the evidence. The court reconvened, found accused guilty of desertion, and sentenced him to 10 years' imprisonment and dishonorable discharge.

Case 121081: Accused was charged with escape and desertion. He was found guilty of escape and not guilty of desertion and sentenced to two years' imprisonment. The reviewing authority sent the case back with an argument in favor of a finding of guilty of desertion. The court reconvened, found accused guilty of desertion, and sentenced him to 20 years' imprisonment.

In the three foregoing cases the special clemency board recommended modification of the sentences on the ground that the original finding of the court was in each case the proper finding.

Fourth. There is no judicial supervision of the proceeding at any stage.

I know this statement will be challenged, and the review of the record by the division judge advocate will be cited, and the elaborate machinery of the office of the Judge Advocate General will be described. But the division judge advocate is not a judicial officer, and furthermore he has no power of supervision. It is frequently upon his advice that the accused is prosecuted; frequently, if not usually, he directs and aids the trial judge advocate with counsel as to how to proceed, what witnesses to call, etc., and he is in no position to act judicially. As for the Judge Advocate General, he has himself decided that he has no power to review or revise. He can merely advise the Secretary of War or the President. And in the vast majority of cases the findings and sentences are final and beyond all power save that of clemency when the record reaches the Office of the Judge Advocate General. Indeed, the only cases where legally the Judge Advocate General may act before the finding and sentence becomes final are those which require confirmation by the President, namely, certain death sentences and certain sentences of dismissal of an officer. In these cases the Judge Advocate General may advise the President. As a matter of fact, however, such advice is transmitted through the Chief of Staff and Secretary of War, who may urge the President to disregard the advice. And the President has the power to disregard it.

By an extra legal order, known as General Order No. 7, War Department, 1918, reviewing authorities are required to submit to the Judge Advocate General, before executing sentence, for advice as to the legality of the finding and sentence, cases where certain punishments are proposed to be inflicted. The real power of the Judge Advocate General under this order was tested by the now famous Tapolina case, which is discussed on pages 9 and 10 of the pamphlet written by Col. Wigmore, for Gen. Crowder, entitled "Military Justice During the War."

Tapolina was a military policeman. He was charged with burglary. His story was that he had heard the sound of breaking glass near the building in question, that he investigated, saw a broken window, heard someone moving about inside, entered, and while searching for the supposed intruders, was himself arrested by two other military policemen. The court believed his story and found him not guilty. When the finding was transmitted to the reviewing authority, who was the commanding officer convening the court, he returned the record and findings with a direction that the court reconvene for revision and reconsideration of the findings. The entire indorsement returning the record was merely an argument to show that the evidence warranted a finding of guilty. The court on reconvention found the accused guilty and sentenced him to imprisonment for five years. Since the case involved dishonorable discharge, which was not to be suspended, it came to the Judge Advocate General's office for a review as to its legality, and the officer reviewing the case in the Office of the Judge Advocate General, in paragraph 18 of his review, said:

"After a careful consideration of the evidence this office is firmly convinced of the absolute innocence of the accused. The evidence against him is wholly inconclusive and his own statements have a ring of sincerity which convinces the reader that he speaks the truth."

The review of the case containing the above quoted paragraph was sent to the commanding officer, with the statement:

"At this stage of this case the matter of the sufficiency of the evidence to sustain a conviction is within the discretion of the reviewing authority, the court having already passed thereon. However, since, in examining the case to its legality, one of the assistants in this office has made a study of the sufficiency of the evidence, it is deemed to be within the sphere of propriety to say that this office entertains grave doubts as to whether the guilt of the accused is established by the evidence. This doubt seems to have been shared by the court in its first finding and acquittal. The guilt of the accused must, of course, be established beyond a reasonable doubt. In order that the reviewing authority may have the benefit of the study referred to, a copy thereof is inclosed herewith for such consideration as he may deem advisable to give it."

The commanding officer, notwithstanding the review of the Judge Advocate General, affirmed the sentence and designated the penitentiary as the place of confinement. This he did upon the advice of his division judge advocate, who was a Regular Army officer, an officer who had been in the line from the Spanish-American War up to the time of the present emergency, and was commissioned in the Judge Advocate General's Department during the emergency. Compare these facts with the statements of the same case on pages 9 and 10 of the pamphlet above referred to, and then ask yourself whether that pamphlet was wrtiten for the purpose of putting the facts fairly before the people. Then consider also the following: Under date of February 13, the substance of the statement of this case, as printed on pages 9 and 10 of that pamphlet, was written in a letter to the Secretary of War and signed by Gen. Crowder, for the purpose of having the Secretary transmit it to Congress. Under date of February 12 the same Judge Advocate General who signed this communication to the Secretary of War,

for the purpose of assuring Congress that this man, Tapolina, had been properly convicted and all his legal rights properly cared for, signed an indorsement to The Adjutant General with reference to this same case, which contained the following: "While it can not be said that there is no evidence upon which the finding of guilty can be based, this office is strongly of the opinion that an injustice may have been done to this man, and that it should be righted as far as possible. It will be noted that Mr. Flager, field director of the Red Cross at Camp Gordon, comments upon the poor reputation of one of the principal witnesses against Tapolina. It is recommended that the unexecuted portion of the sentence in this case be remitted, and that the prisoner be released from confinement and restored to duty upon his written application to that end."

This case demonstrates two things: (1) The absolute impotence of the Judge Advocate General's Office with respect to the review or supervision of trials by court-martial; (2) the readiness of the Judge Advocate General, as a constituent part of the War Department, to uphold action taken by reviewing authorities to the prejudice of the accused, even where that action was taken in direct disregard of the opinion of the Judge Advocate General.

There is then no judicial supervision of a court-martial proceeding. There is no legal method of righting the outrageous injustices done by ignorant courts, prosecutors, and counsel. In short the present procedure affords the accused no substantial protection when he is charged with an offense. All the machinery for review (with a view to supervision) in the office of the Judge Advocate General is extra legal. Most of it was devised by Gen. Ansell, and has been in operation only since the spring of 1918. It is being continued by Gen. Kreger. It may be abolished at any moment by Gen. Crowder or his successor.

The administration of military justice during this war has been as unreasonable, as unjust, and as un-American as the system itself.

The American theory is, that an accused shall be presumed innocent until he is proved guilty. That theory is supposed to obtain in courts-martial practice. In fact just the opposite is true. The average court-martial challenges a man to prove himself innocent. The language used by the reviewing authorities in sending findings of not guilty back for revision illustrate this attitude, e. g., "it is thought that there is sufficient evidence to find him guilty as charged." (Case 112382.) "The evidence is sufficient to establish desertion." (Case 121081.) "The evidence is sufficient to support a finding of attempt to escape." (Case 125028.) It is also most amply demonstrated by the records, which show that during this war about 88 per cent of the trials have resulted in convictions and that during the peace-time régime about 96 per cent of the trials resulted in convictions. These figures would not be quite so startling were the facts what some persons would have us believe, namely, that there are comparatively few trials in the Army as contrasted with the civil community. But such is not the fact. Let it be remembered that no considerable body of troops reached camp before November, 1917; that at no time did we actually have forces in appreciable excess of 4,000,000 men, and that of these 4,000,000, a considerable percentage was in camp but a few months; and it will be clear that a fair average for the war period would be between two and three millions. Then consider Secretary Baker's statement to Congress that up to February 1, 1919, there had been more than 22,000 trials by general courts-martial and 350,000 trials by inferior courts. And Mr. Baker was speaking only of records which had been reported to the War Department. A conservative estimate of the number of trials to date would exceed 400,000. Think of it, from 10 to 20 per cent of the members of our forces brought to trial on criminal charges, and 88 per cent of those tried convicted. What civil community will show so damning a record?

The cases already cited illustrate the harshness of the sentences imposed. In almost all of the cases examined by the special clemency board the sentences were absurdly severe. This board recommended reducing the sentences by more than 77 per cent and remitting a total of over 18,000 years. Think of a court sentencing a boy of 17 to be dishonorably discharged and to be imprisoned for 2½ years for stealing a shirt of the value of $2.38, and another court sentencing another 17-year-old boy to dishonorable discharge and 3 years' imprisonment for stealing a shirt and a pair of shoes of the total value of $5.19. If this does not arouse you, contemplate case No 123180, in which the accused first committed the heinous offense of refusing to take off a bow tie when ordered to do so by a sergeant, and when put in arrest for this awful crime he went further and told the sergeant he would kill him if he got a chance. Upon conviction the court sentenced him to dishonorable discharge and 25 years' imprisonment. The reviewing authority reduced the sentence to 10 years. What a travesty upon common sense.

It has been attempted to explain these results as due to the new and inexperienced officers. I resent this, and assert the contrary. The indubitable facts are that the reviewing authority has the power to reduce a sentence before approving it, and that in almost every instance the reviewing authority was a Regular Army officer. Furthermore, usually a regular officer dominated the court. And, finally, so far as convictions are concerned, the percentage of convictions when the system was administered solely by regulars was 96; after the advent of the temporary officers was 88.

And woe be to him in the service who dared oppose this sacrosanct system. Everybody knows what has happened to Ansell. But not everybody knows what happened to others not so exalted in rank. Many a young officer, attempting to protect the rights of the accused has been threatened with court-martial proceedings himself. (See case 126312, Corporal S. F. Morton.) Capt. Francis M. Doyle learned what opposition to the system means. He was appointed to defend a boy before a special court-martial, composed of three officers who he deemed "unfitted to act in a judicial capacity" and one of whom was "nortorious for his abuse of men." In order to protect his client he demanded that a stenographic report of the trial be taken. The commanding officer at Columbus barracks refused his request. He then appealed directly to the commanding officer of the central department, respectfully stating his objections to the court and demanding "an unbiased court-martial." For this he was himself tried by general court-martial.

There is no question that the system is bad and that its administration has been bad. There is no question that the War Department will resist, in fact, is resisting, any attempt to reform it fundamentally. The Ansell bill, which has been introduced into the Senate by Senator Chamberlain and in the House by Congressman Royal Johnson, and which is supported by all the Members of Congress who have seen service, the War Department is trying to kill in committee. It will offer all sorts of substitutes by way of regulation and reform from within. It will predict Bolshevism and the destruction of discipline. It will even go so far as to say that the object of the military system is the attainment of victory through arms and not the doing of justice to individual soldiers, as if the two were inconsistent. But I challenge the supporters of the present system to produce a single specific case wherein the granting of a fair and impartial trial under a judicial supervision, in the stead of the travesty upon justice actually granted, would have injured discipline or morale one whit. I do not discount the importance or the necessity of maintaining discipline, but I assert that when a commanding officer decides that a person subject to military law is to be tried to determine whether he has violated any civil or military law or regulation, the accused is entitled to a fair and impartial trial; that none of the demands of discipline require that he be deprived of the safeguards provided for an accused by the Constitution; that provision should be made for conducting the trial according to law; and that the question whether the accused has been given a fair and impartial trial is one of law, which should be decided by a judicial tribunal and not by a military officer claiming to act by right of command and without respect to or regard for law.

Senator WARREN. Now, Colonel, unless you have something further you wish to offer, we shall excuse you. We are very glad you came, and we feel under obligations to you.

(Thereupon, at 12:20 o'clock, p. m. the subcommittee adjourned, subject to the call of the chairman.)

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